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From The Desk of Editor

It gives us great pleasure to release JIMS Journal of Law, Volume 6 Issue 2. The Editorial Board expresses its gratitude to all the authors for their contributions of academic research articles on contemporary legal and socio-legal issues.

Privacy is a dream which seems impossible to achieve in today's world. The author in the initial article has alarmed the readers about the challenges nations are facing when it comes to cyber security. The next article in line is a beautiful piece demonstrating administration of India's capital in light of riots and waging war. One of the authors has delved deep into the hazards industrialization is causing to the environment at large. Another write up is an impressive attempt to discuss the jurisprudential value of Religious practice tests. One article gives us a systematic overview of adoption laws of our beloved country. Efficient advocates are sine qua non for a democratic developing country to prosper, an article in this journal brings out the role of Universities and Bar Council of India to save the legal fraternity. The last in queue is an excellent work explaining the impacts of corporate crime on our Indian Economy.

With great hope that this edition of the JIMS Journal of Law will bring about social reforms by increasing legal awareness and ensuring access to justice for all, I have the utmost pleasure in presenting it to the bar, bench, and academic community.

Pallavi

Prof.(Dr.) Pallavi Gupta
Thanking You

## Table of Contents

# THE CHALLENGES OF CYBER SECURITY IN CONTEMPORARY WORLD

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## Introduction

Cyberspace faces more challenges in terms of security and regulation than outer space. Despite the fact that the universe is limitless, each planet or structure within it has physical limits. Cyberspace on the other hand has zero. The Internet lacks borders as a result of a lack of boundaries. Cyberspace poses a new set of legal questions, and old rules can't justify it. Every law is territorially based either concerned with the sovereign state or between the states.

Cyberspace has revolutionized the globalized world like never before. The nation has invested hugely to set up information and communication technology infrastructure to get more citizens online and benefit them from the facilities online. With the tremendous growth of cyberspace also comes along challenges of cyber security.[1]

Cyber security has become a worldwide issue in contemporary era & is on the path to become top most security menace for all countries.

Cyber Security has a vital role to play in this era of IT (Information Technology). One of the main issues in today's scenario is how to protect information. "Cyber Crime" a term which popped up in our minds when we talk about the concept of cyber security & these types of crimes are continuously increasing nowadays.

In this research paper the author has discussed the concept of cyber sovereignty, jurisdiction over cyberspace, cyber security and its challenges, and finally ended the paper by discussing Indian position on such cyber problems.

[1] Anis Ahmad, *Cyber Security Challenges: Some Reflections on Law and Policy in India*, 1 HPJ (2017).

**Cyber Sovereignty**

The Central base of contemporary international order is sovereignty of countries, concept that many scholars relate back to the *"Peace of Westphalia 1648."*[2]

To understand the core role of sovereignty is necessary, but the typical job is to define the term Sovereignty accurately. According to the dictionary of Black Law, it is "*i) Supreme dominion, authority or rule ii). the supreme political authority of an independent state iii) the state itself."*[3]

In 1990 many internet organizations believed that sovereignty over the internet was in the hands of the user only. It was the user who was having control over cyberspace. It was not governed by any states. It was at that time it was argued that cyberspace breaks the physical borders and creates a different set up of man-made activities & decline the viability and legality of legislations which are built on physical boundaries.

It is contended by internet proponents that policymakers do not control cyberspace, even though they have the ability to do so. Cyberspace fundamentally destroys the connection between physical position & authority of a native sovereign's attempts to govern universal occurrences.

***"Cyberspace is not immune from the State sovereignty"& following are some reasons:***

**I.** Cyberspace has no limits and no boundaries. In order for cyberspace to survive and operate, it must be managed by someone. Users would not be able to enter cyberspace without a physical structure. However, since the concrete structure is based on the earth, it inherently comes below the state where these physical resources are stored. It does, however, include a physical dimension that contains computers, integrated circuits, wires, and networking networks. It also has a technical layer made up of machine logic, data packets, and electronics, as well as a social layer made up of humans. This physical equipment is owned by states and corporations and is situated within a state's jurisdiction. As a consequence, cyberspace does not exist outside of the real universe, but rather is a part of it. Sovereignty of state can be exercised on the cyber networks in its geographical boundaries as well as over people within its territories and outside its borders.

Now there are two explanations as to why there is no immunity from the sovereignty of State:

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[2] Marie Baezner and Patrice Robin, *Cyber sovereignty, Cyber defense Trend Analysis*, Center for Security Studies (CSS), ETH Zurich (2018).

[3] *Sovereignty*, Black's Law Dictionary (11th ed. 2019).

1) Any particular entity must govern this cyberspace so as to maintain its existence & proper functioning as it necessitates a physical arrangement, because in absence of such a thing users would have no entrance. This physical arrangement is placed somewhere on earth only and hence it comes under the control of the state where these physical units exist. Moreover this cyberspace itself needs regulation and control.[4] E.g. Internet Corporation of Assigned Names and Numbers (ICANN) is an association which undertakes and manages important issues such as allocating DN (domain names) & IP addresses.[5]

2) Economical connections in cyberspace require legislation to manage & oversee these connections and transactions.[6]

As a result, the concept of sovereignty extends to the state's electronic operations, owing to their right to control certain matters within their geographical boundaries and exercise autonomous state powers.

II. The state has the right to exercise its sovereign rights over cyber assets in its territories solely and unilaterally. States prefer to restrict certain aspects of cyber activity on their soil, such as the collection of personal data and the content that is permitted on the internet. Some states place more strict restrictions on internet access and personal records. Like in the United States, they came up with various cyber laws so as to regulate cyberspace. U.S came up with the "*Computer Fraud and Abuse Act, 2012"* and the "*Electronic Communications Privacy Act, 2012.*"

III. If we consider cyberspace to be immune from state sovereignty then all those financial transactions which take place in cyberspace would be unsubstantial. There must be a law to govern these transactions therefore the states from both sides play an important role while governing cyberspace. Therefore it is quite evident that cyberspace has no immunity towards sovereignty of states.

IV. Each state governs the material available on cyberspace as per their needs. Certain states have banned the illicit pornographic content including India also. Recently, In India, the Government of UP will be accessing the search history of the residents of

[4] See Internet Assigned Numbers Authority, Introducing IANA, http://www.iana.org/about/ (last visited December 15, 2021).

[5] See Internet Corporation for Assigned Names and Numbers, ICANN Factsheet, http://www.icann.org/en/factsheets/fact-sheet.html (last visited December 15, 2021).

[6] Jack L. Goldsmith & Tim Wu, who controls the internet?: Illusions of a borderless world 29-46 (Oxford University Press, New York 2006).

UP. This clearly shows that cyberspace has a control over it not cross borders but indeed within the borders.

V. Cyberspace plays a crucial role in National security. Nuclear activities, national records are all stored in cyberspace. Recently there was a hacking activity all over the country. And to prevent such attacks in the future, the state takes appropriate steps to regulate cyberspace. This cyber sphere is not in any way dissimilar from that of other spheres where states use to preserve its right to defend its safety. As a concern of national security, states are progressively required to prove their existence in this cyberspace. A number of states are conducting and have started several operations and infrastructure projects from cyberspace.[7] If it is determined that use of force is important for cyber security of the state, then states would have to use such force in cyberspace as they use to do in other spheres.

## Cyberspace is global common or not?

It is not required to become globally common that the particular area is a "natural asset outside natural jurisdiction."[8] Relatively global common is generally characterized by following five exclusive features:

i) It has an International Treaty to govern it.

ii) Such treaty allows definite uses and restrictions of it.

iii) It has boundaries and it can be defined.

iv) Countries have decided to relinquish its claim of specific sovereignty on any part of it, or otherwise leave it undeclared as in the case of Antarctic,

v) No particular single country can control it.

We can say in different words that global common does not mean that there is no sovereignty at all but it means that a shared universal sovereignty is present over it. So after having this consideration, it is not correct to classify cyberspace as global common because above mentioned five exclusive prerequisites of global common are not fulfilled by cyberspace.

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[7] For example, "The National Strategy to Secure Cyberspace lists a number of critical infrastructures that are dependent upon cyberspace such as Banking & Finance, Chemical, Oil, Gas and Water."

[8] *Supra* note 3, at 17.

**Issue of recognizing Cyberspace as a "Sovereign Domain":**

One of the central problems regarding bringing the concept of sovereignty over cyberspace is how to persuade countries that cyberspace is also such a sphere where states can declare their sovereignty. The Secretary of Defense entered the "National Military Strategy for Cyberspace Operations" in 2006 which provides that cyberspace is also one of its domains like other domains such as sea, air etc.[9] However, considering it as a specific domain is surrounded by disagreements. Even some people from the defense dept. were of the views that it is not a separate domain.[10] But this kind of disagreements and debates over its separate domain nature should not obscure the important fact that it is also man-made creation, and so states can proclaim its control on cyberspace.

Cyberspace needs a specific physical structure to sustain, it requires regulations formed by the government so as to work properly, and nations are trying to impose more control on it.[11]

**Analysis Of Jurisdiction Over Cyberspace:**

In recent time the ideology of cyberspace being governed by the states is changing into a state to state control. There are issues between different states and not between individual person and state in existing cyber governance & cyber sovereignty. Fundamentally, the USA, its allies and European countries contend that it is not and should not be under control of a sovereign state, on the other side, Russia, China & some other states contend that cyberspace should be controlled by sovereigns either individually or by forming arrangements.

States play an important role in regulating cyberspace thus to find a solution states have to surrender our territorial notions in order to establish a long-term solution to the issue of cyberspace regulation. Countries must join together to build both short and long term options. Regarding the long-term, an international solution must be developed. In this regard states should confer to make and enter into a treaty which deals strictly with Cyberspace. This convention should define international law that regulates intellectual property issues as well as all other legal issues related to the internet, with each member country upholding it. If required, such a convention could also overcome the jurisdictional problem by designating Cyberspace as its own jurisdiction and forming an international judicial system for Cyberspace as a subject matter jurisdiction.

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[9] See U.S. DEP'T OF DEF., *The National Military Strategy for Cyberspace Operations* 3 (2006), available at http://www.dod.mil/pubs/foi/ojcs/07-F-2105doc 1.pdf

[10] David R. Luber & David H. Wilkinson, *Defining Cyberspace for Military Operations*, 93 MARINE CORPS GAZETTE, 40 (2009).

[11] *Supra* note 5.

Recent developments have signaled a positive change in how nations handle security problems, with an emphasis on working to fix cyber issues that can't be addressed in a single sovereign nation. Cyber war, cyber espionage, and cybercrime are problems that go beyond a single state's regulatory forces, necessitate collaboration and support from all sovereign states, and increase prospect of state dispute above the disputed realm of "cyberspace"

Thus at present it can be concluded that cyberspace is not at all immune from sovereignty of the states as they are playing an active role in regulating their internal cyberspace ranging from transactions to what needs to show people.

**Challenges of Cyber Security:**

The increasing Cybercrime & Cyber terrorism is the largest threat to cyber security nowadays, not limited to India but a universal problem. It has become a worldwide issue & is on the path to become top most security menace for all sovereign countries.

At present we can send, receive any kind of material which may be in the form of e-mail, or video merely by pressing a key but have you ever thought about the safety of your data which you are transferring to third person, is such data safe?[12]

And the answer to this is in the concept of Cyber Security. The Internet in our life is one such infrastructure that is developing day by day with high speed. A number of newest technologies are coming in the current high tech environment and creating a changing effect on human life. On the other hand with the growth of recent technologies, we are facing a lot of problems in protecting our personal data in the proper manner & this leads to enhancement in cybercrimes with every passing day.

This is one of the largest concerns for countries and societies today as they move from agro-industrial age to the Information Age. It is paradoxical that on one hand information and communication technologies (ICT) are at the heart of all facets of human life and are central to national, economic and human security, and on other hand the level of their penetration creates certain vulnerabilities.[13]

It is very necessary to increase this security for cyberspace & protect important info for security and economic wellbeing of every country. As almost every state and its government is making, enacting, and implementing stringent legislations to deal with this issue so as to stop such leakage of critical data and resources.

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[12] Reddy, G. N. & G. J. U. Reddy, *A Study of Cyber Security Challenges and Its Emerging Trends on Latest Technologies*, *ArXiv* (2014).

[13] Lieutenant General Davinder Kumar, Cyber Security: Fundamental To India's Sovereignty (Vivekananda International Foundation, 2018).

There are various threats to Cyber Security which we can categorize on the basis of offenders & their purpose in four sectors as: cyber warfare, cyber terrorism, cyber espionage and cybercrime.[14]

These offenders mostly use various kinds of loopholes in cyberspace for accomplishing their acts. These people use to derive unwanted benefits from feebleness of software designs by using different kinds of malwares. Some tricks like hacking is the usual method of penetrating the safeguards in secured systems & intervening functioning of these systems. Another common way is identity theft. The possibility of cyber offenses and creating loopholes in it is increasing day by day.

**Cyber Warfare:**

Though there is no specific definition of this term anywhere, cyber warfare means those activities of one state towards another state in order to attack their information system so as to disrupt their proper infrastructure. There are some instances such as the 2007 website attack in Estonia, & the 2008 attack in Georgia. Every nation is recognizing that 21st century war is going to be highly based on cyberspace. Instances of this can be observed from the Russian attack on Estonia & Ukraine. It was totally cyber intervention in Estonia whereas it was a blend of cyber & kinetic attack in Ukraine, "wherein the bits preceded the bullets."[15]

**Cybercrimes:**

Cybercrimes pose an actual danger nowadays & they are rising quickly in terms of intensity & difficulties with the advancement in internet & mobile phones. As dismal as it may sound, cybercrime is outpacing cyber security. About 80% of these cyber-attacks are in the form of cybercrimes. There are many types of cyber crimes such as hacking, phishing, phreaking, identity theft, etc.

These crimes are expected to rise rapidly due to a number of factors such as various sectors like virtual currency, cloud technology, robotics, etc. Darknet is exploiting the sale of drugs, weapons, recruiting terrorists, etc.

**Cyber Espionage:**

Nowadays we come across instances of this crime on a daily basis as we come to know about news of exfiltration of huge amounts of data & intellectual property which amount to millions in rupees from websites of government & also private entities.

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[14] India's Cyber Security Challenge, *Cyber Security - An Overview*, IDSA Task Force Report 21 (March 2012)
[15] *Id.* at 9.

As the internet is now one of the strong and fast sources of collecting intelligence in order to fulfill national, military, economic & diplomatic objectives.

According to one estimate, about 90 percent of open source data related to intelligence is usually acquired from this cyber world.

This particular crime is also used for theft related to technology & also for hurling probe operations on complex infrastructure so as to exploit it later.

**Cyber terrorism:**

It is a form that is being used as a channel so as to plot different terrorist attacks, also for recruiting sympathizers, or as a novel dome for assault in pursuit of the terrorist's social & political purposes.[16]

In the current scenario, these terrorists are also known to have utilized this cyberspace for a number of purposes like "communication, command and control, propaganda, recruitment, training, and funding purposes." And so from this viewpoint, the challenges of these non-state actors to the security of the nation are tremendously severe.

**Indian Position In Dealing Such Cyber Problems:**

India is very vulnerable to cyber challenges and threats because the major population here is actively using the internet in its day to day life for every kind of activity like shopping, banking, studying etc. There is increasing frequency of cyber-attacks in India such as leak of personal information of 3.2 million debit cards (2016), Data theft at Zomato (2017), Wannacry Ransomware (2017) etc.

Indian parliament enacted the Information Technology Act in 2000 which was earlier centered around the theme of giving legal recognition to electronic transactions. But later on it covered data protection, privacy, cyber offenses such as cyber terrorism etc.

Section 36 of Information Technology (Amendment) Act, 2008 provides that Indian Computer Emergency Response Team (CERT-In) would be a national agency to deal with incidents of cyber security.

Information Technology Act, 2000 contain following provisions to deal with offenses related to computer sources:-

Section 43 of this act provides for compensation to victims in case of unauthorized access to computer systems and certain other events as given in this provision.[17]

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[16] *Id.* at 24.

[17] The Information Technology Act, 2000, § 43, No. 21, Act of Parliament, 2000 (India).

Section 65 of the act deals with the tampering with computer source documents.[18]

Section 66 provides for punishment to a person who committed any act under section 43 with dishonest or fraudulent intention.[19]

By virtue of amendment act 2008, new sections i.e. Section 66B to 66F were added which provides for punishment in case of identity theft[20], cheating by personation[21], cyber terrorism[22] etc.

The Ministry of Communication and Information Technology notified the National Cyber Security Policy 2013 ("NCSP") with a number of objectives including dealing with an aim to strengthen the regulatory framework for ensuring a secure cyberspace ecosystem and to enable effective prevention, investigation and prosecution of cybercrimes.

**Conclusion:**

In the 21st century global economy, we can conclude that cyberspace is one of those important aspects that links a number of actors together, boosts efficiency, opens fresh marketplaces and facilitates managing arrangements which are flatter, and also have an outlying further wide reach. No single country can ensure a fully protected cyber security regime on its own without establishing worldwide infrastructure by joining hands with other countries.

So it has to be a combined effort that warrants international cooperation. Some regional initiatives such as "Budapest Convention on Cybercrime" have been there for decades. These types of initiatives can be combined in the form of universal applicable convention for cyber security and to govern cyberspace. Therefore it is now high time that there is a need to form an "International Convention on Cyber Security and Governance of Cyberspace."

[18] The Information Technology Act, 2000, § 65, No. 21, Act of Parliament, 2000 (India).
[19] The Information Technology Act, 2000, § 66, No. 21, Act of Parliament, 2000 (India).
[20] The Information Technology Act, 2000, § 66B, No. 21, Act of Parliament, 2000 (India).
[21] The Information Technology Act, 2000, § 66D, No. 21, Act of Parliament, 2000 (India).
[22] The Information Technology Act, 2000, § 66F, No. 21, Act of Parliament, 2000 (India).

# THE DILEMMA IN ADMINISTRATION OF NATIONAL CAPITAL TERRITORY OF DELHI: ISSUES AND CHALLENGES

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## Introduction

Seamless administration depends upon various factors including but not limited to a clear demarcation of powers and responsibilities among the people responsible for such administration. If such demarcation is not made, it might end up either in absolutism or administrative impotence which is detrimental to the lives of the general public. To avoid such catastrophe in a country, it is preferable to demarcate the powers of administrative authorities. As defining the powers in detail might not be possible at every level of administrative hierarchy, there will always be some discretionary powers given to certain authorities responsible for administration. With discretionary power, comes the responsibility of exercising such discretion judicially or sensibly. Be it well-defined powers or discretionary powers, the power tussle is more likely between the authorities belonging to different political groups but administering a common sect. Such politically motivated brawl in a democracy would affect the lives of subjects more than the authorities themselves. If the administrative power tussle is between an elected authority and an authority appointed by the President, subjects would want their elected representatives to win but one cannot blindly support the elected representatives of a particular region, especially when the national interest is involved. In such circumstances, the might is right mentality cannot resolve the issue.

The capital of a country is like the mitochondria of a cell. Capital of a country is chosen based on a variety of factors like administrative convenience, military advantage, economic advantage, or even religious reasons. Such chosen capital hosts a variety of public offices that is likely to be accessed by the whole country. For example, the Supreme Court of India and offices of many national authorities in India are situated in Delhi. This puts the capital in the limelight. The capital is always in News and it is usually the region that the

Government tries to be in control as much as possible. Indians might not remember the capital of all the States at all times but they definitely remember the capital of the country. Capital is a sign of unity and it can very well be called as the central node of a country. Indian Capital has a regional Government of its own apart from the Government of India because India is democratic and it believes in collaborative federalism.

The Parliament of India enacted the law of the Government of National Capital Territory of Delhi (Amendment) Act, 2021 (hereinafter referred to as 'Amendment Act, 2021'). The said-law has changed the meaning of the expression "Government" to mean the "Lieutenant Governor" for all laws which the elected Legislative Assembly of Delhi can make.[1] It also prohibits the Legislative assembly from making rules for the day-to-day administration of Delhi.[2] This has created political turmoil between the nominated Lieutenant Governor and elected representatives of Delhi Legislative Assembly. In Indian states, it is usually the State Government that takes care of the day-to-day administration. In other Union territories, the Administrator takes care of the day-to-day administration usually. Delhi is special and cannot be seen merely as a Union Territory. Delhi has its own elected representatives and Government. In such a situation, it is necessary to analyse the feasibility and legality of the power grab done by the Amendment Act, 2021.

**Representative Governance in National Capital Territory of Delhi**

The National Capital Territory is different from other Union Territories in India. The *sui generis* status of National Capital Territory of Delhi under the Constitution makes it a class by itself. [3] The residents of Delhi have higher say in the governance of Delhi. The National Capital Territory of Delhi is currently the only Union Territory that has a fully elected legislative assembly. As per the Constitution, the legislative assembly of National Capital Territory of Delhi cannot have Nominated members because all the seats have to be filled by direct election from the constituencies of National Capital Territory of Delhi.[4] This is not the case for the Union Territory of Puducherry. The Union Territory of Puducherry with a legislature can have partly elected and partly nominated members depending upon the law made by the Parliament in that regard. [5] The National Capital Territory of Delhi though

[1] Government of National Capital Territory of Delhi (Amendment) Act, 2021, § 2, No.15, Acts of Parliament, 2021 (India).
[2] *Id.* at § 4.
[3] New Delhi Municipal Corporation v. State of Punjab Etc. Etc., (1997) 7 SCC 339.
[4] INDIA CONST. art. 239 AA (2) (a).
[5] *Id.* at art. 239AA (1) (a)

represents a democratic setup and representative form of Government for the residents, cannot be turned into a complete autonomous State. Such a move would cut off the national capital from the nation itself. In this context, the National Capital Territory of Delhi has now become a constitutional hybrid that is neither a complete State nor an ordinary Union Territory. A clear demarcation of executive powers between the Union Government and the Government of National Capital Territory Delhi is necessary to make sure this beautiful constitutional hybrid does not lose its shape. While the legislative powers can be understood from a plain reading of article 239AA of Indian Constitution, the demarcation of executive powers of administrative authorities is still not completely settled. The history of governance in Delhi is inclined more towards representative governance than the centre's administrative supremacy.

The seed of representative governance in Delhi was sowed in the Government of Part C States Act, 1951 which created the first Legislative Assembly in Delhi post-independence.[6] The powers of the then Legislative Assembly were restricted concerning matters of public order, police (including railway police), constitution and powers of local authorities, public utility authorities, lands and buildings, jurisdiction and powers of courts, etc. Similar to the current setting, the then Legislative Assembly had powers to legislate on matters stated in State List and Concurrent List subject to those restrictions. [7] The Council of Ministers headed by the Chief Minister were aiding and advising the Chief Commissioner in all matters for which the Legislative Assembly had powers to legislate but not for the matters in which the Chief Commissioner had discretionary powers. In case of a difference of opinion, the decision of the President was said to be final.[8] This democratic setup was short-lived. In the year 1956, the Chief Commissioner's province of Delhi among the other Part C States was changed into a Union Territory. The legislative assembly was removed and Delhi went under the control of the Administrator appointed by the President.[9] This idea of reorganizing the Part C States into Union Territories without legislature was due to the recommendations of the State Reorganization Commission in 1955. The justification given was that the federal countries like the United States of America and Australia have their capitals centrally administered and having legislatures or ministers in such less populated areas cannot be

[6] The Government of Part C States Act, 1951, § 3, No. 49, Acts of Parliament, 1951 (India).
[7] *Id.* at § 21.
[8] *Id.* at § 36.
[9] The States Reorganization Act, 1956, No. 37, Acts of Parliament, 1956 (India).

justified merely on the principles of responsible government.[10] This justification is unacceptable because comparing India to the United States of America and Australia is not appropriate as the population of Delhi is way more than Washington, D.C., and Canberra. From the year 1966 to 1990, there was a compromised form of democracy in the form of elected Metropolitan Council without full legislative or financial powers. The power of administration during that period was with the Administrator designated as Lieutenant Governor.[11]

After thirty-seven years of darkness, democracy returned to Delhi. The Report of the Committee on Reorganization of Delhi Set-up in 1989 found that there were multiple authorities with confusion and overlapping of jurisdiction among them. Giving due consideration to the difficulties of administration and dissatisfaction disclosed by the people of Delhi, the Committee recommended bringing in a Legislative Assembly and Council of Ministers collectively responsible to such Legislative Assembly in the National Capital Territory of Delhi. The Union Territory was proposed to be changed into a National Capital Territory. This recommendation was to make sure the Legislative Assembly and Council of Ministers in National Capital Territory of Delhi have adequate powers to deal with matters concerning a common man. The Report also clearly stated that in the cabinet form of Government adopted in Indian Constitution, the Lieutenant Governor is required to function with the aid and advice of the Council of Ministers except on the matters outside the purview of Legislative Assembly and matters in which any other law requires the Lieutenant Governor to exercise their discretion or judicial or quasi-judicial functions.[12] Based on the recommendations in the Report, the Constitution (69th Amendment) Act, 1991 was passed to add article 239 AA and article 239 AB to the Constitution establishing a Legislative Assembly in National Capital Territory of Delhi.[13] The Government of National Capital

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[10] Report of the State Reorganization Commission, 1955, *Future of remaining centrally administered areas*, 77 - 79, (January 28, 2022, 10:30 PM), https://www.mha.gov.in/sites/default/files/State%20Reorganisation%20Commisison%20Report%20of%201955_270614.pdf.

[11] *Delhi Metropolitan Council (1966-1990),* DELHI ASSEMBLY, (January 28, 2022, 06:20 PM), http://delhiassembly.nic.in/metropoliton.htm#:~:text=The%20demand%20for%20a%20broad,from%20September%207th%201966.

[12] Committee on Reorganisation of Delhi Set-up Report, 1989, *Drawbacks and deficiencies in the existing set-up*, Chapter VI, 26-30, (January 28, 2022, 8:30 PM), https://indianculture.gov.in/flipbook/675.

[13] Statement of Objects and Reasons, The Constitution (Sixty-ninth Amendment) Act, 1991.

Territory of Delhi Act, 1991 was also enacted in this regard.[14] Thus, constitutionally special and unique status was given to the National Capital Territory of Delhi.

**Cabinet Government in National Capital Territory of Delhi**

The Government of National Capital Territory of Delhi is a Westminster-style cabinet system of Government in which the Council of Ministers, headed by Chief Minister, are collectively responsible to a fully elected Legislative Assembly recognized by the Constitution. The Legislative Assembly of National Capital Territory Delhi was formed under article 239AA inserted in the year 1991.[15] The Constitution has provided for special provisions exclusively for National Capital Territory Delhi which lays down the scope of legislative powers to be exercised. The lawmaking powers of the Legislative Assembly cannot extend to the matters of Public Order, Police, and Land in the State List. It can however make laws for other matters in the State List and all the matters in the Concurrent List.[16] The matters of Police and Public Order are outside the scope of National Capital Territory Delhi's legislative assembly because Delhi is different from other states or union territories in India. Being a capital territory, a larger national interest is involved in ensuring the security of the Union Government officials and their administrative convenience. However, this does not undermine the federal balance of a cabinet government conceptualized by the collective responsibility of the Council of Ministers towards the legislative assembly elected by the people of Delhi. The federal balance will not be affected by any partition of legislative or executive powers between the Union Government and the Government of National Capital Territory Delhi if such partition is explicit in the Constitution itself. A law made by Parliament cannot mess with the federal balance embodied in the Constitution. During the Constitutional Assembly debates, Dr. B.R. Ambedkar called this principle "the chief mark of federalism."[17] In the pretext of following this principle, the parliament has made an amendment to the Government of National Capital Territory of Delhi Act, 1991 which seems like an oxymoron. The Amendment Act, 2021 being passed by both the Houses of Parliament, received the assent of the President on March 28, 2021.[18] This Amendment Act, 2021 has made the following changes to the Government of National Capital Territory of

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[14] The Government of National Capital Territory of Delhi Act, 1991, No. 1, Acts of Parliament, 1992 (India).

[15] *supra* note 13.

[16] *supra* note 4, at art. 239AA, cl. (3)(a).

[17] The Honourable Dr. B.R. Ambedkar, Constituent Assembly of India Debates (Proceedings) Volume XI, (January 28, 2022, 8:30 PM), http://164.100.47.194/Loksabha/Debates/cadebatefiles/C25111949.html.

[18] Ministry of Home Affairs, Press Information Bureau, Press Release ID: 1714828, (January 29, 2022, 7:30 PM), https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1714828.

Delhi Act, 1991 that will adversely affect the constitutionally assured federal balance in National Capital Territory Delhi: -

1. It has inserted a new sub-section (3) in section 21 according to which the expression 'Government' referred to in any law to be made by the Legislative Assembly shall mean the 'Lieutenant Governor'.[19] Assigning the meaning of 'Government' to a Lieutenant Governor when there is already an elected Government in National Capital Territory Delhi is nothing but a mockery of democracy.
2. It has added a new proviso to the section 33 which prohibits the Legislative Assembly from making any rule to enable itself or its Committees to consider the matters of the day-to-day administration of the Capital or conduct inquiries concerning the administrative decisions. Any such rule made before the commencement of this Amendment Act, 2021 is also void.[20] This is a matter of concern because it restricts the Committees of the Legislative Assembly from conducting inquiries about administrative decisions. This will harm the accountability and transparency of administrative authorities in their decision-making.
3. It has inserted a new proviso in sub-section 2 of section 44 according to which the opinion of Lieutenant Governor shall be obtained on all such matters, specified by a general or special order of the Lieutenant Governor, before taking any executive action in pursuance of the decision of the Council of Ministers or a Minister, to exercise powers of Government, State Government or Appropriate Government.[21] This will make the position of elected Government of National Capital Territory Delhi weak and will also make the Council of Ministers responsible to the Lieutenant Governor. The Lieutenant Governor who was making decisions on the aid and advice of the Council of Ministers will now influence the decision of the Council of Ministers itself. This amendment will also cause unnecessary delay for the Government of National Capital Territory Delhi to exercise the executive powers that fall within its domain.

On the whole, the Amendment Act, 2021 has made the position of Government of National Capital Territory Delhi feeble because the elected Government of National Capital Territory Delhi is being barred to exercise its powers unless it obtains the opinion of the

[19] *supra* note 1, at § 2.
[20] *Id.* § 4.
[21] *Id.* § 5.

Lieutenant Governor. The Amendment Act, 2021 has literally metamorphosed the Lieutenant Governor into a Government. The Amendment Act, 2021 has made the Council of Ministers collectively responsible to the Lieutenant Governor instead of an elected Legislative Assembly. Even though the laws made by Parliament will prevail over the laws made by the Legislative Assembly of National Capital Territory Delhi in case of repugnancy,[22] the Parliament cannot unjustly take away the assembly's lawmaking power itself. The legislative powers of National Capital Territory Delhi's Legislative Assembly are being restricted without a constitutional mandate which disrupts the federal balance enshrined in the Constitution of India.

**Scope of Lieutenant Governor's executive powers**

Executive powers denote residue of Governmental functions that remain after judicial and legislative functions are taken away. In India, the real executive power is with the Council of Ministers in Parliament or State Legislatures. The President or Governors are merely formal or constitutional heads of the executive.[23] This may not be the case for Union Territories without the Council of Ministers. As far as the National Capital Territory of Delhi is concerned, it does have a Council of Ministers headed by a Chief Minister. Therefore, the real executive powers including the day-to-day administration in the National Capital Territory of Delhi should not be carried out by the Lieutenant Governor or President and it should vest with the Council of Ministers unless the Constitution of India provides otherwise. Delhi being a National Capital Territory, certain executive powers do lie with the Lieutenant Governor in special circumstances as enshrined in the Constitution. Those powers and their scope were interpreted by the Hon'ble Supreme Court of India in the years 2018 and 2019. The Press Release on April 23, 2021 given by the Ministry of Home Affairs states that the Amendment Act, 2021 discussed earlier is in line with the judgments of the Hon'ble Supreme Court dated July 4, 2018 and February 14, 2019.[24] Therefore, it becomes imperative to understand the ratio of those two judgments to verify if the Amendment Act, 2021 is really in line with them.

In the case of the *Government of National Capital Territory of Delhi v Union of India & Ors.*,[25] The Hon'ble former Chief Justice Dipak Mishra, speaking for the majority, has held

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[22] *supra* note 4, at art. 239 AA (3) (c).
[23] Rai Sahib Ram Jawaya Kapur And Ors. v. The State Of Punjab, AIR 1955 SC 549.
[24] *supra* note 18.
[25] (2018) 8 SCC 501.

that the Lieutenant Governor of Delhi is an Administrator in a limited sense only. The Lieutenant Governor should not differ from decisions of the Council of Ministers due to an attitude because it would negate the concept of collective responsibility of Council of Ministers towards the Legislative Assembly of National Capital Territory of Delhi guaranteed under article 239AA of Constitution of India. The executive power of the representative Government in the National Capital Territory of Delhi is coextensive with the legislative powers of its Legislative Assembly. However, if Parliament makes law for the subjects in State List or Concurrent List, then the executive action of the Government of National Capital Territory of Delhi should conform to it. Lieutenant Governor of Delhi is bound by the aid and advice of the Council of Ministers as per article 239AA (4), unless a reference is made to the President in any matter of exceptional circumstances and thus the words "any matter" in the proviso of article 239AA does not mean every matter. This reference cannot be made mechanically and it should be in line with the principles of collaborative federalism, constitutional balance, and the idea of representative Government. If such a reference is made, the decision of the President would be binding.

In the case of *Government of National Capital Territory of Delhi v Union of India*,[26] The Hon'ble Supreme Court of India held that the appointment of Special Public Prosecutor under section 24 of Code of Criminal Procedure, 1973 is to be done by the Lieutenant Governor acting on the aid and advice of the Council of Ministers. The Hon'ble Court also held that the word "State Government" used in section 2(5) of the Electricity Act, 2003 would mean the Government of National Capital Territory of Delhi and it does not mean the Lieutenant Governor. The Delhi Government also has the power to issue directions to the Delhi Electricity Regulatory Commission in matters of public interest and the power to revise minimum rates of Agricultural Land (i.e., circle rates) under the Indian Stamp Act, 1899. However, the powers concerning setting up a police station for the Anti-Corruption Bureau and setting up Commission of Inquiry was given to the Union Government as it was outside the scope of Delhi Government's powers. The Hon'ble Court reaffirmed the principles laid down earlier in 2018 concerning collective responsibility, collaborative government, and representative governance.

After a combined reading of both the judgments discussed above, it can be concluded that the Amendment Act, 2021 violates the principles laid down by the Hon'ble Supreme

[26] (2019) 3 MLJ 35.

Court. It has mischievously changed the meaning of "Government" into Lieutenant Governor which is taking away the executive powers of elected Delhi Government guaranteed. Prohibiting the legislative assembly from making rules of day-to-day administration is against article 239AA of Constitution of India which guarantees law-making power to the Legislative Assembly on all matters of Concurrent List and State List except three matters as interpreted by the Hon'ble Supreme Court. Day-to-day administration is a wider phenomenon that does not fall specifically under those three matters alone i.e. police, public order, and land. The formal head Lieutenant Governor is now being turned into a one man Government, and such absolutism is neither warranted by article 239AA of the Constitution of India nor by the judicial pronouncements which the objectives of the Amendment Act, 2021 claims to comply with.

**Conclusion and Suggestions**

The idea of democracy is not simply limited to what the majority says. It is what the majority says after listening to the dissenting opinions and considering them on merit. India cannot afford to lose its democratic charm in its Capital itself. The National Capital Territory is the cherry in the cake that gets projected to the foreign nations more easily than other territories. In this context, it would be hypocritical for India to give up on democratic Delhi and project itself as democratic ideal among the international community.

Delhi belongs to the whole country as much as it belongs to people residing in Delhi. Absolutism in the capital territory would demean not just the capital territory but also the whole nation. Taking away the law-making powers of the elected representatives is undemocratic no matter which law protects such power grab. Such absolutism also undermines collaborative federalism in a capital territory. If Absolutism is allowed then it would drive democracy into the path of oligarchy or something even worse than that. Decentralization of power is better suited for highly populated democratic countries. The concerns regarding the national safety and administrative convenience are reasonable but not reasonable enough to completely make the elected representatives in Delhi administratively impotent. There can obviously be some restrictions in their powers keeping the national interest in mind. However, such restriction should be warranted by the Constitution of India.

The judicial pronouncements in this issue are all inclining towards the grant of rule-

making powers to the elected Legislative Assembly of Delhi as much as possible. The Parliament of India while doing the exact opposite of what the Courts have suggested, either misunderstood the judgments or consciously misinterpreted the judiciary to meet its ends. Blaming the Parliament of India for conscious misinterpretation would serve no purpose and may also negatively impact the future of Delhi. It is more appropriate to consider the reasons stated by the Parliamentarians themselves for their actions to avoid politicizing the issue. Therefore, assuming the good intentions of the Parliament, it would be easier to resolve the issue both on paper and ground. In these types of issues, if one resorts to fight the Parliament in Court of law, the results would not be pleasing to the people of Delhi. If the amendment violating article 239AA is struck down, the Parliament might nullify the judgment by amending the Constitution itself to alter the special status of Delhi, which is undesirable in the long run. Negotiation and healthy debates can address the problem better. Parliament of India also contains elected representatives and would definitely value the democratic ideals more than anything else. It would be easier to convince the Parliament of India than to confront it. Therefore, the following suggestions are made in this regard: -

1. The Amendment Act, 2021 shall be withdrawn by the Parliament of India considering the public outcry. Any amendments that are to be made to the Government of National Capital Territory of Delhi Act, 1991 shall happen after consulting the stakeholders i.e., Legislative Assembly of National Capital Territory of Delhi. This will ensure the idea of representative governance and collaborative federalism.
2. If the Parliament of India is not willing to withdraw the law as suggested above, then the President of India may refer this matter to the Hon'ble Supreme Court of India under article 143 of the Indian Constitution. The Hon'ble Supreme Court exercising its advisory jurisdiction can clarify if the controversial amendment to the Government of National Capital Territory of Delhi Act, 1991 was complying with its pronouncements on July 4, 2018 and February 14, 2019. This move will settle the legal debates revolving around the legal status of Delhi and its administration by clearing all the confusion.
3. The Government of India shall set up an Ad-hoc Commission under section 3 of the Commission of Inquiry Act, 1952 with a mandate to recommend the legislative draft of amendment in Government of National Capital Territory of Delhi Act, 1991. The Commission's recommendation should give due weightage to the clarification which will be given by the Hon'ble Supreme Court of India answering the reference (as

suggested above) made by the President of India.

4. The above-said commission shall be directed to ascertain the public opinion in this regard, by issuing a Press Note or notification inviting written memoranda from the citizens. The recommendations of the said Commission should give 50% due weightage to the information obtained from the people of Delhi and the remaining 50% to the citizens from other parts of India. Giving weightage to the opinions of people from other parts of India will remind them that the Capital territory belongs to the country as a whole and not just the people of Delhi.

# IMPACT OF POWER PLANT ON ENVIRONMENT : A LEGAL CHALLENGE

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## Introduction

India is a developing economy and this peculiarity has been accomplished by advancement in various areas, like infrastructure, technology, medical care, telecom, etcetera. Infrastructure is respected to be the one of the foundations of any developing society, as it adds to exchange and business, just as to the expectations for everyday comforts of any general public.
Infrastructure covers regions, for example, power, streets, water ventures, rail routes, etc. India has the second biggest populace on the planet and to help this immense populace, India is continually working its energy sector to build its power producing limit, with the goal that it can meet its power needs.
Power is an important component of any country's infrastructure. India's electricity sector is one of the most diverse in the world. Traditional sources of power generation in India include coal, natural gas, oil, nuclear power, and hydropower, as well as less mainstream sources like wind, solar, and agricultural and domestic waste.

With India's fast rising electricity demand, there is a pressing need to expand the country's power plant generation capacity. In 2017, India was rated 26th in the World Bank's list of countries with access to electricity. The Indian government has made "Power for All" a priority. As a result, capacity expansion in the country has accelerated.

That being said, a power plant's environmental impact is multifaceted, encompassing both its construction and operation. These consequences, sometimes known as impacts, might be momentary or long-term. A power plant and its auxiliary components (such as natural gas pipelines, water intakes and discharges, coal delivery and storage systems, new transmission lines, and waste disposal sites) occupy space on the ground and in the air, consume water, and, in many cases, emit pollutants into the atmosphere. The plant's footprint on the earth prevents others from purchasing or using the land. It may also have an impact on the current

and future uses of adjacent and surrounding land parcels. A coal-fired power station has a lot of tall structures and tall exhaust stacks. The plant's height may pose a safety risk to airplanes or have a visual impact on nearby landowners. There would be implications on land use, soils, and wildlife on the site if the property to be utilized for the power plant is a "greenfield," an undeveloped lot with primarily vegetation (crops, pasture, or old-field vegetation).

Power Plants that burn fossil fuels or biomass, burn fuels to produce hot air or steam, which is used to spin turbines that generate electricity. The nuclear fission reaction is used in nuclear power plants to generate steam. Exhaust gasses and other byproducts, such as air pollution, result from the combustion of fuel. Water from neighboring rivers or lakes, as well as local subterranean water aquifers, is needed to generate steam, and it must be cleansed. After it has been used, water may need to be released from the plant. All elements must be examined, including the volume of utilized water discharged, the temperature of the discharged water, and the concentration of contaminants in the water.

Solid wastes can come in a variety of forms, all of which must be dealt with. As a solid byproduct, coal combustion produces ash. Spent nuclear fuel rods and low-level radioactive waste are produced by nuclear power reactors. Before discharging to surface waters, power facilities that utilize water to generate steam or cold must frequently filter and purify the water. The filtered solids are a waste product that must be properly disposed of.

To remove the heat from the water used for cooling, cooling towers are frequently employed. The air that has been warmed by the water in the cooling tower is released into the atmosphere, carrying large amounts of water in the form of vapor, in some cases millions of gallons every day. That lost water vapor, obtained locally, represents significant water consumption by the power plant.

Some aspects of the construction and operation of a power plant can have unsettling effects on the community in which the power plant is built. Construction of the power plant, while very organized, can be viewed by surrounding landowners and other citizens as ugly and chaotic and might have an effect on community aesthetics or business. Costs for community services such as police, fire protection, emergency medical service, and traffic control can increase. Additional requirements might be placed on the municipal water supply or wastewater treatment capacity, or on solid-waste management systems. Coal-fired power plants require an efficient, reliable and long-term means of coal delivery, usually by rail or

barge. Nearby road or rail traffic might be complicated or burdened by construction traffic and the delivery of materials, particularly large items. Noise levels in neighborhoods might increase during construction, and power plant operation also creates noise and vibration. The cooling towers of an operating power plant can also create fog and rime ice. Air space issues and compatibility with local land use must be considered in light of the space the power plant occupies and the way it operates[1].

Now before delving into the intricacies of the impact, it is apposite here to establish the importance of judicial decisions which have time and again emphasized upon the sustainable mode of development which will constitute a significant part of this article because power sector and sustainable mode of development can't be kept separated.

Sustainable development is a typical benchmark through which all development projects are judged. Noticeably finding its origin in global policy from the Brundtland Report in 1987[2], it is frequently defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs"[3]. Having been embraced globally as the standard for development by nations, it is the bedrock upon which the Sustainable Development Goals[4] have been laid out. Their latest iteration, consisting of 17 SDGs, was adopted by all United Nations member States in 2015. Titled as the "2030 Agenda for Sustainable Development"[5] These SDGs are broad, with their focus being on overall development of society in a manner which comports with environmental preservation now and in trust for the future. SDG13 specifically focuses on "Climate Action", which is to be balanced with the other SDGs (such as SDG9, which encourages "Industry, Innovation and Infrastructure").

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[1] Citizens For Green Doon v. Union of India (Civil Appeal No 10930 of 2018)

[2] Our Common Future, also known as the Brundtland Report available at https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf (Last visited on December 28, 2021.)

[3] "Report of the World Commission on Environment and Development: Our Common Future" (1987) available at https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf (Last visited on December 28, 2021.)

[4] Id

[5] Available at https://www.undp.org/sustainable-development-goals (Last visited on December28, 2021.)

The principle of sustainable development has found consistent application in matters of environmental law. Sustainable development has a multi-dimensional approach, with a focus on the development of the economy, protection of individual rights and environmental concerns, while ensuring both inter- and intra-generational equity. This allows the principle of sustainable development to look beyond creating policy *goals* (which necessarily seek specific outcomes) towards creating policy *approaches* (which rather seek to provide better frameworks)[6]. The principle of sustainable development has been explicitly recognized in multiple judgments of this Court.

In *Indian Council for Enviro-Legal Action v. Union of India*[7], a three-judge Bench of the Supreme Court described the principle of sustainable development in the following terms:

> "31...While economic development should not be allowed to take place at the cost of ecology or by causing widespread environmental destruction and violation; at the same time, the necessity to preserve ecology and environment should not hamper economic and other developments. Both development and environment must go hand in hand, in other words, there should not be development at the cost of the environment and vice versa, but there should be development while taking due care and ensuring the protection of the environment. This is sought to be achieved by issuing notifications like the present, relating to developmental activities being carried out in such a way so that unnecessary environmental degradation does not take place. In other words, in order to prevent ecological imbalance and degradation that developmental activity is sought to be regulated."

In *Essar Oil Ltd. v. Halar Utkarsh Samiti*[8] a two-judge Bench of the Supreme Court referred to the Stockholm Declaration while elucidating on the principle of sustainable development. It noted that while socio-economic needs could be fulfilled through development, environmental concerns will always remain. However, these concerns should not be seen as a deadlock between development and the environment but as an opportunity to harmonize both,

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[6] J B Ruhl, 'Sustainable Development: A Five-Dimensional Algorithm for Environmental Law' (1999) 18 Stanford Environmental Law Journal 31

[7] (1996) 5 SCC 281

[8] (2004) 2 SCC 392

through the principle of sustainable development. Speaking through Justice Ruma Pal, the Supreme Court observed:

> "27. This, therefore, is the aim, namely, to balance economic and social needs on the one hand with environmental considerations on the other. But in a sense all development is an environmental threat. Indeed, the very existence of humanity and the rapid increase in the population together with consequential demands to sustain the population has resulted in the concreting of open lands, cutting down of forests, the filling up of lakes and pollution of water resources and the very air which we breathe. However, there need not necessarily be a deadlock between development on the one hand and the environment on the other. The objective of all laws on the environment should be to create harmony between the two since neither one can be sacrificed at the altar of the other..."

In *N.D. Jayal & Anr v. Union of India & Ors*[9], a three-judge Bench held that a balance between developmental activities and environmental protection could only be maintained through the principle of sustainable development. Doing this was held to be necessary, without which the future generations could be in jeopardy. Justice S Rajendra Babu (speaking for himself and Justice Mathur) held as under:

> "22. Before diverting to other issues, certain aspects pertaining to the preservation of ecology and development have to be noticed. In Vellore Citizen'' Welfare Forum v. Union of India [(1996) 5 SCC 647] and in M.C. Mehta v. Union of India [(2002) 4 SCC 356] it was observed that the balance between environmental protection and developmental activities could only be maintained by strictly following the principle of "sustainable development". This is a development strategy that caters to the needs of the present without negotiating the ability of upcoming generations to satisfy their needs. The strict observance of sustainable development will put us on a path that ensures development while protecting the environment, a path that works for all peoples and for all generations. It is a guarantee to the present and a bequeath to the future. All environment-related developmental activities should benefit more people while maintaining the environmental balance. This could be ensured only by strict

[9] (2004) 9 SCC 362

adherence to sustainable development without which the life of the coming generations will be in jeopardy."

Justice Babu also noted that while the right to a clean environment is guaranteed as an intrinsic part of the fundamental right to life and personal liberty, the right to development can also be declared as a component of Article 21:

> "24. The right to development cannot be treated as a mere right to economic betterment or cannot be limited as a misnomer to simple construction activities. The right to development encompasses much more than economic well-being, and includes within its definition the guarantee of fundamental human rights. The "development" is not related only to the growth of GNP. In the classic work, Development As Freedom, the Nobel prize winner Amartya Sen pointed out that "the issue of development cannot be separated from the conceptual framework of human rights". This idea is also part of the UN Declaration on the Right to Development. The right to development includes the whole spectrum of civil, cultural, economic, political and social processes, for the improvement of people'' well-being and realization of their full potential. It is an integral part of human rights. Of course, construction of a dam or a mega project is definitely an attempt to achieve the goal of wholesome development. Such works could very well be treated as integral components for development."

More recently, in *Rajeev Suri v. Delhi*[10], a three judge Bench of this Court had to decide on the permissibility of the Central Vista Project. In considering the use of the principle of sustainable development, Justice A M Khanwilkar observed that the principle of sustainable development necessarily incorporates within it the principle of development – development which is sustainable and not environmentally degrading. He held as under:

> *"507. The principle of sustainable development and precautionary principle need to be understood in a proper context. The expression "sustainable development" incorporates a wide meaning within its fold. It contemplates that development ought to be sustainable with*

[10] 2021 SCC OnLine SC 7

*the idea of preservation of the natural environment for present and future generations. It would not be without significance to note that sustainable development is indeed a principle of development-- it posits controlled development. The primary requirement underlying this principle is to ensure that every development work is sustainable; and this requirement of sustainability demands that the first attempt of every agency enforcing environmental rule of law in the country ought to be to alleviate environmental concerns by proper mitigating measures. The future generations have an equal stake in the environment and development. They are as much entitled to a developed society as they are to an environmentally secure society.*

*508 The jurisprudence in environmental matters must acknowledge that there is immense inter-dependence between right to development and right to natural environment. In International Law and Sustainable Development, Arjun Sengupta in the chapter "Implementing the Right to Development [International Law and Sustainable Development-- Principles and Practice, Edn. 2004, pg. 354]" notes thus:*

*"... Two rights are interdependent if the level of enjoyment of one is dependent on the level of enjoyment of the other..."""*

Similarly, in *Municipal Corporation of Greater Mumbai v. Ankita Sinha*[11], another three judge Bench of the Supreme Court ruled on the powers of the NGT under the National Green Tribunal Act 2010. The Court noted the significance of environmental justice and environmental equity, and highlighted how environmental harms cause disproportionate implications for the economically or socially marginalized groups. Thus, it was considered important to ensure that environmental equity was achieved, through the use of principles

[11] 2021 SCC OnLine SC 897

such as sustainable development. In this regard, speaking through Justice Hrishikesh Roy, the Court held as under:

"XI. ENVIRONMENTAL JUSTICE AND ENVIRONMENTAL EQUITY

> *82 Environmental equity as a developing concept has focused on the disproportionate implications of environmental harms on the economically or socially marginalized groups. The concerns of human rights and environmental degradation overlap under this umbrella term, to highlight the human element, apart from economic and environmental ramifications. Environmental equity thus stands to ensure a balanced distribution of environmental risks as well as protections, including application of sustainable development principles.*

In *Bengaluru Development Authority v. Sudhakar Hegde*[12], a two-judge Bench of this Court observed that there was no winner in environmental litigation, since both – development and protection of environment – are necessary. The Court clarified that a framework created by environmental rule of law has to balance both these considerations by creating transparent and accountable institutions, while allowing for participatory democracy.

The notion of sustainable development is well ingrained in Indian environmental law jurisprudence[13]. It has evolved into a multi-faceted principle that does not obstruct progress but rather builds it around what is sustainable. Sustainable development encompasses two concepts: development that provides equity between present and future generations, as well as development that ensures equity between diverse sections of society now. While the notion of sustainable development has deep roots, there is a lack of clarity on how to determine if a given development initiative adheres to the principle. The idea of sustainable development may yield diverse and arbitrary measurements if the Court does not apply a single benchmark or standard in its study of the impact of development projects (depending on the nature of individual projects). This not only adds to the law's uncertainty, but it also makes the

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12 (2020) 15SCC 63

13 Supra note 4

application of the principle of sustainable development more selective, limiting its ability to promote long-term change.[14]

Adopting the criteria of 'environmental rule of law' to verify governance decisions under which developmental projects are allowed is a viable solution to this challenge. The United Nations Environment Programme suggested such an approach in its 2015 Issue Brief, "Environmental Rule of Law: Critical to Sustainable Development," in the following terms:[15]:

> "Environmental rule of law integrates the critical environmental needs with the essential elements of the rule of law, and provides the basis for reforming environmental governance. It prioritizes environmental sustainability by connecting it with fundamental rights and obligations. It implicitly reflects universal moral values and ethical norms of behavior, and it provides a foundation for environmental rights and obligations. Without environmental rule of law and the enforcement of legal rights and obligations, environmental governance may be arbitrary, that is, discretionary, subjective, and unpredictable."

UNEP has further reiterated the importance of the 'environmental rule of law' in its 2019 report titled "Environmental Rule of Law: First Global Report", where it notes:

> *"Environmental rule of law is key to achieving the Sustainable Development Goals. Indeed, it lies at the core of Sustainable Development Goal 16, which commits to advancing "rule of law at the national and international levels" in order to "promote peaceful and inclusive societies for sustainable development, provide access to justice*

[14] Id

[15] Available at <https://wedocs.unep.org/bitstream/handle/20.500.11822/10664/issuebrieferol.pdf?sequence=1&amp%3BisAllowed=> ( Last visited on December 28, 2021.)

*for all and build effective, accountable and inclusive institutions at all levels.*"

[...]

*Environmental law and institutions have grown dramatically in the last few decades, but they are still maturing. Environmental laws have taken root around the globe as countries increasingly understand the vital linkages between environment, economic growth, public health, social cohesion, and security. Countries have adopted many implementing regulations and have started to enforce the laws. Too often, though, there remains an implementation gap.*

*Environmental rule of law seeks to address this gap and align actual practice with the environmental goals and laws on the books. To ensure that environmental law is effective in providing an enabling environment for sustainable development, environmental rule of law needs to be nurtured in a manner that builds strong institutions that engage the public, ensures access to information and justice, protects human rights, and advances true accountability for all environmental actors and decision makers...*"

**Authorization and Operating Requirements for the Establishment of Power Plants in India**

Under the Electricity Act, generation of electricity (excluding hydro) is a delicensed industry, and putting up a power facility does not require a license (but only the central government and state-owned corporations or authorities can generate, develop, utilize, or dispose of atomic energy). However, generating power is still subject to the necessary environmental and other permissions relevant to the generation plant's construction, development, and implementation. Developers of hydropower facilities frequently sign memorandums of understanding or implementation agreements with the state government where the project is being built.

The CEA is no longer required by the Indian government for techno-economic approval of a thermal energy project (however, this is still required for setting up a hydro plant).

Authorisation requirements vary based on the location of each project, as rules can be at the federal and state levels. The following are the main permits required to build a power plant (other permits may be required based on the type of fuel, location, and project):

- Environmental clearance for the specific project from the Ministry of Environment, Forests and Climate Change (MoEFCC).
- Consent to establish for the specific project by the state pollution control board under the Air (Prevention and control of Pollution) Act 1981 and the Water (Prevention and Control of Pollution) Act 1974.
- Approvals to acquire land for the project, including approvals from local bodies such as the village council (*gram panchayat*).
- Approval for site and building plan (including clearance for fire safety standards and protection apparatus and system) and licensing and registration of the project under the Factories Act 1948 (issued by the Chief Inspector of Factories).
- Certificate for use of boilers under the Indian Boilers Act 1923.
- License for storage and use of explosives under the Explosives Act 1884.
- License for storage and use of petroleum products under Petroleum Act 1934.
- Approvals, clearances or no objection certificates from authorities such as the Archaeological Survey of India, Ministry of Defence and Airports Authority of India (as applicable).

The consents required for renewable energy projects are state-specific and may vary from one state to another.

**Authorization and Other Ongoing Requirements to operate Electricity Generation Plants**

The Electricity Act does not require a license to operate a generation plant (except hydro). However, a variety of permissions, consents, and permits from various federal and state agencies must be obtained and maintained during the plant's operation. The following are some of the most important authorizations:

- Consent to operate by the state pollution control board under the Air (Prevention and Control of Pollution) Act 1981 and the Water (Prevention and Control of Pollution) Act 1974 in relation to the project.

- Connectivity-related approvals to connect the interconnection facility to the transmission or distribution network.
- Commissioning certificates from the relevant authority.
- Compliance with the regulations issued by CEA such as:
    - CEA (Safety Requirements for Construction, Operation and Maintenance of Electrical Plants and Electrical Lines) Regulations 2011; and
    - periodical inspection of the electrical installations under the CEA (Measures relating to Safety and Electric Supply) 2010.
- Compliance with the electricity supply code, including the metering code and metering regulations framed by the relevant SERC.

The consents required for renewable energy projects are state-specific and may vary from one state to another.

**Requirements Concerning Connection of Generation to the Transmission Network or a Distribution Network**

The producing unit must link to the inter-state transmission system (in case of inter-state supply) for power delivery from the point of injection to the site of drawl, for which an application for connectivity is filed and an agreement is formed with the Central Transmission Utility (CTU). The following are required for interstate electricity supply:

- The right to use the inter-state transmission system (that is, open access) must be applied for to the CTU.
- After open access is granted, an agreement for long-term or medium-term access must be entered with the CTU.

CERC (Grant of Connectivity, Long-term Access, and Medium-term Open Access in Inter-State Transmission and Related Matters) Regulations 2009 control connectivity and open access in inter-state transmission systems (in case of inter-state supply). Similarly, the applicable SERC regulations govern connectivity and open access for intra-state supply.

**Requirements Concerning the Decommissioning of a Power Plant at the end of its Period of Operation.**

When decommissioning a power plant, all state-specific rules governing equipment disposal must be followed. When it comes to nuclear power facilities, the Atomic Energy Regulatory Board (AERB) has released safety manuals outlining the rules that must be followed when the plant is shut down. These include the adoption of a decommissioning plan to guarantee

worker, public, and environmental safety.

Having now highlighted some of the landmark judicial pronouncements which have affirmed the value of rule of law and the environmental jurisprudence viz a viz sustainable development and the legal aspects regarding the construction of Power plants in India, I will now further move to establish the colossal impact of power plants on the environment by analyzing different modes which is employed for power generation.

**1. Energy Generation through Thermal Power Plant**

At present, thermal power accounts for almost 60 per cent of India's total installed power generation capacity. It is produced by burning fossil fuels like coal, gas, etc. Of this, coal alone accounts for more than half of India's installed electricity generation. It has been the centerpiece of India's energy ecosystem for several decades and is expected to continue being so for at least a decade or two, largely because it is the cheapest natural resource and is abundant in India.[16]

Coal is a fossil fuel formed from the decomposition of organic materials that have been subjected to geologic heat and pressure over millions of years. Coal is considered a nonrenewable resource because it cannot be replenished on a human time frame.

The activities involved in generating electricity from coal include mining, transport to power plants, and burning of the coal in power plants. Initially, coal is extracted from surface or underground mines. The coal is often cleaned or washed at the coal mine to remove impurities before it is transported to the power plant—usually by train, barge, or truck.

Finally, at the power plant, coal is commonly burned in a boiler to produce steam. The steam is run through a turbine to generate electricity.[17]

**Environmental Impacts**

**Air Emissions**

When coal is burned, carbon dioxide, sulfur dioxide, nitrogen oxides, and mercury compounds are released. For that reason, coal-fired boilers are required to have control devices to reduce the emissions that are released.

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[16] https://www.thehindubusinessline.com/blexplainer/is-it-the-beginning-of-end-for-indias-thermal-power-plants/article38025578.ece

[17] Ibid

Mining, cleaning, and transporting coal to the power plant generate additional emissions. For example, methane, a potent greenhouse gas that is trapped in the coal, is often vented during these processes to increase safety.

**Water Resource Use**

Large quantities of water are frequently needed to remove impurities from coal at the mine. In addition, coal-fired power plants use large quantities of water for producing steam and for cooling. When coal-fired power plants remove water from a lake or river, fish and other aquatic life can be affected, as well as animals and people who depend on these aquatic resources.

**Water Discharges**

Pollutants accumulate in the water utilized in the boiler and cooling system of the power plant. Pollutants in the water can harm fish and plants if the water used in the power plant is released into a lake or river. Furthermore, if rain falls on coal stored in piles outside the power station, the water that washes off these piles can drain heavy metals from the coal into neighboring bodies of water, such as arsenic and lead. When the water used to clean the coal is dumped back into the environment, it can contaminate bodies of water with heavy metals. This type of discharge normally necessitates a permit and is closely monitored.

**Solid Waste Generation**

When coal is burned, it produces ash, which is mostly made up of metal oxides and alkali. Coal has a ten percent ash content on average. When coal is cleaned in mines, as well as when air contaminants are removed from stack gas at power plants, solid waste is formed. Much of this trash ends up in landfills and abandoned mines, but some of it is now repurposed into usable goods like cement and construction materials.

Even when a coal-fired power station closes down, soil at the site can become contaminated with numerous contaminants from the coal and take a long time to recover. Coal mining and processing have a negative impact on the environment. Surface mining disturbs larger areas than underground mining.

**2. Electricity from Hydropower**

India has overtaken Japan, becoming the nation with fifth- largest hydropower production capacity in the world with total installed base at over 50 GW, and is only behind Canada, US, Brazil and China according to International Hydropower Association (IHA). India has the

hydro power potential of around 145GW,of which 45GW is already been utilized[18].
Hydropower is a renewable energy source since it generates electricity using the Earth's water cycle. Water evaporates from the Earth's surface, condenses into clouds, rains back down, and flows into the ocean.

The kinetic energy created by the movement of water as it flows downstream can be transformed into electricity. A hydroelectric power plant turns this energy into electricity by forcing water through a hydraulic turbine attached to a generator, which is frequently held at a dam. The water is discharged from the turbine and returned to a stream or riverbed beneath the dam. Hydropower is primarily reliant on precipitation and elevation changes; in order to create electricity, high precipitation levels and large elevation shifts are required.. Therefore, an area such as the mountainous Pacific Northwest has more productive hydropower plants than an area such as the Gulf Coast, which might have large amounts of precipitation but is comparatively flat.

According to Yüksel [19] hydropower does not pollute the air we breathe in the way that the energy source does not produce any air pollutants. Unlike thermal power plants for example, there are no gaseous or fly ash emissions emitted during the production. The fact that hydropower often replaces fossil-fired generation, it can therefore also be said that it is reducing the problem with acid rain and smog. Despite all these advantages hydropower plants have, there may also be negative impacts. Lately the impact on the ecological aspects from the power plants has received attention. In the report from World Commission on Dams [20]It is stated that dams will have effects e.g. on the terrestrial ecosystem and biodiversity, the flow regime, migration of aquatic organisms, and can cause emissions of greenhouse gasses. Bratrich[21] states that hydropower affects the flow regime, migration of organisms and transport of nutrients and sediments.

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[18] Available at <https://www.ibef.org/archives/industry/renewable-energy-reports/indian-renewable-energy-industry-analysis-december-2021 >

[19] https://www.sciencedirect.com/science/article/pii/S1364032109001592

[20] https://lupinepublishers.com/agriculture-journal/fulltext/environmental-impacts-of-hydropower-and-alternative-mitigation-measures.ID.000133.php

[21] https://onlinelibrary.wiley.com/doi/pdf/10.1002/rra.788

Abbasi [22] claim that hydropower plants cause major ecological impacts in all of the four different habitats, which are associated with the projects; the estuary into which the river flows, the downstream reaches of the dammed river, the reservoir catchment and the artificially created lake. Different research works from all corners of the world report considering the negative effects of hydropower on the environment and call for the importance of adopting appropriate mitigation measures. Therefore, to ensure sustainable development, various mitigation and enhancement measures have to be integrated at the early stages of project planning. Furthermore, appropriate mitigation measures not only for hydropower development that is newly planned and implemented in future, but also for the refurbishment and upgrading of hydropower plants which are currently in operation, need to be devised.

**The Impact**

**Air Emissions**

Hydropower's air emissions are negligible because no fuels are burned. However, if a large amount of vegetation is growing along the riverbed when a dam is built, it can decay in the lake that is created, causing the buildup and release of methane, a potent greenhouse gas.

**Water Resource Use**

Hydropower often requires the use of dams, which can greatly affect the flow of rivers, altering ecosystems and affecting the wildlife and people who depend on those waters.

Often, water at the bottom of the lake created by a dam is inhospitable to fish because it is much colder and oxygen-poor compared with water at the top. When this colder, oxygen-poor water is released into the river, it can kill fish living downstream that are accustomed to warmer, oxygen-rich water.

In addition, some dams withhold water and then release it all at once, causing the river downstream to suddenly flood. This action can disrupt plant and wildlife habitats and affect drinking water supplies.

**Water Discharges**

Hydroelectric power plants release water back into rivers after it passes through turbines. This water is not polluted by the process of creating electricity.

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[22] https://www.sciencedirect.com/science/article/pii/S1364032110004193

**Land Resources Use**

The construction of hydropower plants can alter sizable portions of land when dams are constructed and lakes are created, flooding land that may have once served as wildlife habitat, farmland, and scenic retreats. Hydroelectric dams can cause erosion along the riverbed upstream and downstream, which can further disturb wildlife ecosystems and fish populations. Whilst hydropower presents a cleaner option than dirtier forms of electricity production, it does not come without its negative impacts. This essay has identified a number of these environmental and social impacts occurring as a result of hydropower dam facilities. Environmental impacts include deforestation, the loss of wildlife, the loss of aquatic life, changes to the flow of waterways, changes in water temperature, the build-up of sediment and the creation of landslide hazards. Social impacts include human displacement, loss of livelihood and heightened flood risk. Schlosberg's environmental justice framework was then used to argue that the distributive injustice of tribal displacement, wrought by large hydropower schemes, was largely a result of the tribal communities lacking participation in the decision-making process and lacking recognition of their plight by government officials. Several policy and structural faults were identified to explain why the proliferation of hazardous large hydropower schemes continues to this day, despite the lessons learnt from the 2013 Uttarakhand flood disaster. This includes privatization policies that shield investors from accountability, identified risks being ignored in favor of economic development and the recent reclassification of large hydropower schemes as 'renewable' sources of energy. Whilst small hydropower is shown to produce fewer negative impacts than large hydropower and is more cost-effective, it is not without its own risks. These risks stem from poor government policy that allows small hydro projects to be constructed without undergoing an environmental impact assessment.[23]

**3. Natural Gas**

In 2017, the Indian government announced that it would increase the share of natural gas in its energy mix to 15% by 2030. As of September 2021, natural gas made up 6.5% of India's energy mix. India is promoting natural gas as a 'transition fuel' as it moves towards using

[23] Available at https://www.e-ir.info/2020/02/14/hydropower-in-india-a-source-of-heightened-risk-and-inequality/ .

renewable energy as the main power source, as other countries in Southeast Asia and Africa are doing.[24]

**Electricity from Natural Gas**

Natural gas is a fossil fuel formed when layers of buried plants and animals are exposed to intense heat and pressure over thousands of years. The energy that the plants and animals originally obtained from the sun is stored in the form of carbon in natural gas. Natural gas is combusted to generate electricity, enabling this stored energy to be transformed into usable power. Natural gas is a nonrenewable resource because it cannot be replenished on a human time frame.

The natural gas power production process begins with the extraction of natural gas, continues with its treatment and transport to the power plants, and ends with its combustion in boilers and turbines to generate electricity.

Initially, wells are drilled into the ground to remove the natural gas. After the natural gas is extracted, it is treated at gas plants to remove impurities such as hydrogen sulfide, helium, carbon dioxide, hydrocarbons, and moisture. Pipelines then transport the natural gas from the gas plants to power plants.

Power plants use several methods to convert gas to electricity. One method is to burn the gas in a boiler to produce steam, which is then used by a steam turbine to generate electricity. A more common approach is to burn the gas in a combustion turbine to generate electricity.

Another technology that is growing in popularity is to burn the natural gas in a combustion turbine and use the hot combustion turbine exhaust to make steam to drive a steam turbine. This technology is called "combined cycle" and achieves a higher efficiency by using the same fuel source twice.

**Environmental Impacts**

At the power plant, the burning of natural gas produces nitrogen oxides and carbon dioxide, but in lower quantities than burning coal or oil. Methane, a primary component of natural gas and a greenhouse gas, can also be emitted into the air when natural gas is not burned completely. Similarly, methane can be emitted as the result of leaks and losses during

[24] https://www.business-standard.com/article/current-affairs/how-natural-gas-could-thwart-or-support-india-s-renewables-progress-121101900140_1.html

transportation. Emissions of sulfur dioxide and mercury compounds from burning natural gas are negligible.

Compared to the average air emissions from coal-fired generation, natural gas produces half as much carbon dioxide, less than a third as much nitrogen oxides, and one percent as much sulfur oxides at the power plant. In addition, the process of extraction, treatment, and transport of the natural gas to the power plant generates additional emissions.

**Water Resource Use**

The burning of natural gas in combustion turbines requires very little water. However, natural gas-fired boilers and combined cycle systems do require water for cooling purposes. When power plants remove water from a lake or river, fish and other aquatic life can be killed, affecting animals and people who depend on these aquatic resources.

**Water Discharges**

Combustion turbines do not produce any water discharges. However, pollutants and heat buildup in the water used in natural gas boilers and combined cycle systems. When these pollutants and heat reach certain levels, the water is often discharged into lakes or rivers. This discharge usually requires a permit and is monitored.

**Land Resource Use**

The extraction of natural gas and the construction of natural gas power plants can destroy natural habitat for animals and plants. Possible land resource impacts include erosion, loss of soil productivity, and landslides.

**4. Solar Energy**

Solar energy is a renewable resource because it is continuously supplied to the earth by the sun. There are two common ways to convert solar energy into electricity: photovoltaic and solar-thermal technologies. Photovoltaic systems consist of wafers made of silicon or other conductive materials. When sunlight hits the wafers, a chemical reaction occurs, resulting in the release of electricity. Solar-thermal technologies concentrate the sun's rays with mirrors or other reflective devices to heat a liquid to create steam, which is then used to turn a generator and create electricity.

## Environmental Impacts

### Water resource Use

Photovoltaic systems do not require the use of any water to create electricity. Solar-thermal technologies may tap local water resources if the liquid that is being heated to create steam is water. In this case, the water can be reused after it has been condensed from steam back into water.

### Solid Waste Generation

Solar-thermal technologies do not produce any substantial amount of solid waste while creating electricity. The production of photovoltaic wafers creates very small amounts of hazardous materials that must be handled properly to avert risk to the environment or to people.

### Land Resource Use

Photovoltaic systems require a negligible amount of land area because they are typically placed on existing structures. In contrast, solar-thermal technologies may require a significant amount of land, depending upon the specific solar-thermal technology used. Solar energy installations do not usually damage the land they occupy, but they prevent it from being used for other purposes. In addition, photovoltaic systems can negatively affect wildlife habitat because of the amount of land area the technology requires.

## 5. Biomass Energy

The term "biomass" is attributed to numerous fuel types from such sources as trees; construction, wood, and agricultural wastes; fuel crops; sewage sludge; and manure. Agricultural wastes include materials such as corn husks, rice hulls, peanut shells, grass clippings, and leaves. Trees and fuel crops (i.e., crops specifically grown for electricity production) can be replaced on a short time scale.

Organic wastes such as agricultural wastes, sewage sludge, and manure will continue to be created by society. As a result, biomass is seen as a renewable resource.

While plants are growing, biomass obtains its energy from the sun. Photosynthesis is the process through which plants transform solar energy into chemical energy. When the plant

material is burned, this energy is released as heat. Biomass power plants use boilers to burn biomass fuel. The heat generated by this process is utilised to convert water into steam, which is then used to turn steam turbine to generate electricity.

Biomass is sometimes burned in combination with coal in boilers at power plants. This process, called co-firing, is typically used to reduce air emissions and other environmental impacts from burning coal. Co-firing biomass with coal may require a coal boiler to be modified somewhat so it can combust coal. When co-fired with coal, only a small amount of biomass is typically added (no more than 15 percent of the total amount of fuel going into the boiler) to maintain the boiler's efficiency.[25]

**Environmental Impacts**

**Air Emissions**

Biomass power plants emit nitrogen oxides and a small amount of sulfur dioxide. The amounts emitted depend on the type of biomass that is burned and the type of generator used. Although the burning of biomass also produces carbon dioxide, the primary greenhouse gas, it is considered to be part of the natural carbon cycle of the earth. The plants take up carbon dioxide from the air while they are growing and then return it to the air when they are burned, thereby causing no net increase.

Biomass contains much less sulfur and nitrogen than coal;6 therefore, when biomass is co-fired with coal, sulfur dioxide and nitrogen oxides emissions are lower than when coal is burned alone. When the role of renewable biomass in the carbon cycle is considered, the carbon dioxide emissions that result from co-firing biomass with coal are lower than those from burning coal alone.

**Water Resource Use**

Biomass power plants require the use of water, because the boilers burning the biomass need water for steam production and for cooling. If this water is used over and over again, the amount of water needed is reduced. Whenever any type of power plant removes water from a lake or river, fish and other aquatic life can be killed, which then affects those animals and people that depend on these aquatic resources.

[25] Available at https://www.sciencedirect.com/topics/engineering/biomass-cofiring

### Water Discharges

As is the case with fossil fuel power plants, biomass power plants have pollutant build-up in the water used in the boiler and cooling system. The water used for cooling is much warmer when it is returned to the lake or river than when it was removed. Pollutants in the water and the higher temperature of the water can harm fish and plants in the lake or river where the power plant water is discharged. This discharge usually requires a permit and is monitored.

In general, crops grown for biomass fuel require fewer pesticides and fertilizers than crops grown for food, which means that less pesticide and fertilizer runoff will reach local streams and ponds than if food crops are grown.

### Solid Waste Generation

The burning of biomass in boilers creates a solid waste called ash that must be disposed of properly. However, the ash from biomass normally contains extremely low levels of hazardous elements.

### Land Resource Use

Generating electricity from biomass can affect land resources in different ways. Biomass power plants, much like fossil fuel power plants, require large areas of land for equipment and fuel storage. If these biomass plants burn a waste source such as construction wood waste or agricultural waste, they can provide a benefit by freeing areas of land that might otherwise have been used for landfills or waste piles. Biomass grown for fuel purposes requires large areas of land and, over time, can deplete the soil of nutrients. Fuel crops must be managed so that they stabilize the soil, reduce erosion, provide wildlife habitat, and serve recreational purposes.

## 6. Wind Energy

Wind is created because the sun heats the Earth unevenly, due to the seasons and cloud cover. This uneven heating, in addition to the Earth's rotation, causes warmer air to move toward cooler air. This movement of air is wind.

Wind turbines use two or three long blades to collect the energy in the wind and convert it to electricity. The blades spin when the wind blows over them. The energy of motion contained in the wind is then converted into electricity as the spinning turbine blades turn a generator. To create enough electricity for a town or city, several wind turbine towers need to be placed together in groups or rows to create a "wind farm."

**Environmental Impacts**

**Land Resource Use**

Wind turbines generally require the use of land, although they may also be sited offshore. Land around wind turbines can be used for other purposes, such as the grazing of cattle or farming.

When wind turbines are removed from land, there are no solid wastes or fuel residues left behind. However, large wind farms pose aesthetic concerns and wind turbines that are improperly installed or landscaped may create soil erosion problems. Wind farms can also have noise impacts, depending on the number of wind turbines on the farm. New blade designs are being used to reduce the amount of noise. Bird and bat mortality has been an issue at some wind farms. Improvements to wind turbine technologies and turbine sitting have helped mitigate bird mortality. Research on impacts to bats is now underway.

**7. Nuclear Power Plants and the Environment**

Nuclear energy originates from the splitting of uranium atoms in a process called fission. Fission releases energy that can be used to make steam, which is used in a turbine to generate electricity. Uranium is a nonrenewable resource that cannot be replenished on a human time scale. Uranium is extracted from the earth through traditional mining techniques or chemical leaching. Once mined, the uranium ore is sent to a processing plant to be concentrated into enriched fuel (i.e., uranium oxide pellets). Enriched fuel is then transported to the nuclear power plant. In the plant's nuclear reactor, neutrons from uranium atoms collide with each other, releasing heat and neutrons in a chain reaction. This heat is used to generate steam, which powers a turbine to generate electricity. Nuclear power generates a number of radioactive by-products, including tritium, cesium, krypton, neptunium and forms of iodine. Nuclear waste has become an acute problem as it can remain active for thousands of years.

The incidences of Three Miles Island nuclear power plants accident in US (1979)[26],

[26] Available at < https://world-nuclear.org/information-library/safety-and-security/safety-of-plants/three-mile-island-accident.aspx#:~:text=In%201979%20at%20the%20 Mile,background%20 levels%20to%20 local%20 residents.>

Chernobyl accident in Soviet Union (1986)[27], Fukushima nuclear plant disaster in Japan (2011)[28] have posed a new threat to humanity and the environment.

**Environmental Impacts**

Nuclear Energy contributes to the environmental pollution in two ways:

1) nuclear explosion or use of nuclear ballistic missiles; and
2) use of and residue of nuclear power plants in storage, transportation and disposal of nuclear waste.

**Air Emissions**

Nuclear power plants do not emit carbon dioxide, sulfur dioxide, or nitrogen oxides as part of the power generation process. However, fossil fuel emissions are associated with the uranium mining and uranium enrichment process as well as the transport of the uranium fuel to and from the nuclear plant.

**Water Resource Use**

Nuclear power plants use large quantities of water for steam production and for cooling. Some nuclear power plants remove large quantities of water from a lake or river, which could affect fish and other aquatic life.

**Water Discharges**

Heavy metals and salts build up in the water used in all power plant systems, including nuclear ones. These water pollutants, as well as the higher temperature of the water discharged from the power plant, can negatively affect water quality and aquatic life. Nuclear power plants sometimes discharge small amounts of tritium and other radioactive elements as allowed by their individual wastewater permits.

Waste generated from uranium mining operations and rainwater runoff can contaminate groundwater and surface water resources with heavy metals and traces of radioactive uranium.

Every 18 to 24 months, nuclear power plants must shut down to remove and replace the

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[27] Available at <https://www.google.com/search?q=chernobyl+accident+in+russia&oq=Chernobyl+accident+in+Russia&aqs=chrome.0.0i512j0i22i30l3j0i390l4.1849j0j4&sourceid=chrome&ie=UTF-8>

[28] Available at < https://world-nuclear.org/information-library/safety-and-security/safety-of-plants/fukushima-daiichi-accident.aspx>

"spent" uranium fuel.2 This spent fuel has released most of its energy as a result of the fission process and has become radioactive waste.[29]

**Radioactive Waste Generation**

Enrichment of uranium ore into fuel and the operation of nuclear power plants generate wastes that contain low-levels of radioactivity. These wastes are shipped to a few specially designed and licensed disposal sites.

When a nuclear power plant is closed, some equipment and structural materials become radioactive wastes. This type of radioactive waste is currently being stored at the closed plants until an appropriate disposal site is opened.

Radioactive wastes are classified as low-level waste or high-level waste. The radioactivity of these wastes can range from a little higher than natural background levels, such as for uranium mill tailings, to the much higher radioactivity of used (spent) reactor fuel and parts of nuclear reactors. The radioactivity of nuclear waste decreases over time through a process called radioactive decay. The amount of time it takes for the radioactivity of radioactive material to decrease to half its original level is called the radioactive half-life. Radioactive waste with a short half-life is often stored temporarily before disposal to reduce potential radiation doses to workers who handle and transport the waste. This storage system also reduces the radiation levels at disposal sites.

By volume, most of the waste related to the nuclear power industry has a relatively low level of radioactivity. Uranium mill tailings contain the radioactive element radium, which decays to produce the radioactive gas radon. Most uranium mill tailings are placed near the processing facility, or *mill*, where they come from. Uranium mill tailings are covered with a sealing barrier of material such as clay to prevent radon from escaping into the atmosphere. The sealing barrier is covered by a layer of soil, rocks, or other materials to prevent erosion of the sealing barrier.

The other types of low-level radioactive waste are the tools, protective clothing, wiping cloths, and other disposable items that become contaminated with small amounts of radioactive dust or particles at nuclear fuel processing facilities and nuclear power plants.

[29] Available at https://www.nrc.gov/reading-rm/doc-collections/fact-sheets/radwaste.html (Last visited on December 29, 2021.)

These materials are subject to special regulations for their handling, storage, and disposal so they will not come in contact with the outside environment.

High-level radioactive waste consists of *irradiated*, or *spent*, nuclear reactor fuel (fuel that is no longer useful for producing electricity). The spent reactor fuel is in a solid form, consisting of small fuel pellets in long metal tubes called rods.

**Spent reactor fuel storage and reactor decommissioning**

Spent reactor fuel assemblies are highly radioactive and, initially, must be stored in specially designed pools of water. The water cools the fuel and acts as a radiation shield. Spent reactor fuel assemblies can also be stored in specially designed dry storage containers. An increasing number of reactor operators now store their older spent fuel in dry storage facilities using special outdoor concrete or steel containers with air cooling. The United States does not currently have a permanent disposal facility for high-level nuclear waste.

When a nuclear reactor stops operating, it must be decommissioned. Decommissioning involves safely removing from service the reactor and all equipment that has become radioactive and reducing radioactivity to a level that permits other uses of the property.[30]

**Cooling Water System**

Cooling systems are used to keep nuclear power plants from overheating. There are two main environmental problems associated with nuclear power plant cooling systems. First, the cooling system pulls water from an ocean or river source. Fish are inadvertently captured in the cooling system intake and killed. Second, after the water is used to cool the power plant, it is returned to the ocean or river. The water that is returned is approximately 25 degrees warmer than the water was originally. The warmer water kills some species of fish and plant life.

**Nuclear Energy and Indian Legal Regime**

India's first nuclear reactor was Apsara. It was also the first nuclear reactor in Asia. Nuclear power is the fifth largest source of electricity in India after thermal, hydroelectric, natural gas, and renewable sources of electricity. As of 2021, India has 23 operational nuclear reactors

[30] Available at < https://www.eia.gov/energyexplained/nuclear/nuclear-power-and-the-environment.php> (Last visited on December 29, 2021.)

with an installed capacity of about 6,780 MW which amounts to 2.2 percent of total production of electricity in India.

India passed the Atomic Energy Act in 1962 and Radiation Protection Rules of 2004 and has also passed the Civil Liability for Nuclear Damage Act in 2010 to deal with the gigantic problem. The Atomic Energy Act is "for the development, control and use of atomic energy for the welfare of people of India and for other peaceful purposes and for matters connected therewith.[31]" The Civil Liability for Nuclear Damage Act, 2010 has been passed to "provide for nuclear damage and prompt compensation to the victims of a nuclear incident through a no-fault liability regime channelizing liability to the operator, appointment of Claims Commissioner, establishment of Nuclear Damage Claims Commission and for the matters connected therewith or incidental thereto.[32]" Thus, the act is based on the theory of "absolute liability " or "no fault liability" as was pronounced by the Supreme Court in *M.C. Mehta v. Union of India*[33].

**G Sundaram v. Union of India[34] : A Historic Case Pertaining to Nuclear Energy.**

This case involved the subject matter in which India had entered into an agreement with erstwhile Russia in November 1988 and a supplementary agreement in June, 1998 establishing a nuclear power plant (NPP) at Kudankulam (Tamil Nadu). It was set up accordingly as it was in tune with the Indian national policy to use nuclear power for peaceful purposes. Various objections were made by individuals and institutions for setting up this plant on myriad grounds. The court declined to interfere in the establishment of the plant but culled out several significant points which were to be taken into consideration while establishing other nuclear reactors.

It was concluded by the Court that there are many such nuclear power projects operational in India working very successfully and efficiently, with no occurrence of mishap. A nuclear project cannot be stopped only on apprehension and conjectures.

[31] Available at <https://legislative.gov.in/sites/default/files/A1962-33.pdf>
[32] Available at <https://indiacode.nic.in/bitstream/123456789/2084/1/201038.pdf>
[33] (1987) 1 SCC 395

Accordingly, "economic scientific benefits" with "minor radiological detriments" have to be taken into consideration and larger public interest has to be protected along with small harm. It also held that nuclear power plants are being established not to negate the right to life but to protect the right to life guaranteed under Article 21 of the Constitution while conforming and achieving the purpose of the Atomic Energy Act.

The pronouncement has firmly settled the doctrine that public welfare and public interest is the supreme law of the land and a balance must be struck to achieve the goals of sustainable development and public safety.

**Conclusion**

True, life would be unintelligible without the energy industry, and no activity is without effects, and power plants are no exception. Environmental law has established itself as a "radical intruder" in the development process. Fossil energy dominance is preserved by a legislation designed for a time before renewables and climate change "equilibrium." Environmental law, when viewed critically and with a focus on more rapid renewable energy development, reinforces renewable energy's "cost barriers" by giving structural and specific deference to traditional resources, even as regulatory reform tightens controls on fossil-fuel electricity generation.

In India, the government has realized the deadly effects of coal based power plant which contributes more than 65 percent of India's energy sector and it has made bold commitments at international forums more recently at Conference of Parties, 2021 (COP26) by showing its commitment to achieve inter alia, net zero emissions by 2070,committed to increase non-fossil fuel energy capacity to 500 GW, meet 50 percent of its energy requirements from renewable energy, reduce carbon emissions by one billion tons, and bring down the economy's carbon intensity below 45 percent, all by 2030. It can also be gleaned from the above discussion the crucial role the Indian Supreme Court has played in the development of Indian environmental jurisprudence by reiterating the importance of sustainable development. There are enough laws and regulations which are in place to address the lacunas which pose a threat to the environment. With regard to the power plants, the compliance mechanism for setting up and running it is quite strong to ensure that no contravention is done to the statutory and regulatory provisions.

[34] (2013) 6 SCC 620.

The government is committed to increasing the usage of clean energy sources and is now working on a number of large-scale sustainable power projects as well as extensively promoting green energy. Furthermore, renewable energy has the potential to provide a large number of jobs at all levels, particularly in rural areas. The Ministry of New and Renewable Energy (MNRE) has set a lofty goal of building 227 GW of renewable energy capacity by 2022, with around 114 GW planned for solar, 67 GW for wind, and the rest for hydro and bio, among other things. In the next four years, India's renewable energy sector is predicted to receive $80 billion in investment. By 2023, India will have around 5,000 compressed biogas plants.

By 2040, it is predicted that renewable energy would generate roughly 49% of total electricity, thanks to the use of more effective batteries to store electricity, which will reduce the cost of solar energy by 66 percent compared to today's cost.

The Indian government plans to create a "green city" in each state that is powered by renewable energy. Solar rooftop systems on all of the city's houses, solar parks on the outskirts, waste to energy facilities, and electric mobility-enabled public transportation systems will all be used to mainstream environmentally friendly power in the 'green city.'

With that being said, the future prospects as regards the power sector in India looks very bright. Especially its strong commitment towards relying on renewable energy which is more environment friendly. It only remains to be seen how steadfast we will act as a nation to achieve the ambitious goals while fulfilling our constitutional and global obligations.

# HOW ESSENTIAL IS THE ESSENTIAL RELIGIOUS PRACTICE TEST?

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## Introduction

The Indian Constitution contains a positive concept of secularism, in that it does not erect a wall between the state and religion, but rather allows for state action if the situation warrants it. The 42nd Amendment of 1976 made it more explicit by adding the word 'secular' to the Preamble, despite the fact that the vision of secularism- 'Sarva dharma sambhava' or equal treatment and respect for all religions - has always existed in India. After the 42nd Constitutional Amendment inserted 'secular' into the preamble, the judiciary was tasked with interpreting the term in light of India's diverse culture.

Elucidating the secular nature of the Indian Constitution, the Supreme Court stated in St. Xavier's College v. the State of Gujarat[1] that there is no mysticism in the secular character of the state. Atheists, agnostics, and religious adherents are all treated in the same way by secularism; the ideology is neither pro nor anti-god. It separates God from the affairs of the state and guarantees that individuals will not be treated differently due to their religious beliefs. In fact, in *SR Bommai* v. *Union of India*[2] The Supreme Court declared secularism to be a basic feature of the Indian Constitution.

As previously said, Indian secularism attempts to keep a positive relationship with religion without favouring any one religion. Since the state cannot keep religion distinct from social life, there is a need to bridge the gap between religious intervention and secularism. The Essential Religious Practices test, which was designed to distinguish between practices that were essentially religious and those that were not, has been extensively discussed in recent landmark decisions, such as the Karnataka Hijab Case[3], and the Sabrimala Temple Case[4], and

[1] 1974 AIR 1389
[2] AIR 1994 SC 1918
[3] WP NO. 2347/2022
[4] *India Young Lawyers Association* v. *State of Kerala* 2018 SCC SC 1690

the Triple Talaq Case[5]. The evolution of the essential religious practice test raises the question of whether calling a practice non-essential is a case of judicial overreach.

**Meaning of Secularism**

Secularism as such is not limited to an individual. It is evident in their outer behaviour, but his attitude toward other religious communities will dictate his behaviour towards others. It is something that may affect social harmony. It is plausible that non-secular beliefs would lead to the development of apathy in society; for this reason, the proactive role that the state plays becomes all the more vital in matters of secularism. To that end, the state must take a constructive role; secularism is not just about state neutrality in religious matters, but also about mutual respect and tolerance across religious communities. The state must foster a culture of religious tolerance within the country and design a mechanism to promote a secular way of living.

In *Aruna Roy* v. *Union of India*[6] The Supreme Court of India stated that the essence of secularism is the absence of religious discrimination by the state. It can be practised by adopting a completely neutral stance towards faiths; on the basis of such mutual understanding and respect for each other's religious faith, mutual mistrust and intolerance can be gradually eradicated.

**Constitutional Provision on freedom of Religion**

Articles 25-28 of the Constitution provide the right to religious freedom. The Constitution does not define the term 'religion'. Religion is a matter of individual faith and belief. As such, it has no effect on societal peace and harmony; rather, it is a matter personal to an individual. Simply put, the state must ensure that every citizen in society has an equal guarantee of religious freedom.

Since the focus of this paper is on religious practice and religion, it is crucial to comprehend the Constitutional provisions pertaining to religion, namely Articles 25 and 26, as well as the courts' interpretations of these provisions. It would be appropriate to state the Articles for discussion at the outset.

[5] AIR 2017 9 SCC 1 (SC)
[6] AIR 1995 SC 293

*"25. Freedom of conscience and free profession, practice and propagation of religion*[7]

1. *Subject to public order, morality and health and the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion*
2. *Nothing in this article shall affect the operation of any existing law or prevent the State from making any law*
   a) *regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;*
   b) *providing for social welfare and reform or throwing open Hindu religious institutions of a public character to all classes and sections of Hindus*

*Explanation I: The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.*
*Explanation II: In sub-clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly."*

*"26. Freedom to manage religious affairs Subject to public order, morality and health, every religious denomination or any section thereof shall have the right*[8]

a) *to establish and maintain institutions for religious and charitable purposes;*
b) *to manage its affairs in matters of religion;*
c) *to own and acquire movable and immovable property; and*
d) *to administer such property by law"*

The freedom of conscience and the right to freely profess, practise, and promote religion are rights that are guaranteed to all individuals by Article 25(1) of the Indian Constitution, not just Indian citizens. This right, however, is subject to public order, health and morality, and other provisions of Part III of the Indian Constitution.

Freedom of Conscience pertains to an individual's right to have beliefs and doctrines concerning subjects he deems favourable to his spiritual well-being[9]. An individual is free to

[7] The Constitution of India, art. 25
[8] The Constitution of India, art. 26
[9] *Ratilal Panachand Gandhi* v. *State of Bombay*, AIR 1954 SC 388

adhere to the religious tenets of any community or sect. Not only does he have the freedom to hold such religious beliefs, but he also has the right to express his sentiments through overt behaviours sanctioned by his religion.

To 'profess' a religion means to freely and openly declare one's beliefs and beliefs.

To 'propagate' means to disseminate and publicise for the edification of others his religious beliefs. It means the right to express one's beliefs to another person; nevertheless, this right does not grant a person the right to convert another person to one's faith.

In a similar vein, Article 26 guarantees every religious denomination the right to administer its religious affairs as well as the right to establish and maintain institutions. In the Shirur mutt case[10], the Supreme Court defined denomination as a set of individuals grouped together under the same name: a religious sect or body with a shared faith and organisation that is marked by a distinct name.

Articles 25 and 26 provide protection not only to matters of religious beliefs, but also for activities performed in lieu of religion, and thus include a guarantee for rituals and observances, ceremonies, and modes of worship that are an intrinsic component of religion.

What constitutes an essential part of religion or religious practice must be determined by courts in relation to a doctrine of a certain religion and incorporated as an integral part of the religion.[11]

**The doctrine of Essential religious practice**

The doctrine stipulates that protection for religious freedoms under Articles 25-28 shall be accorded to practices that are fundamentally religious or intrinsic to the religion, whilst the state may control all other secular activities. Since the Supreme Court ruled that a number of religious practices are not fundamental to their respective faiths, a number of religious practices have been deemed non-essential. In India, the essential religious functions test was originally established in *Commissioner of Hindu Religious Endowments* v. *Shri Lakshmindra Thirtha Swamiyar* of Shirur Mutt[12] (popularly known as The Shirur Matt case). The court expanded the protection of Articles 25 and 26 beyond mere doctrinal belief to embrace the practices and rituals that its adherents followed.

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[10] *Commr., Hindu Religious Endowments, Madras* v. *L.T Swamiar*, 1954 SCR 1005
[11] *ibid*
[12] *ibid*

In *Ratilal Panachand* v. the *State of Bombay*[13]Justice Mukherjee reaffirmed the Supreme Court's position in the Shirur Mutt case, stating that religious denominations had complete autonomy to determine which religious practises were essential to them and that no outside authority had the authority to declare a practice to be non-essential.

In the 1950s, the essential practice theory underwent a radical development as a result of two court decisions. In *Venkataramana Devaru* v. *the State of Mysore*[14], the Supreme Court determined the validity of the Madras Temple Entry Authorization Act 1947, which sought to reform the practice of religious exclusion of Harijans from a temple founded by the Gowda Saraswat Brahmins. The competing claims were, on the one hand, the Brahmin's right to manage their religious affairs under Article 26(b), and on the other hand, the constitutional obligation of the state to throw open Hindu temples to all classes and sections of Hindu under Article 25(2). The court found Article 25(2)(b) and Article 26 in conflict and to overcome this, it applied the rule of harmonious construction and pronounced that Article 26(b) was subject to 25(2) (b), given the broader scope of the latter. In order to advance the State's effort to reform religion, the Supreme Court compromised the religious autonomy inherent in Shirur Mutt through this interpretation.

In *Hanif Qureshi* v. *the State of Bihar*[15] The court ruled that the slaughter of cows was not an essential Islamic practice and so dismissed the claims of the petitioner. The secular or religious nature of the practice was no longer a significant question.

This minor shift in usage profoundly changed the essential practises test, giving the Court the authority to determine what religious practises could and could not be followed based on the Court's view of the practice's essentiality to the religion in question.

In *Saifuddin Saheb* v. *the State of Bombay*[16], the Supreme Court invalidated a law prohibiting religious ex-communications. Justice Das Gupta, delivering the majority opinion, observed that the courts must determine as to what constitutes an essential part of a religion or religious practices based on the doctrine of a particular religion. In his concurring decision, Justice Ayyangar ruled that Article 25(1) safeguarded the fundamental and integral practises of the religion, which was not subject to the law promoting social welfare under Article 25(2)(b).

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[13] AIR 1953 Bom 242
[14] 1958 SCR 895
[15] AIR 1958 SC 731
[16] AIR 1962 SC 853

The Supreme Court's analysis of religious practices was predicated on determining what constituted an essential part of religion.

In *Durgah Committee, Ajmer And Another* v. *Syed Hussain Ali And Others*[17]Justice Gajendragadkar significantly expanded the role of the judiciary in the interpretation of religion by stating, 'for the practices in question to be treated as part of religion, they must be regarded by the religion in question as its essential and integral part'. The Supreme Court then proceeded to differentiate between religious and superstitious practices, stating that practises, though religious, may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself, implying that, in addition to determining which practises qualified as religion, it was also taking on the role of rifting superstition from real religion.

This audacious claim of the Court's active role in reforming religion revealed a major shift in the Court's attitude to matters pertaining to religion.

The right to religious freedom is exclusively limited to religious matters. Despite being related to religion, secular activities are not protected from state intervention. Nevertheless, it has always been difficult to determine if a particular activity is secular since, in certain circumstances, the core religious action is closely intertwined with the secular activity.

There are few other cases in which the judiciary has used essential religious function as a tool to bring about social justice.

In the case *Seshammal* v. *the State of Tamil Nadu*[18]The Supreme Court ruled that the hereditary principle of temple priests was invalid, stating that the archakas and priests are temple servants and that their appointment, remuneration, and benefits fall within the scope of secular activities susceptible to state interference.

Nonetheless, the applicability of the essential religious practice test has also been subject to considerable criticism.

In *Acharya Jagdishwaranand Avadhuta* v. *Commissioner of Police*[19] and *Commissioner of Police* v. *Acharya Jagdishwaranand Avadhuta*[20], the courts determined, after examining

[17] (1962) 1 SCR 383
[18] AIR 1972 SC 1586
[19] (1983) 4 SCC 522
[20] (2004) 12 SCC 770

several religious texts and religious practises of the Amanda Margis, that the tandava dance was not one of their essential religious practices, thereby narrowing the definition of Essential Religious practices. In this case, it was stated unequivocally that the criterion for determining whether a practice is vital to a religion is to establish if the nature of the religion would alter without that practice. If removing that part would result in a fundamental change in the character of that religion or its beliefs, then that part might be considered essential.

In the Sabarimala case[21], it was recently decided that it cannot be said that the exclusion of women of any age group is an essential practice of the Hindu religion; rather, it is an essential part of the Hindu religion to allow women to enter a temple as devotees and followers of the Hindu religion and offer their prayers to the deity. It is improbable that allowing women into the temple would fundamentally alter the character of the Hindu religion. Thus, the exclusionary practices, which has the backing of subordinate legislation in the form of Rule 3(b) of the 1965 Rules enacted pursuant to the 1965 Act, is neither an essential nor an integral part of the Hindu religion, without which the Hindu religion, of which Lord Ayyappa's devotees are a part, cannot survive. The word 'morality' in Article 25(1) cannot be limited to the meaning of morality as perceived by an individual, a section, or a religious sect. When a violation of a fundamental right occurs, the phrase morality refers to constitutional morality.

In her dissenting opinion, Justice Indu Malhotra said that it is up to the religious community, not the court, to determine what constitutes an essential religious practice. It is not up to the courts to judge which of these religious activities should be abolished unless they are destructive, repressive, or a social evil, such as Sati.

In the Hijab ban case[22]The Karnataka government issued an order prohibiting students from wearing the hijab at state-funded institutions. This Order was challenged in the Karnataka High Court, which banned the wearing of all religious symbols, including hijabs and saffron shawls in educational institutes. The petitioner argued that the ban on hijab infringed their right guaranteed under Article 25. By citing Islamic scriptures, it was asserted that wearing a hijab is an essential practice of their religion which cannot be restricted by the government.

According to the Court, the hijab is a cultural practice that arose as a form of protection for women. Even if it were to acknowledge that wearing the hijab is an Essential Religious Practice, the practice would only be protected under the Constitution if it did not conflict with

[21] *Supra* note 5 at 2
[22] *Supra* note 4 at 2

constitutional values such as equality and dignity. In this circumstance, however, the practice of wearing the hijab does not transgress this line.

**Conclusion**

It is pertinent to note that the courts have come a long way since the Shirur mutt case, in which adherents of the faith were given absolute autonomy to determine what is essential for them, to now determine what religious practices are essential by evolving the doctrine of essential religious practices. The evolution of the Essential religious practice test represents an interventionist approach as the test has made it easier for courts to characterise practice as not essentially religious, as opposed to arguing that it affects public order, health, or morality. On conducting a thorough analysis of the interpretation of the essential religious practice test, it is possible to conclude that the judiciary has been prejudiced in determining what constitutes an essential religious practice or a secular activity, and that the judiciary uses judicial transgression to restrict religious freedom. This has effectively obliterated the meaning of the word "freely," and this doctrine gives rise to an unstable system in which judges have unfettered discretion to decide each invocation of Article 25 on its own merits, based on the petitioner's religion. Justice Indu Malhotra stated correctly in the Sabarimala case[23] that judicial review of religious practice should not be done since the court cannot impose its morality or rationale on the form of worship of a deity. This would deny the freedom to practise religion in accordance with one's faith and beliefs. It would equate to courts attempting to rationalise religion, faith, and beliefs that are outside their purview.

In addition, the judiciary must not overlook that the Constitution provides for a broad division of powers and therefore must not infringe on the domain of others, should a doctrine permit the courts to do so. In so doing, the judiciary resorts to a transgression by acting as the sole arbiter of whether or not a particular act is basically religious in nature.

# ADOPTION LAWS IN INDIA: AN OVERVIEW

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## Introduction

### Adoption Laws in the Past

While adoption is thought to be as old as human existence, it was performed in many ancient communities, with the most commonly cited example being Moses' adoption by Emperor Octavian Augustus, adoption played a significant role in many Eurasian societies' customary laws,[1] the motivations or rather the cause for the introduction of adoption laws have changed over the centuries.Today, the fundamental purpose of adoption is to provide a second shot at life and a better future for children who have been abandoned by their parents, as well as to fulfill the desire of adults who wish to care for a kid. [2] This is opposed to the practices of societies in the past that resorted to adoption as a means of continuing the family lineage[3], reestablishing political ties and assuring long-term care for adoptive parents. [4]

Adoption, according to literary and legal sources, dates back nearly four millennia. The Code of Hammurabi from ancient Babylonia, which dates back to roughly the eighth century B.C. and has several characteristics that are still in use today, is one of the earliest legal books that addressed subject matter pertaining to adoption[5] by virtue of modern adoption laws such as the establishment of adoption as a legal contract that could be executed only with the consent of the birth parents. Although multiple laws today revoke the rights of the birth parents once the adoption deed had been executed, this was not the case with the code. However, there were some stark differences such as the provisions that the code contained that severely punished the adopted persons if they attempted to return to their birth families. If his parents failed to teach him a trade or if he was not properly reared, the adoption deed could be

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[1] Goody , Jack."*Adoption in a Cross-Cultural Perspective*." vol. 11, Comparative Studies in Society and History, no. pp. 55 , (1969),
[2] B. Tizard , *Adoption: A second chance*. Vol 8 , Psychological Medicine 725–725 (pp. 251.) (1978).
[3] J. Duncan M. Derrett. *"Private International Law. Adoption."* vol. 20, The Modern Law Review, (1957).
[4] Leo A. Huard, *The Law of Adoption: Ancient and Modern*, Vol 9, Vanderbilt Law Review, pp.743 (1956).
[5] Cole, E. S., Donley, K.S." *History, values, and placement policy issues in adoption*", Oxford University Press (p.p273–294), (1990).

dissolved by a court at the adopted person's request. Furthermore, unlike modern adoption rules, only male children were allowed to be adopted. There were other exemplars of adoption laws in ancient Greece, Rome, and France, such as the Laws of Solon (6th century B.C. ), the Law Code of Gortyn (5th century B.C. ), the Institutes of Gaius (about 161 A.D.), and the Napoleonic Code.

## The Introduction of Modern Adoption Laws

The first examples of current adoption legislation are from the second half of the nineteenth century. Adoption began to be marketed as a means of promoting the best interests of children, not just as a legal mechanism, but also as a means of promoting societal pro-activeness in promoting the welfare of children, as a result of the new ideology of societal pro-activeness in promoting the welfare of children.[6] The Massachusetts Adoption of Children Act, 1851, is widely acknowledged as the first contemporary statute on child adoption. The birth parents' written consent was required, as was a joint application for adoption by the husband and wife, as well as the child's complete separation from its original family. [7] This was due to the fact that the link developed between the parties, particularly the adoptive parents and adopted children, was seen to be similar to natural filiation. The Judge was given the authority to decide if the prospective adoptive parents had sufficient finances and ability to raise the kid in order to provide the child with suitable nurture and education, which was a very progressive feature of the Act. A number of countries began implementing their own versions of Adoption statutes between the second half of the nineteenth century and the first few years of the twentieth century.

## The British Adoption Laws

England began to acknowledge the importance of adoption in 1926, when it passed its first modern adoption legislation, the Adoption of Children Act, 1926, which applied to all of England and Wales. There were three key reasons why the Act was passed at that time period. The first was that after WWI, there was a significant increase in organized adoption and adoption societies. The second factor was the rising pressure from adoption societies,

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[6] Sokoloff, Burton Z. "*Antecedents of American Adoption*." vol.3, The Future of Children, (pp17-25), 1993.
[7] Bradshaw, Jonathan "*The well-being of children in the UK*", 4th edt. Policy Press, 2016.

adoptive parents, and children's charities to pass adoption legislation. The third reason was that the 1920s were considered as a period of domestic reform in the United Kingdom, with several progressive laws being implemented during this time period, including the adoption legislation.

The Act, on the other hand, was not as comprehensive as contemporary adoption legislation. It was essentially enabling legislation, giving all adoptive parents the legal right to go to a court of law to gain a legal entitlement allowing them to keep their adopted kid for the first time. It established age requirements for potential adopters and included a condition that only married couples might submit a joint application, but that in all other cases, the adoption would be done under one name. Only in special circumstances,' as established by the Court, might single men adopt female children. Adopted children would not be entitled to receive from their adoptive parents' estate if they died intestate. However, the legislation did not make it mandatory for adopters to formally adopt a child, and as a result, the informal adoption practices remained. Despite the failures, the Act was well-received, and by the mid-1930s, more than 5000 children had been officially adopted per year. However, there was considerable criticism about how adoptions were handled, such as the casual and haphazard manner in which even the most renowned adoption organizations handled the procedure. As a result, in 1939, the Adoption of Children (Regulation) Act was passed, which established regulatory measures for the adoption process by involving local authorities.

Following the findings of the Curtis Committee after WWII, the Children Act of 1948 was enacted, transferring responsibility for children's services, including adoption, to local governments. In 1954, the Hurst Committee advised that municipal governments be more involved, and annual adoption numbers averaged approximately 13000. The 1960s had the highest rate of adoption in history, with an average of 14,800 every year. The Houghton Committee on Adoption issued a report in 1972, and its recommendations were included into the Children Act of 1975 and the Adoption Act of 1976. Through a system of well-integrated and professional child care services, it aspired to professionalize and further control the adoption process. Currently in the United Kingdom, The Adoption and Children Act of 2002 governs over the adoption of children and also has provisions by virtue of which same-sex couples can adopt children. It was in fact one of the most radical overhauls of an adoption

legislation within the past three decades. It introduced the concept of special guardianship[8] which is essentially a legal status that allows a kid to be cared for by someone with powers comparable to those of a regular legal guardian, but without the need for the child's birth parents to be legally separated. [9] This, in turn, connects up with the Hindu law of adoption in its core concept, as both stipulate that an adopted child is treated the same as a biological child for all intents and purposes.

**Adoption in India**

Adoption has been common in India for a long time, just as it has been in other prehistoric communities. However, because of the diversity of cultures and practices found in the country's many societies, adoption is largely managed and regulated by personal laws. The Hindu Adoption and Maintenance Act of 1956 and the Guardians and Wards Act of 1890 are the two main pieces of legislation that govern adoption in India. Because the Muslim, Christian, Parsi, and Jewish communities' personal laws do not allow for adoption, they rely on the Guardians and Wards Act.

**The Hindu Law on Adoption**

The Hindu Law is the only law in India that treats adopted children the same as biological children. The fundamental reason for this is because under Hindu Law, a son was vitally significant to a Hindu family's spiritual and material well-being. The old Hindu rule only allowed for the adoption of a male kid, and it did not allow for the adoption of orphans. Adoption of male children was further restricted based on caste, and only the male parent had the authority to adopt, with the female's approval or disapproval having no bearing on the adoption procedure. Gender prejudices have been lessened to some extent under modern Hindu law, while they have not been totally removed. The ability to adopt a child is available to both male and female members of society.

Following independence in 1956, the Hindu Adoption and Maintenance Act was created to update, revise, and codify the pre-existing Hindu Laws. The Act begins by defining who is eligible to adopt under its provisions. The Act allows any Hindu male or female who is of

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[8] *Ibid*

[9] Katestanley, paula davies, family law, Macmillan International Higher Education, 2013.

sound mind and is not a minor to adopt a kid. A male, however, who is married at the time of potential adoption, must have his wife's consent, and any female who is single, married but whose husband is deceased, whose marriage has been dissolved, or whose husband is incompetent as judged by a Court of Law, has the power to adopt.[10] [11] There are a few prerequisites that the adoptive parents must meet according to Hindu Law. The first is that no surviving sons in the adoptive family's subsequent three generations, whether biological or adoptive, should exist at the time of adoption. The second stipulation is that no daughter or daughter's daughter shall be present at the time of adoption. If an adoptive father wants to adopt a female child and an adoptive mother wants to adopt a boy, the father or mother must be at least 21 years older than the child. All links that the child had with his original family will be dissolved after adoption, and he will inherit all of his adopted family's rights and obligations as if he were a biological child. If a family has numerous wives, the oldest will be the adoptive mother, while the others will be stepmothers. [12] A landmark case with regard to adoptive parents was *Sawan Ram v Kalavati* [13] where the issue in question was whether in case a widow adopts a child, is the adopted child also considered to be the late husband's child and so his heir? The Court ruled that the adoption would cover her deceased husband in the same way that a conventional adoption would. Only the father, mother, or guardian of a Hindu kid who is to be adopted can make the decision. In addition, unless the mother has ceased to be a Hindu, has abandoned the world, or is of unsound mind, the father requires the mother's agreement. The mother may however only give up the child for adoption if the father has passed away or has renounced the world or has ceased to be a Hindu or is of unsound mind. [14]

Despite the modernizing of Hindu Laws, there is still a widespread feeling of gender discrimination. A married woman cannot adopt a kid without the approval of her husband unless he dies, suffers a disability, or renounces the world, however a husband can adopt a child without the consent of his wife. In addition, despite her husband's agreement, a Hindu wife cannot give up a child for adoption, as mentioned in the preceding paragraphs. In the case of *Malti Roy Choudhury v Sudhindranath Majumdar*, [15] Malti had been adopted by her

[10] Hindu Adoption and Maintenance Act, Sec 7, Act No.78 OF 1956, 1956(India)
[11] Hindu Adoption and Maintenance Act, Sec 8, Act No.78 OF 1956, 1956.(India)
[12] Hindu Adoption and Maintenance Act, Sect 12, 13,14, Act No.78 OF 1956, 1956(India)
[13] Sawan Ram v Kalavati , AIR 1967 SC 1761.
[14] Hindu Adoption and Maintenance Act, Sec 9, Act No.78 OF 1956, 1956(India) 1956.
[15] Malti Roy Choudhury v Sudhindranath Majumdar, AIR 2007 Cal 4.

mother, who had passed away. Following her mother's death, she became the sole heir and applied for all of her mother's estates and possessions. All documentation was provided, including proof of the adoption ceremony in the presence of the husband and the priest, school records, and so on, but the court refused to recognise the adoption as legal since Malti was adopted by her mother rather than her father, thus dismissing her appeal.

**Adoption under the Guardians and Wards Act**

For Muslims, Christians, Jews, and Parsis in India, adoption is regulated under the Guardians and Wards Act, 1890. It is the only non-religious universal law that supersedes all other related statutes and applies to the entire Union of India, with the exception of the state of Jammu and Kashmir. This was mainly so as the personal laws of the aforesaid communities do not provide for adoption but only guardianship. Any minor has the capacity to be adopted under the Act and the child will be appointed guardians by a Court of Law or any other competent authority. A Guardian as per the Act is a person who has the responsibility to care for the minor or his property or of both the minor and his property.[16] An application has to be made to the person or organization who is giving up his or her child for adoption post which the court reviews the same and decides based on the facts and evidence presented at a hearing as to whether the adoption can proceed or not.

There are slight differences for adoption of Muslim children due to certain traditional practices as prescribed under their personal laws. Adoption under Muslim tradition is termed as 'kafala' and is highly regulated. There is more of a sense of guardianship prevalent as opposed to parenthood. The cause behind the high amount of regulation is to preserve the family lineage. Adopted children keep their biological family names and inherit only from their biological parents, not from their adoptive parents. If the adoptive parents give the adopted child any wealth or property from the biological family, the adoptive parents cannot use that property as their own and must instead act as trustees for it.

The Personal laws of Christians and Parsis also do not contain specific adoption laws. Christians can only adopt a child under foster care and once the child reaches majority, he or she is free to break all connections with the foster parents. Such children do not possess a

[16] Guardians and Wards Act, Sect 4, Act No. 08 , 1890 (India)

legal right of inheritance. When the foster parents pass away, their inheritance is divided only among the legitimate heirs of the intestate. Christians in India can adopt children under section 41 of the Juvenile Justice (Care and Protection of Children) Act 2015, as well as different state government guidelines and rules. Section 37 read along with regulation 6 and 7 of the Annual Report of the Child Welfare Committee 2017 has the power to legally declare an orphaned, abandoned or surrendered child free from adoption and also allows children up to the age of 18 up for adoption. The Act lays down conditions for the capacity of prospective adoptive parents to adopt children. This includes that they must be mentally sound, physically fit and should be fully prepared to adopt the child with sufficient means to provide for the child's growth and development. Consent of both parents is required in cases of married couples and such couples require two years of a stable marital relationship to be eligible to adopt a child under the Act. A single male is not eligible to adopt under this Act and the minimum age difference between the prospective adoptive parents and the child should not be less than 25 years.[17]

**The role of CARA (Central Adoption Resource Authority) in India**

The Central Adoption Resource Authority is a body headed by the Ministry of Women and Child Development and functions, which was set up in India in 1990 [18] as the central adoption authority in India and regulates and monitors both domestic and inter-country adoption. It functions in accordance with the Hague Convention on Intercountry Adoption that was ratified by India in 2003. Any single woman, married couple, NRI or a foreign citizen can adopt a child through the CARA. In terms of giving up a child for adoption, both the parents and a guardian are eligible for the same. In cases where one of the parents has renounced the world or is mentally unsound, the other parent can give up the child for adoption by himself or herself and in cases where both parents are dead or are not competent in law, and then the guardian can undertake the same. Furthermore, as of 2018, CARA has made it possible for individuals in a live-in relationship to adopt children from India.

The first step to adopt a child in India is to register for the same with an authorized adoption agency where an authorized social representative will guide the parents through the proper

[17] Juvenile Justice (Care and Protection of Children) Act, Sec 57, Act 2 of 2015, 2015 (India)

[18] Central Adoption Resource Authority ministry of women & child development government of India, CARA http://cara.nic.in/, last visited 5th June 2022

requirements and procedure for the adoption. Post this, authorized members of the agency will conduct a field visit to the house of the prospective adoptive parents to conduct a home study and the agency in certain cases may request the parents to attend counseling sessions. The home study will have to be conducted within 3 months from the date of registration. Once the agency is satisfied, it shall inform the parents when the child is ready for adoption and it will provide the parents with all the necessary details about the child such as medical reports and other documents and also allow them to spend time with the child. Post documentation, a petition is filed through a lawyer which is to be presented in court. The court hearing takes place between the judge and the parents post which the judge approves or denies the adoption based on the facts and circumstances of the case and post the receipt of investment in the child has been furnished to him or her.

**Adoption between countries**

Inter-country adoption is a legal process that allows a person to adopt a kid from another nation and bring the child to live with him or her permanently. [19] One of the most prominent precedents in this regard is *Lakshmi Kant Pandey v Union of India.* [20] In this case, the petitioner, an attorney, filed public interest litigation to the Supreme Court of India alleging neglect and malpractice that was prevalent in the social organizations and private adoption agencies with regard to inter-country adoptions. The Court vide its judgment, pointed out the absence of legal regulation which proved to be detrimental to the children who were a part of the process of inter-country adoption and were more likely to be subject to abuse by profiteering or trafficking. As a result, in consultation with multiple social institutions focused on child welfare and safety, the Court established a framework of normative and procedural safeguards to regulate inter-country adoption as protection against abuse, maltreatment, or exploitation of children and to ensure them a healthy, decent family life. The Court looked to many applicable laws and policies in creating standards and processes, including Articles 15(3), 24, and 39 of the Indian Constitution, which deal with child welfare, as well as the values enshrined in the United Nations Declaration on the Rights of the Child (1959).

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[19] ADOPTION PROCESS - UNITED STATES DEPARTMENT OF STATE ,https://travel.state.gov/content/travel/en/Intercountry-Adoption/Adoption-Process.html . last visited 05th June 2022

[20] Lakshmi Kant Pandey v Union of India, 1984 AIR 469.

The Supreme Court of India also ruled that any application from a foreigner or non-resident Indian seeking to adopt a child must be sponsored by a social or child welfare agency recognised or licenced by the government, or a foreign government department authorized to sponsor such cases in the country where the foreigner resides. The foreign agency should also be one that has been 'approved' by CARA, the Government of India's Ministry of Social Justice and Empowerment. Any social or child welfare agency in India should not directly evaluate an application for adoption from a foreigner or a non-resident Indian. [21]

**The Need for a Uniform Civil Code for Adoption**

In a country such as India with a vast population with a very diverse set of cultures which although embodies secularism, poses its own set of problems in the legal scenario. Multiple Personal laws of various religions in India in terms of applicability in the 21st century seem redundant, patriarchal, biased and are in conflict with the right to equality and other constitutional provisions. In the case of adoption, the starkly different law for Hindus and Non Hindus creates an emotional conundrum. Non-Hindu parents who wish to adopt a child and raise him or her as their own are not legally permitted to use the term "parents" or claim the child as their own. This makes adoption in its literal sense, a salient feature of Hinduism in India which then proves to be hypocritical to the 'secular' nature and state of being of India as a country. A Uniform Civil Code with respect to adoption laws will not violate the fundamental right to religion as it doesn't prevent the practice of religion but simply regulates a process which in reality requires minimum to no involvement of religion and must be preceded by basic human rights and gender equality. It is simply absurd that Muslim and Christian Indians are unable to legally adopt a child due to a lack of a uniform adoption code. The introduction of a Uniform Civil Code will undoubtedly improve not only the status of Indian women but also the Indian society in all aspects of social life. Giving people the option to opt out of religious classification is one way to avoid conflict. It should not be mandatory to have a set of religious personal laws that govern a person's life; rather, there is a necessity to have more laws to ensure basic human rights.

[21] Adoption Procedure for Intercountry Relative Adoption, http://cara.nic.in/parents/Eg_intercountry_relative_adoption.html, last visited 12th August 2022

## Conclusion

By virtue of this analysis, it can be seen that though the adoption laws in India have vastly progressed from what was followed earlier, there is still a major revamp necessary in the overall application of these laws to the 21st century. Considering the more progressive nature of the current society with regard to matters such as religion, societal implications and gender equality, it is only right that these changes apply in a positive manner to not just adoption laws but also all the legal statutes that govern the country. The exclusion of religion, caste, gender or any other similar factor from the formation and execution of legislations and equal applicability of the said legislations to all is of prime importance and this can be achieved only through the introduction of a Uniform Civil Code. With that being said, adoption is a noble cause that brings joy to children who have been abandoned or orphaned and allows the humane side of civilization to shine through thereby not only making India but the world a better place for us and our future generations.

# DEVELOPMENT OF LEGAL EDUCATION IN INDIA AND THE ROLE OF THE BAR COUNCIL OF INDIA AND UNIVERSITIES TO FURTHER IT

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## Introduction

There are several objectives of legal education.[1] One such objective of legal education in India would be related to the use of education to develop perceptions and understanding of the environment, local and global; to understand the problems of one's society; to influence values and attitudes.

Legal education should help in developing the academia and research of its own nation. The Indian legal education system also should have the objective to generate the kinds of skills and knowledge needed for tasks in society. The use of legal education should be used to broaden opportunity and mobility in society, and also be used to meet administrative objectives including the governance of institutions, managing and evaluating programs, etc.

There has been a transformation of legal education in India. Some significant factors for the following involve the changing demands of the legal markets, the partnership between the bar, bench and academia in the management of legal education in the National Law Universities, an increase in the demand for legal studies, the willingness of the government to finance law schools and improve the faculty to some extent, collaborations with foreign law schools and firms, etc. However, the quality and standard of legal education has not been satisfactory till now. Several attempts have been made by the Bar Council of India to reform the system; however, the results have not been up to the mark.

[1] International Legal Centre, New York, Legal Education in a Changing World: Report of the committee on Legal Education in Developing countries, Available at http://nai.diva-portal.org/smash/get/diva2:275991/FULLTEXT01.pdf%3E.

In the case of *State of Maharashtra v. Mahubhai Pragmatic Vashi*,[2] the Supreme Court of India noted that there is a need for a well-organized and convincing legal education to meet the ever-growing challenges and the new trends in the world order. The vision envisaged by the Constitution of India as well as the various legal provisions in the Indian laws is to provide justice-oriented education essential to the realization of the various rights enshrined in the Constitution of India. It also envisages to prepare such law students and legal professionals to be equipped with the tools to be able to adapt to the ever-growing challenges and the new trends.

**The Functioning of The Legal Education System In India**

The Constitutional Provision

Education has been put under List III of the Seventh Schedule of the Constitution of India thus putting the duty of imparting education on the Union as well as the States. Legal Profession as well as other professions also fall under List III of the Seventh Schedule. While there is no specific entry for legal education under the Schedule, it will be dealt with as under the Entry pertaining to higher education and entitlement to practice before courts.

Entry 66 of List I deals with the coordination and determination of standards in institutions for higher education. It is as follow:

> *66. Coordination and determination of standards in institutions for higher education or research and scientific and technical institutions.*

Entry 25 of List III also deals with education. It states that 25. *Education, including technical education, medical education and universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I; vocational and technical training of labor.*

The University Grants Commission is the umbrella organization for all institutions of higher education.

Entries 77 and 78 of List I also deal with the entitlement of persons to practice before the Supreme Court and the High Courts. The Entries read as follows:

> 77. *Constitution, organization, jurisdiction and powers of the Supreme Court (including the contempt of such court) and the fees taken therein; persons entitled to practice before the Supreme Court.*

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[2] 1 1995 SCC (5) 730.

78. *Constitution, organization (including vacations) of the High Courts except provisions as to officers and servants of High Courts; persons entitled to practice before the High Courts.*

The Bar Council of India

The Bar Council of India acts as the body regulating the standards of the legal profession.[3] The Bar Council addresses every issue regarding the admission, practice, ethics and standards of the law schools and the legal profession. An important function of the Bar Council of India is to promote legal education and to lay down standards of such education. Section 7 of the Advocates Act, 1961 empowers the Bar Council to:

*"7. Functions of Bar Council of India. —*

*(1) The functions of the Bar Council of India shall be-*

*(h) to promote legal education and to lay down standards of such education in consultation with the Universities in India imparting such education and the State Bar Councils;*

*(i) to recognize Universities whose degree in law shall be a qualification for enrolment as an advocate and for that purpose to visit and inspect Universities 3[or cause the State Bar Councils to visit and inspect Universities in accordance with such directions as it may give in this behalf]; 4[(ia) to conduct seminars and organize talks on legal topics by eminent jurists and publish journals and papers of legal interest;* "

Section 49 of the Advocates Act empowers the Bar Council to make rules with respect to legal education & related matters. Parts of the provision reads as follow:

> *"49. (1) [The Bar Council of India may make rules for discharging its functions under this Act, and, in particular, such rules may prescribe— 2[(a) the conditions subject to which an advocate may be entitled to vote at an election to the State Bar Council including the qualifications or disqualifications of voters, and the manner in which an electoral roll of voters may be prepared and revised by a State Bar Council;*
>
> *(ae) the manner in which the seniority among advocates may be determined; 3[(af) the minimum qualifications required for admission to a course of degree in law in any recognized University;]*
>
> *(ag) the class or category of persons entitled to be enrolled as advocates;*

[3] Bar Council of Uttar Pradesh vs. State of U.P., 1973 SCR (2) 1073.

*(ah) the conditions subject to which an advocate shall have the right to practise and the circumstances under which a person shall be deemed to practise as an advocate in a court;]*

*(d) the standards of legal education to be observed by universities in India and the inspection of universities for that purpose;*

*(e) the foreign qualifications in law obtained by persons other than citizens of India which shall be recognized for the purpose of admission as an advocate under this Act;"*

The Advocates Act, 1961 confers the BCI with wide ranging powers to prescribe the standards of Indian legal education. The UGC has statutory powers to coordinate standards of higher education including law. The university itself has wide ranging powers to improve their own legal education system including size of enrolment, nature of examination system, policies of the university, etc.[4]

**Changes brought by the Bar Council**

The Bar Council can lay down standards of classroom teaching, practical skills and training, legal aid, other practical training programmes, etc. There is a need for the Bar Council to make reforms. There are several reasons for the reforms not being done, including pressure from the government. This issue has been previously discussed at different levels, including a committee that was constituted under the chairmanship of Justice A.M. Ahmadi. The committee had given a few recommendations including:

- A reconstitution of the Bar Council of India which includes representation from the judiciary, Bar Council as well as UGC.
- A stop to provisional admission before affiliation
- The constitution of a high-level committee to review the affiliations that have already been granted.
- An entrance examination to be set up before the admission stage
- The recommendation of a 5-year integrated law course immediately after high school
- Rule 21 of the Bar Council Rules that directed the law schools to incorporate methods such as tutorials, case methods, and other techniques to supplement the imparting of

[4] Meenu Paul, "Legal Profession – One of the Objectives of Legal Education and the Role of Bar Councils in Legal Education in India in the 21st century, Available at http://www.gbv.de/dms/spk/sbb/toc/337625247.pdf.

legal education with an inclusion of problem solving methods such as mock trials, moot court competitions, etc.

- The establishment of a National Law University in each State.

The Bar Council of India has brought about several changes in the Indian legal education system by the powers conferred to them under the Advocates Act. Changes such as the introduction of the five years integrated degree program in Law, the introduction of the National Law Schools, and also the recommendation for an examination for the enrollment of advocates into the Bar were brought about in the last few decades. The first National Law School was established in Bangalore in 1986 which has remained till now the best law school in India. With the success of the National Law School several other National Law Universities were established. The establishment of the National Law School of India University in Bangalore successfully challenged the institutionalized mediocrity and succeeded in attracting serious students to the study of law.[5] The national law schools have promoted excellence in legal education and research and proven to the students that law can be a preferred career option. In fact, the introduction of the five-year integrated programs have also attracted a large crowd of studious and conscientious students towards the field of law.[6]

**Challenges to Legal Education in India**

While there have been developments in the Indian legal education system, there have been quite a lot of challenges too. The changes brought about by the Bar Council of India have not been up to the mark of what they should have been. The primary motive of beginning an integrated five-year law course in India was to fully equip the law students with the necessary tools to help in the reduction of the already massive backlog of cases, while also raising the standards of the profession. However, this has not been seen in the decades since such changes have been made: the backlogs remain and not many students opt to go to litigate in the civil courts. This is mostly due to the lucrative corporate sector jobs with a heavy salary to even the starting associates. Thus, the objective of providing legal education for justice-oriented education for the realization of the various rights enshrined under the Constitution of India fails as these students do not even enter the justice system and remain in the private corporate sector.

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[5] Chandra Krishnamurthy, Legal Education and Legal Profession in India, 36 INT'L J. LEGAL INFO. 245, 253-54 (2008).

[6] *Id* at 245, 257-58.

**Resources and Infrastructure**

Over the past few years, the number of law schools in the country have increased drastically. However, this growth lacked careful planning. It was the result of heightened demand for legal services which caused this increase. The haphazard pattern where traditional universities started law faculties of their own made these law schools a mere accessory to these traditional university campuses. They were less of a hub for education, and more of a source of profit. While the dedicated National Law Universities have better resources and infrastructure, these law faculties form the larger chunk. The students studying in these colleges do not have the same infrastructure in terms of library, research, guidance and opportunities. These campuses should be able to impart the same level of dedicated training which is necessary to foster the minds of the young legal professionals. For this, minimum requisite standards for infrastructure must be set and followed.

**Lack of Research Tradition**

One of the most fundamental tools a lawyer possesses is that of legal research. From finding out the underlying issue, to finding principles and to determining the solution, the entire process is strongly founded on the basis of thorough research. This prerequisite for a lawyer is usually developed at a stage in the law school itself. However, in India, the universities do not give a lot of emphasis to such research skills. There are course modules on Legal Research and mandatory submissions for students, but they are hardly sufficient to inculcate the necessary skills. There is lack of yearning for knowledge and patience to find information, both key aspects to being a good researcher. The key reasons for this can be the lack of resources made available to them, and the lack of practical experience. There is a need to set up a culture of research by way of expert-training, quality projects and access to better learning resources. The quality of research based higher degrees of LLM and PhD are dissatisfactory in quality. The purpose behind pursuing these degrees is often the objective aim of attaining formal credentials. There is no substantial support for the students genuinely interested in pursuing research positions on a full-time basis. The opportunity-cost of pursuing full-time research appears to be too high to attract competent candidates. This contributes to a climate of laxity in the process of conducting and supervising research activities.[7]

[7] Chauhan, S. (2020, March 27). Crisis in legal studies in India. *Frontline*. https://frontline.thehindu.com/the-nation/education/article31039043.ece

### Syllabus and Curriculum

The curriculum taught in a law school must be such that it caters to both the academic and practical aspects of legal training. While the BCI has listed the compulsory subjects and provided for a number of optional subjects, the final decision is as per the discretion of the university. This often results in lack of choices made available to the students and variation in the syllabi taught across the law colleges in the country. Often, the students are force-fed enormous amounts of theory, case laws and details, which do very little to expand their academic insight and better their professional skills. Instead of focusing on feeding more information to the students, emphasis must be given to the quality of the course structure which can expand the range of professional and academic skills of the students. The structure of the courses taught in law colleges must also take into consideration the concept of globalization, and ensure that it is reflected by way of more elaborate modules which emphasize on International Law.

### Cost of education in National Law Universities

The National Law Universities come under the jurisdiction of the respective States meaning thereby that they are reliant on the State funding for purposes of infrastructure, payment of salaries and other expenses. While some of the States have been generous in such support, most of these universities struggle to attain state funding for the recurring expenses. As a result, most of these universities have a higher fee structure compared to the departments or colleges that are affiliated to public universities. They are dependent on the student fees to meet these expenses. The overall cost of studying in these elite institutions totals to a steep average of 10-12 Lakhs for a five-year course.

The private institutions also charge an exorbitant amount of fee, but that is not the primary concern. It is that such a high fee structure of state-run universities makes them somewhat inaccessible to those who do not belong to a higher income group. Keeping in mind that the per capita net national income was estimated to be 1.35 Lakh for 2019-20 (PTI, 2020), only those who can afford to spend a whopping sum of over 2 Lakh per annum can afford to study in these institutions. There are very few scholarships or funded seats available in these institutions, and ironically enough, the very universities dedicated to impart legal education fail to uphold the principle of social justice.

## Reforms in Legal Education

In the case of *Bar Council of India v. Bonnie FOI Law College & Ors.*,[8] the Supreme Court had ordered the constitution of a 3-member committee on reform of legal education. Pursuant to this case this committee was formed and a report discussing the various challenges to legal education was made which included several issues. Looking into the roles of the Bar Council and the universities the following improvements could be made to the Indian legal education system:

## Entrance Examinations And Drastic Differences Among Law Colleges

There has been an increase in Indian law schools. Statistics show that there were less than 100 law schools in the 1980s.[9] This has now increased to a number of 1200 law schools.[10] While there has been a rapid increase in the number of law schools in India there has been no careful planning of the same. The higher demand of law schools in India furthered the Bar Association to allow new law schools to open without proper infrastructure.[11] India does have some reputed law schools; however, there is a large chunk of law schools where the administration does not bother about giving the students a proper education and solely do it for the purpose of making money. Thus, there is a difference between the quality of students from different law schools which is starkly different. So, while the number of law students have increased, enabling an ease of entry, there is no proper legal education being imparted.

Not only was law seen as a backup option to medical or engineering, there has been a high dropout rate from law schools. Delhi alone has seen an alarming dropout rate of around 50 per cent.[12] Even the entrance examinations do not test the aptitude of the examinee in a manner that reflects his ability to be a good lawyer. It is true that the skills required for a good advocate have to be inculcated; however, they now do not even reflect the general aptitude of the candidate because they follow a set pattern. Moreover, a lack of motivation on the part of students stems from the teaching method and quality. The students find such classes uninteresting and only attend class to fulfill the minimum attendance requirement

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[8] Special Leave to Appeal (C) No. 22337 of 2008 with W.P.(C) No. 987 of 2013

[9] N.R. Madhava Menon, *Reflections on Legal and Judicial Education* 75 (2009).

[10] Prachishrivastava, In two years, number of law schools increased from 800 to 1,200: Now BCI hopes to put brake on mushrooming epidemic, Legally India, Available at https://www.legallyindia.com/lawschools/in-two-years-number-of-law-schools-increased-from-800-to-1-200-now-bci-hopes-to-put-brake-on-mushrooming-epidemic-20141209-5408.

[11] G. Singh, *Revamping Professional Legal Education: Some Observations on the LLB Curriculum*, 27(1) Indian Socio-Legal Journal 41, 46 (2001).

[12] R. Singh, *A Survey of Legal Education: Delhi and Haryana*, 29(3) Indian Bar Review 73, 81 (2002).

which has been set by the Bar Council.[13] Unless interest is generated in students, they will lose any incentive to learn the subject, thereby defeating the purpose of legal education.

Not only do the students see the corporate sector as a safe option, they just go with the flow. There is not much of an emphasis on researching and ethics due to which there is much more plagiarism in projects which is also a sheer waste of time, for both the teacher as well as the students. There is a need to motivate the students as the importance of research is not understood well by them. No matter what career path they take it is necessary for the research and analytical skills which are the foundational skills required for any job.[14]

Presently, most of the law schools have an inadequate and subjective form of examination system thereby rendering it unreliable. The objectives of the students during such exams, and mostly law schools, then changes from learning the subjects and areas to only achieving a decent grade in these examinations. The objective of examinations should be to understand the subject, gain knowledge and application and understand the subject.

A set of norms should be laid down by the BCI with regards to the conduct of these examinations, not only for the quality of the examinations but also the evaluation criteria. The current form of examinations should be supported by assessments that are conducted throughout the year including assignments, mock cases, etc. The BCI along with the universities must also ensure that the examinations are conducted smoothly.

There has been a Common Law Admission Test (CLAT) that is being used for most of the National Law Universities in India. Some other law schools also have their own admission examinations. There have been several problems that have been found in such examinations.[15] Not only the problems in the examinations but there are a multitude of law schools with their own respective entrance examinations. The Bar Council along with the universities should ensure uniformity and introduce an all India entrance test for all the law schools in India. Not only would this help in building the academic standards but also aid the students in entering law school.[16]

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[13] A.K. Avasthi, *Role of the Bar Council of India: Judicial Interventions and Suggestions*, 29(3) Indian Bar Review 9, 23 (2002).

[14] Rebecca Furtado, What's Wrong With Legal Education in India, Ipleaders, Available at https://blog.ipleaders.in/whats-wrong-legal-education-india/.

[15] CLAT Is an Example of Everything That Is Wrong With Education In India, The Wire, Available at https://thewire.in/education/clat-2017-common-law-admission-test.

[16] Justice Ahmadi Inaugurating the 3-day All India Conference of Lawyers organized by Bar Association of India, 18.11.1994

**Problems within the law school**

Rule 4 of the Bar Council of India Rules requires the students to attend a minimum of 66% of the classes. This attendance requirement is not enforced in all the law schools, while some have a requirement of higher than 66%, and some also allot a percentage of the final grade on the attendance too.[17] There is a need for accountability in this regard and the students not meeting the required attendance should not be allowed to write the examinations. The Bar Council as well as the University should lay out necessary guidelines to outline the bare minimum of at least 66% percent attendance. An idea to improve the attendance and also teach the students would be some form of class exercises and weekly assignments based on various legal problems. Not only should this be counted towards the final grade, but this would also help improve their performance.

Rule 21 of the Bar Council of India Rules directs each law school to have an adequately equipped library consisting of books, law reports, statutes, etc. Libraries are core to legal education as it equips the students with the necessary materials required for knowledge as well as research. The BCI must strictly enforce the rules and ensure a decent functioning library in each law school.

It is important for the BCI and universities to plan out the curriculum meticulously as it is the foundation that builds the future of the legal profession. The BCI has revised the curricula of the law schools in the past; however, this needs to be constantly revised and updated. Not only this but the BCI should also arrange the subjects in a manner that will help the students understand better i.e. which courses should be taught in the first year, second year, etc. There must be a coordination between the teaching of substantive and procedural laws. The BCI can also consider making a distinct outline for students interested in litigation by possibly framing the syllabus for the latter years in law school.

The BCI has given the universities a mandate to teach according to the prescribed syllabus and also conduct the examinations and to publish the results in a timely manner; however, this has not been adhered to by all the universities. An example is of the universities in Bihar where the examinations have been backlogged for two to three sessions.[18] The BCI needs to take special care of such situations to ensure that this does not occur again.

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[17] Based on interactions with different law school students.

[18] Ramadhar Singh, Prospects of Legal Education, Legal Education in India in the 21st Century: Problems and Prospects, Proceedings of the All India Law Teachers Congress, Faculty of Law, University of Delhi.

Quite a few universities in India still administer education at the undergraduate level in the regional language thereby administering the regional language at law schools too. Due to this, such law schools may have only a basic fluency in the English language. While administering legal education in the regional language does help in practicing in the lower Courts, the quality of legal education does suffer as there is no scope for visiting faculty and research collaborations. Furthermore, most of the subject material, including statutes and cases, etc. are all in the English language. While the Bar Council of India has tried to rectify this by providing that the medium of instruction should be in English, this has yet to be implemented.

**The faculty and teaching techniques**

A look at the best law schools in the world shows that such law schools have a great emphasis on research and academia. The Indian law schools need to develop an institutional culture that promotes and encourages research and academia.

The University Grants Commission and the Bar Council of India have repeatedly requested Universities to revise their syllabi but to no avail. Furthermore, it is a challenge to attract good faculty to law schools in India.[19] Generally the financial incentives offered by the private sector attract all the good talent rather than the low paying academic career.[20] Several institutions have been unable to attract good faculty due to the measly pay packages. The BCI needs to ensure the employment of full-time professionals to enable the students to get quality education. With a number of colleges solely set up for a profit motive they do not expand much on their faculty thus, hire unqualified and part time faculty. An amendment to the Advocates Act in 1979 allowed full time teachers to practice as well, which has now created part time teachers that both teach as well as practice. Such teachers are unable to pay adequate attention to teaching and the functions associated with it. Legal education requires a certain amount of dedication from the teacher as well and the amount a student imbibes depends on the availability of the teacher for doubt clearing and guidance. This is impossible if the teacher is part time.

These colleges do not have adequate selection criteria for the appointment of faculty but teaching at such colleges would count as years of experience once the teacher applies

[19] Shyam Sunder, Higher Education Reforms in India (Yale School of Management, Working Paper Dec. 7, 2011), Available at http://ssrn.com/abstract=1975844.

[20] Tamar Lewin, Survey Finds Small Increase in Professors' Pay, N.Y. TIMES, April 11, 2011, http://www.nytimes.com/2011/04/11/education/11faculty.html?; Slight Increase in Faculty Salaries, National Education Association, http://www.nea.org/home/34399.htm.

elsewhere.[21] Since some of them are government aided, they appoint minimal faculty so that their expenses are lower and they can obtain maximum profits out of the situation. Despite a number of recommendations and suggestions, the lecture method remains the method of teaching in most law colleges. However, it is possible to attract good faculty by promoting a range of institutional reforms and financial incentives.[22] The success will depend upon the university itself as well and its contribution to its own growth story.

The method of teaching is crucial to legal education. The Bar Council has given recommendations to not only confine teaching to substantive and procedural laws but also extend it to impart professional skills and ethics. A course named ethics has to be taught in every law school as per the Bar Council of India's orders.[23] The traditional classroom teaching should also include case methods, workshops, mock trials, seminars, etc. This would enable the students to become more self-reliant and autonomous in searching for legal material and also assess the problems and challenges ahead of them.

Clinical Legal Education is a progressive education ideology and pedagogy which promotes learning by doing. It is a learning environment where students identify, research and apply knowledge in a setting which replicates, at least in part, the world where it is practiced.[24] Clinical legal education can supplement the traditional method of teaching law which is more theory based.

**Problems in the system itself**

Not only are there problems with the individuals but there are problems in the system itself. The UGC NET, the examination used for teacher recruitment, is flawed. Having some subject knowledge does not mean that the person would be able to teach students. The UGC NET also just tests basic memory power and is nowhere concerned with the teaching capability of an individual. This way teachers may not even care about whether the students have a thorough understanding of the subject they are teaching. This clubbed with the lower salaries paid to teachers makes it a difficult task to even find good teachers at these institutions.[25]

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[21] K. Singh, *Legal Education in the New Millennium,* 31(1) Indian Socio-Legal Journal 103, 108 (2005).

[22] Jack Grove, Academic Salaries No Longer Attract Top Talent, Survey Finds, TIMES HIGHER EDUCATION (Mar. 22, 2012), http://www.timeshighereducation.co.uk/story.asp?storycode=419399.

[23] More Information can be found at http://www.barcouncilofindia.org.

[24] Richard Lewis, "Clinical Legal Education Revisited" Professor of Law, Cardiff University, Wales, United Kingdom, Pg.5, http://www.law.cf.ac.uk/research/pubs/repository/21

[25] Pranusha Kulkarni, What's Wrong With Legal Education in India, IPleaders, Available at https://blog.ipleaders.in/whats-wrong-legal-education-india/.

**Setting Goals for Indian Law Schools**

Legal education needs to create a conducive environment within the educational institutions and promote the relation between law and public service. Indian legal education should embrace within itself the concept of nation building.[26]

Legal education has a massive role in the establishment of a society. Laws need to be abided by and legal education will help in shaping the quality of the rule of law.[27] Legal education has an important role to play in the establishment of a law-abiding society. Excellence in legal education and research is extremely important because it will help shape the quality of the rule of law. India has been facing several institutionalized problems of administration to justice i.e. delay in cases, governance crisis, corruption, etc.[28] Due to such problems there is a huge divide between the law taught by books and the law in reality.[29] To confront this divide and try to limit it there is a need to establish good governance based on the rule of law, for which the law schools need to play a more active and responsible role.

There is a need to emphasize on facilities such as research and publication activities, the need to reform curriculum, train the faculty, etc. This will help in growth and development of legal education with an increase in reputation of the profession to meet the challenges of the field and to grow and contribute by providing fullest opportunity to law aspirants for the progress of the country.[30]

Law schools should help students acquire the attributes of effective, responsible lawyers including self-reflection and lifelong learning skills, intellectual and analytical skills, core knowledge and understanding of law and professionalism.

The curriculum should be designed in such a way as to develop knowledge, skills, and values progressively. The teaching of theory, doctrine, and practice should be integrated and professionalism should be taught pervasively throughout the duration of law school. The law schools should maintain a continuous dialogue with academics, practitioners, judges,

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[26] C. Raj Kumar, Legal Education, Globalization, and Institutional Excellence: Challenges for the Rule of Law and Access to Justice in India, Indiana Journal of Global Legal Studies , Vol. 20, No. 1 (2013), Available at https://www.jstor.org/stable/10.2979/indjglolegstu.20.1.221.

[27] Charles E. Tucker ,Jr. ,Cabba ges and Kings: Bridging the Gap for More Effective Capacity-Building, 33 U. PA. J. INT'L L. 1169, 1192–93 (2012)

[28] Marc Galanter & Jayanth K. Krishnan, "Bread for the Poor": Access to Justice and the Rights of the Needy in India, 55 HASTINGS L.J. 789 (2004.

[29] C. Raj Kumar, Rule of Law and Legal Education, THE HINDU (July 4, 2006), http://hindu.com/2006/07/04/stories/2006070403320800.htm.

[30] Mayank Shekhar, Challenges of Legal Education in the 21st Century, Legal Bytes, Available at https://www.legalbites.in/challenges-legal-education-21st-century/.

licensing authorities, and the general public to help the students and to best understand their goals.

Assessments should be based on multiple parameters including criteria - referenced assessments, multiple formative and summative assessments, and various methods of assessment.[31]

**Setting goals for Bar Council of India**

The BCI, UGC and universities have a great role to play in the improvement of the standard of Indian legal education. With a changing environment these bodies should also keep up and revise the curricula/teaching methods. While there has been an increase in the number of National Law Universities, there is a requirement for at least one per state. Mutual cooperation between the Bar Council and the universities is essential.

The Bar Council, as well as the universities, have a duty to improve the standards of Indian legal education. The Bar Council should periodically review the adequacy and prospects of legal education.[32] An enlarged curriculum has been prescribed by the Bar Council which if enforced properly will cater to the academic as well as practical aspects of legal education.[33] The Bar Council would now need to ensure the proper faculty and functioning of the curriculum. Legal education is not entirely under the control of the Bar Council; the universities are responsible for the implementation of any scheme of legal education. It depends upon the university to take appropriate steps to enhance the quality of legal education and its own prestige.

The current Indian legal education system needs to be improved and reformed. The Bar Council, the UGC, and the universities have an immense role to play in improving the standards of legal education in India. There should be a sense of working cohesive and comprehensively without any conflict. The Indian legal education system should be able to meet the ever-growing demands of society as well as equip the students and professionals with the tools to be able to assess and handle the complexities of differing situations.

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[31] Dr. Tabrez Ahmad Professor & Director, Legal Education Challenges & Reforms in 21st Century All India Seminar on Global Legal Education by Confederation of Indian Bar In Association with KIIT

[32] Krushna Chandra Jena, Role of bar councils and universities for promoting legal education in India, Journal of the Indian Law Institute, Vol. 44, No. 4.

[33] *Id.*

## Conclusion

Indian legal education needs to help build the competence in law students, thereby building competence in the legal profession. Indian law schools need to start focusing on the content rather than the outcome-focused programs. Teaching methods that effectively and efficiently achieve desired educational objectives should be used as a program of instruction with best practices being employed when using any instructional methodology.

The Indian legal system needs to improve the academic space for engaging in teaching and researching.[34] A significant focus of the law schools should be on developing a curriculum which meets the needs and demands of the ever-changing legal world. To do this there is a need to recruit competent and committed faculty members, establish teaching and researching centers, develop and maintain proper infrastructure, etc.

In 2011 a Bill was proposed called the Higher Education and Research Bill, 2011 which proposed to set up a National Commission for Higher Education and Research to determine, coordinate and maintain standards and promotion of higher education and research. This was to be applicable to vocational, technical and professional educational institutions.[35] This Commission would restore the university autonomy and allow experimentation and competition in individual institutions, possibly resulting in academic excellence at least in some law schools. The Foreign Educational Service Providers' Bill as amended in 2013 could invite some world renowned universities to set up their own campuses or enter into agreements with Indian universities in India. This would bring forth structural and functional changes within the delivery of education.[36]

While the Indian law schools have developed over the years there is still a need to continuously assess and evaluate the law schools and keep on reforming them. There is a need to promote excellence both in teaching and researching, and this should be at the forefront of the objectives of Indian legal education.

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[34] *Id.*

[35] *Id.*

[36] Madhavan, M. and Sanyal, K. 2012. *India Infrastructure Report 2012*. 1st ed. [ebook] New Delhi, India: IDFC, pp. 3-15. Available at: http://www.idfc.com/pdf/report/2012/Chapter_1.pdf.

# CORPORATE CRIME: AN OVERVIEW, IMPACT AND CHALLENGES FACED BY INDIAN ECONOMY

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*"Corporate crime is the conduct of a corporation or of its employees acting on behalf of the corporation, which is prescribed and punished by law."- J. Braithwaite*

## Introduction

A Corporation may be defined as an enterprise or an organization incorporated under the law having a separate legal identity to carry on a business or activity. It is created by individuals, stockholders, or shareholders, with the purpose of operating for profit and is allowed to enter into contracts, sue and be sued, own assets, pay central and state taxes and borrow money from financial institutions[1]. The process of forming a corporation legally is known as incorporation of a company which distinguishes it from its true owners and even protects against the claims in which an owner can be held personally liable.

Corporate entities and their setups are not altogether a recent phenomenon in India. They also existed in early ancient India and mainly comprised groups of businessmen engaged in similar line of businesses or activities. However, these business groups faded out during the series of invasions and other disturbances that preceded the advent of European traders in India at the end of the fifteenth century[2]. The modern corporation in India can be traced back to the time of emergence of East India Company (EIC) back in 1600, being granted the royal charter providing monopoly of trade in India. Even the transplanting of English company law into India was also to enable better trade between England and India, in order to establish symmetry in the corporate legislation between the two countries. During that period, law was mainly used as an instrument to facilitate trade relations only. Afterwards in the nineteenth century, a unique managing agency system emerged which was created by small groups of

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[1] *Corporation*, CORPORATE FINANCE INSTITUTE (CFI), https://corporatefinanceinstitute.com/resources/knowledge/finance/what-is-corporation-overview/

[2] Radhe Shyam Rungta, THE RISE OF BUSINESS CORPORATIONS IN INDIA 1851-1900 (1970)

corporations entering into management contracts for businesses. Managing agency system emerged out of necessity to bring in efficiency but created a great deal of controversy. The managing agents started enjoying enormous autonomy and benefits at the cost of the passive investors due to lack of proper information being provided. In all, managing agents invest a very little bit but disproportionately obtaining a large amount and control over the money or even at times vanishing with the sum of money collected with free hands. This system was a legislature failure where legislative instruments failed to take into account the local, social and economic circumstances. The only sole aim being no repugnancy should stand between the Indian and British laws, indirectly preferring British interests over to local interests. This phenomenon continued for several decades until new changes were introduced after the 1936 Amended Act. So, when Companies (Amendment) Act, 1936 came in power it took a departure from the English corporate law by taking cognizance of the issues relating to managing agency system and introduced some checks and balances by limiting the duration of the managing agency contract and permitting the removal of the managing agent for cause[3]. Thus, committing corporate crime is not a new problem which has been encountered in today's time but has been there from a very long time in various allied forms in different sectors, industries and areas.

At present, large corporations have also started dominating the business around the globe and have formed an integral part of human lifestyle and culture but the immense dominance of the corporate set up brought in for fostering economic growth has lead into the indulging in malpractices and wrong doings being undertaken by taking into account that they are not natural human enterprises or organization, so their activities being criminal or otherwise also being not ordinary. Corporate crime in today's world has become such a great dangerous proposition that their criminal behavior defies 'common reality'[4]. To a very large extent it seriously threatens the wellbeing of the society, considering its root presence and the impact in every aspect of social and community life by the number of people it affects. Hence, the corporate entities are in a very strong position of causing massive physical and economic harm.

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[3] Robert C. Rosen, *The Myth of Self-Regulation or the Dangers of Securities Regulation without Administration: The Indian Experience*, 2 J. INT'L L. 261 (1979).

[4] Shover, Neal.Wright, John P., *Crimes of Privilege: Readings in White-Collar Crime*, (Oxford University Press, New York, 2001).

**Major forms of Corporate Crime in India**

In India, economic offenders have over the years siphoned off crores and crores of rupees of people by exploiting the area of economic activities in which they work or specialize and continue to do so until the lawmakers fill in the void by taking into consideration the loopholes existing in the affected system. From the recent past, it can be seen that the economic offenders have also started playing safe by moving away to different territory of land merely just after committing the scams and scandals where the extradition process is cumbersome. Some of the different forms of corporate crime committed are below mentioned:

**(1.) Money Laundering**

Money laundering is conversion of black money into white money. Money laundering is closely linked with organized crime and the main source of money is mainly obtained from illegal activities i.e., drugs and cartel, terrorist activities etc. Money laundering is mainly done to cheat and adjust the pile of cash with the clear intention of hiding the main source of proceeds. Money laundering can have an adverse impact on the economy and political stability of a country as it could contaminate and corrupt the structure of the State at all levels which should be curbed. In a striking case of ***Anosh Ekka v/s. Central Bureau of Investigation***[5]**The** Apex Court found the accused guilty for laundering huge sums of money belonging to public wealth. His bail application was also rejected on the prima facie grounds of him being a public representative and looting the public at large. Also, tampering with the evidence and abusing the process of law by making mockery of the justice delivery system.

**(2.) Bank Frauds**

Economic offenders targeted banks for committing scams in which they siphoned off crores of crores of rupees of people by offering bribes and maintaining close relationships with the management and staff for their benefit.

**Example** – (i) Vijay Mallya, chairman of Bangalore based United Breweries Holdings Limited (UBHL) and also owner of the Kingfisher Airlines Ltd. He came under the scanner of the Central Bureau of Investigation (CBI), Serious Fraud Investigation Office (SFIO), Enforcement Directorate (ED) and Securities and Exchange Board of India (SEBI) after his

[5] 2011 SCC OnLine Jhar 1184

venture Kingfisher Airlines Ltd terribly fell resulting in default over his 10,000 crore plus rupees loan. After that in March 2016, Vijay Mallya fled from India to the UK and has been fighting against his extradition.

(ii) Nirav Modi, diamond merchant was the main accused of the Punjab National Bank (PNB) scam in which a fraud of Rs 11,400 crore was committed in Mumbai. After the investigation was over it was found out that two of the employee's deputy manager Gokulnath Shetty and clerk Manoj Kharat from the Brady House branch at Mumbai used to issue Letters of Undertaking (LoU) to Nirav Modi's companies without fully following the due process. The employees use to issue LoU's without securing proper cash reserves or collateral and omitted the recordings of the transaction made in the bank's core banking software.

### (3.) Insider Trading

An insider can be defined as a person having access to valuable non-public sensitive information about a corporation including key managerial persons, directors or owners of stock equaling more than 10% of a firm's equity. Insider trading is illegal use of non-public material sensitive information being provided for earning profits on trade by the insider person to the outsiders. In a notable case of the United ***States of America v/s. Rajat Gupta***[6] The accused was convicted for engaging and conspiring in an insider trading scheme while serving on board of directors of various companies, disclosing non-public sensitive information about the companies to his friend and business associate Mr. Raj Rajaratnam.

### (4.) Stock Market Frauds

The stock market scams committed in the earlier times were due to no regulation of listed companies in a systematic way on stock exchanges thereby resulting in vanishing of companies after collecting crores of crores of rupees through initial public offer from public at large, ultimately only leaving behind the general public with no exercisable remedy at all. In the case of ***Sahara India v/s. SEBI***[7], Sahara India Real Estate Corporation Limited (SIRECL) and Sahara Housing Investment Corporation Limited (SHICL) floated an issue of fully convertible debenture (OFCD's) and showcased their issued debenture as private placement. The Apex Court ordered the Sahara Group of companies to refund the amount of around Rs. 17,400 crore to their 30 million investors within 3 months with an interest of 15%.

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[6] United States of America v. Rajat Gupta, 925 F. Supp. 2d 581, 584 (S.D.N.Y. 2013)
[7] (2013) 1 SCC 1

### (5.) Insurance Company Frauds

Insurance companies have also been seen as victims of the frauds committed with them as many times insurance holders deliberately setting fire to their insured goods, go-downs, factories, making more than one claim on the basis of the same accident, inflated claims supported by corrupt surveyors etc. In a remarkable case of ***United India Insurance Co. Ltd v/s. Rajendra Singh & Ors***[8], an award of compensation was also secured by claimants by practicing fraud. But afterwards when Insurance Company came to know about the fraud committed they moved petitions under Section 151, 152 and 153 of CPC for recall of the award. The award challenged was rejected by the Tribunal on the ground of lack of power to review its own awards and later on dismissed by the High Court resorting to any other remedy available against it. Finally, the Supreme Court held that the Tribunal and High Court erred in refusing to entertain the matter as the Insurance Company had no other remedy to avail and was justified in pursuing the matter as it involved public money.

### (6.) Import and Export Frauds

Import and Export frauds are committed by under invoicing the imports and over invoicing the exports thereby traders converting their foreign exchange black money into white money. In addition to it enjoying the rich incentives provided by the Government on more exports being done and helping in balancing the Balance of Payment (BOP) and Balance of Trade (BOT) structures of the economy.

### (7.) Fake Currency

Counterfeiting is related to coins and currencies which is a criminal act defined under Section 28 and punishable under Section 489B of the Indian Penal Code 1860. Flow of fake currencies can often undermine the economy as well as provide a threat to the national security of any country.

[8] 2000 SCC OnLine SC 563

## Laws Governing Corporate Crime in India

### Indian Penal Code 1860

The Indian Penal Code 1860 provides severe, rigid and specific punishments for offenses committed that falls within the purview of the corporate crimes and has defined fraudulently clearly under Section 25 of the Code. Some other acts punishable are mentioned below:

- Forgery - Section 463 of the Indian Penal Code 1860 clearly provides that under any circumstances in which any individual creates any false document or electronic record with a clear intent of receiving unlawful gains or even to injure another party concerned it will amount to commission of forgery.
- Bribery - Section 171B of the Indian Penal Code 1860 lays down the provisions regarding bribery in which any person voluntarily giving any form of gratification which can be in monetary terms or other reward with the motive of luring other person to carry out their duties and the other person accepting the gratification offered is said to have committed the offense of Bribery.
- Cheating - Section 420 of the Indian Penal Code 1860 clearly provides that anyone who cheats or even induces any person to deliver any property, alter or destroy any valuable document signed or either sealed shall be held liable for punishment.
- Extortion - Section 383 of the Indian Penal Code 1860 provides for extortion where one party coerces another party for payment of sum of money, or property or even other services, any such act committed amounts to the crime of extortion. It is made punishable because any officer in power may use his official right against any other person for extracting money, transferring of property paper or for some other services.
- Falsification of Weights – Fraudulent use of weights and measures is punishable under the provisions of Section 265 of the Indian Penal Code 1860 making it clear that if any person engages in any kind of activity of fraudulent use of weights or even thereby depicts the same to be different in weight before others is liable for punishment.
- Public Servant Unlawfully Engaging in Trade – Section 168 of the Indian Penal Code 1860 completely restricts public servants from engaging in any form of trade or taking any unfair advantage from any of the traders exercising official powers. This provision helps in striking a balance to ensure that public servants do not misuse their powers.

**Some other Key Legislation**

- Companies Act 2013 - It is a legislation which primarily focuses on the issues relating to corporate frauds and specific sanctions attached in connection with any company, corporate entity or body corporate falling under the purview of the Act.
    i. *Section 212 - investigation into the affairs of the Company by Serious Fraud Investigation Office.*
    ii. *Section 447- Punishment for Fraud.*
    iii. *Section 448- Punishment for False Statement.*
    iv. *Section 449- Punishment for False Evidence.*
    v. *Section 450- Punishment where no specific Penalty or Punishment is provided.*
    vi. *Section 451- Punishment in case of Repeated Defaults.*
- Prevention of Money Laundering Act 2002 - This Act particularly aims at preventing any kind of money laundering activities being done. Conversion of black money to white is the biggest problem which this Act tries to eradicate for greater good and complete growth of the economy.
- Prevention of Corruption Act 1988 - This Act was brought in to deal with the increased cases of bribery and corruption by consolidating the features and provisions of Indian Penal Code and Criminal Procedure Code. The key aspects relating to public duty, authority and servant have been laid down very clearly along with sanctions to restrict public servants from engaging in any unlawful activities.
- Information Technology Act 2002 - To deal with the increased cyber and security threats the Information Technology Act 2002 came into power. Special provisions relating to corporate crime with sanctions have been provided in it to restrict frauds being committed with the public.
    i. *Section 43 - Penalty and compensation for damage to computer systems, etc.*
    ii. *Section 43A - Compensation when failure to protect data.*
    iii. *Section 44 - Penalty for failure to furnish information, return, etc.*
- Securities And Exchange Board of India Act 1992 – This Act led to establishment of a Board to protect the stake and interest of investors in securities and to promote the development of and regulation of securities market or in matters connected therewith.
- Negotiable Instruments Act 1881 – This Act deals with the regulations and issues relating to negotiable instruments which provide a remedy which can be exercised

against any party whether being individual or corporate. Section 138 of the Act provides for the action to be taken in case of dishonor of cheque for insufficiency of funds in account.

## Legal Position Of India in Determining Corporate Crime Punishments

Indian Penal Code 1860 being an old law in comparison to Indian Company Law legislation contains some specific serious offenses under which a corporate body can be made punishable with a fixed term of sentence. In a significant case of ***Standard Chartered Bank v/s. Directorate of Enforcement***[9], the prima facie question also arose that in a case where an offense was punishable with a mandatory sentence of imprisonment can a company incorporated under the Companies Act be prosecuted. The Supreme Court clarified that a company is liable to be prosecuted and punished for criminal offenses being committed. Although to a modern rule a company cannot be sentenced to imprisonment but where there is an imprisonment and fine as a punishment provided under the statute, the Court can impose fine against the company. In another case of ***Iridium India Telecom Ltd v/s. Motorola Inc.***[10], the Supreme Court held that companies and corporate houses functioning incorporated under the Company Laws cannot escape and claim immunity from criminal prosecution on the ground of incapability of possessing mens rea. By the principle of attribution, the persons or group of persons in control of the affairs of the company can be held liable for criminal prosecution. Thus, according to settled principle of criminal law when a corporation commits a crime it can be held liable for criminal offence, but in India the statutes and judicial interpretations have provided an alternative remedy to impose fine on the corporations owing to their artificially created character which does not make them technically criminally liable.

## Impact of Corporate Crime in India

- Impact on Economy: Corporate crime committed affects the deep rooted economy and the society very hard as the money siphoned off causes a great distress to other sectors as well as the general public at large and the investors (foreign and national)

[9] AIR 2005 SC 2622
[10] (2011) 1 SCC 74

get a wrong image thereby restricting them from investing in any future purpose activities too. Around 73 lakh crore rupees have been lost since 1992 due to the economic scams committed[11]. Moreover, Indian economy lost almost 6,600 rupees in the fiscal year of 2012 alone[12]. The potential losses suffered by the Indian economy (according to reported corruption cases in media from October 2011 to September 2012) stands at INR 364 billion which excludes large scams such as 2G, Commonwealth Games, Mining Etc[13].

- Impact on Employees: Corporate crime has a direct impact on the employees of an organization as they get their monthly salary reduced or even outstanding and in tough times are fired from their jobs due to huge losses incurred. It completely creates a hostile situation for employees, in which they are in constant worry, self-doubting and do not feel safe under the umbrella of their employers. The manufacturing sector reported a loss of 87,000 jobs between April and June 2017 in India according to the sixth round of the Labour Bureau's Quarterly Employment Survey Report and at least 600 more people also lost their jobs due to sudden shutdown of firms owned by Nirav Modi and Mehul Choksi involved in PNB Scam[14].
- Impact on Companies: Corporate crime causes a great market loss to the companies and creates a struggling situation for them to survive. At times of high stringency even salaries of the employees get minimized and the existing debt of the stakeholders gets burdened with more interests and penalties which are even at times not settled when the companies wind up their business completely. Top three frauds experienced by corporations are diversion/theft of funds or goods, bribery and corruption and lastly, regulatory non-compliance[15]. After the introduction of Companies Act 2013, in a survey conducted 88% felt that stringent regulatory environment can help reduce incidents of fraud to a large extent by having a mandatory establishment of a

[11] Singh, Menjor. Economic Reforms in India: Problems & Prospects. Vol. 1. Mittal Publications, 2001. 98. Print.

[12] Ibid 11

[13] *Bribery and Corruption: Ground Reality in India*, EY, https://ficci.in/Sedocument/20254/FICCI-EY-Report-Bribery-corruption.pdf

[14] News in Numbers: 87,000 manufacturing jobs lost from April-June 2017, Mint, https://www.livemint.com/Industry/bhXVKUs6UoRBNqV1VkjhWO/News-in-Numbers-87000-manufacturing-jobs-lost-from-AprilJ.html

[15] *India Fraud Survey*, Deloitte, https://www2.deloitte.com/content/dam/Deloitte/in/Documents/finance/in-finance-annual-fraud-survey-noexp.pdf

vigilance mechanism for listed companies and greater accountability on board of directors to prevent and detect fraud[16].

- Impact on Offenders: Corporate crime can be a big scam or even a small scam which does not come into limelight very easily. Since, there are no eye witnesses and are mostly committed using new technologies, it becomes very difficult for officers to trace the offenders. This is the only reason why lots of cases are not even reported. Seeing the difficulties and loopholes existing in legislation offenders often get motivated to commit it again. Microsoft's Global Tech Support Scam Research report showed that consumers in India experience relatively high "scam encounter rate" being 69% in 2021 which was somewhat similar to the 70% rate earlier experienced in year 2018[17].
- Impact on Victims: Corporate crime committed tarnishes the image of any corporate house which completely shatters their customer base and any individual does not feel safe in using their products or owning their shares in the market which even tend to crash after sometime. Most often it affects the share owners very hard as they may start suffering from depression, stress, anxiety, panic attacks, etc and in many cases may also develop suicidal tendencies due to huge losses incurred. After the PNB Scam came in lime light, Public Sector Undertaking (PSU) banks lost about more than Rs 70,000 crore in market value in which the government alone lost over Rs 40,000 crore in just merely five trading sessions.

**Challenges faced due to Corporate Crime in India**

Corporate crime has a large impact on the functioning of the economy and is also known as socio-economic crime due its multifaceted impact structure. When corporate scandals are exposed and revealed it causes great losses to the business houses and its functioning structures, being directly connected with the consumers and society at large. In the recent past of India, various scandals and scams were exposed and came into limelight like Satyam Scam, Nirav Modi – PNB Scam, Kingfisher Scam, 2G Scam, Fodder Scam, Commonwealth Scam and many more. Due to these scams and scandals coming into limelight, it created a

[16] Ibid 15

[17] Microsoft's Global Tech Support Scam Research, Microsoft, https://blogs.microsoft.com/wp-content/uploads/prod/sites/5/2021/07/MSFT-2021-Global-Tech-Support-Scam-Research-Report.pdf

chaotic situation in the whole country where questions were raised on the governance and policy structure of these organizations as well as of government. These types of scams and scandals completely shake the entire system and its functioning. Later on to make up for the losses it is the general public which has to bear the whole cost in terms of high tax rates, high cost of commodities, high cost of petrol and diesel, high cost on securities and insurance premiums etc. A single scam committed is capable of impacting the whole environment comprising business houses, investors, society and the government at large. Some of the major reasons why these corporate crimes take place is also due to technological developments which made committing fraudulent activities more complex and hard to detect, transactions appearing good on the books but after careful examination revealing that money ended up in different places and most importantly transnational element in which local authorities of particular jurisdictions can only investigate and handle cases which is in itself a very time taking process.

**Conclusion**

At present in India, a modern growing society is experiencing new and advanced technologies day by day so the rate of corporate crime being committed by different means is also increasing rapidly. It is crucial that Investigating Officers are provided with adequate skills and training to trace down the culprits before the actual happening of the scam takes place as otherwise tracking them down becomes a difficult and complicated task. The usage of forensic data analytics tools should also be brought into use to mitigate, detect and investigate potentially hazardous transactions, events or patterns of related behavior belonging to any kind of misconduct, fraud or non-compliance. Considering the importance which corporate crime holds and its impact which revolves around on the other key notable areas of economy it is important that the government should make strict laws with severe punishments attached to corporate crimes with a speedy disposal system of cases. Here speed is of the key essence as worldwide investors are diving into to drive the various business environments.