LHSSJ

Law, Humanities & Social Sciences Journal

MAHARASHTRA NATIONAL LAW UNIVERSITY MUMBAI

JANUARY 2026 | VOLUME I | ISSUE I

Accessible at www.lhsscollective.in

Published by:

Law, Humanities & Social Sciences Collective,
Maharashtra National Law University Mumbai,
2nd and 6th Floor, MNLU-CETTM Campus,
MTNL Building, Technology Street,
Powai, Mumbai – 400 076.

Website- lhsscollective.in

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FOREWORD BY THE PATRON

I pen this introductory note to the inaugural volume of Maharashtra National Law University Mumbai's LHSS Journal with a sense of institutional pride and accomplishment.

As a University, MNLU Mumbai has always committed itself to fostering and nurturing study and research at the intersection of law and other disciplines. To understand the law requires a keen awareness of the human condition in which it is situated. This condition could variously straddle culture, polity, society, or thought traditions, each of which informs and illuminates the law. In the past few years, knowledge and intellectual inquiry have shown a decisive shift away from specialisation to integrating fields of study. The LHSS Collective's blog and now its journal speaks to this need of furnishing a bridge between law's doctrinal iterations and its larger milieu.

In the pages of this journal, readers will come across articles that engage with diverse themes, from the policy and politics around heritage conservation to legal-ethical debates on relationships, privacy and incarceration. One also notes with interest the enthusiasm among these young scholars in engaging with jurisprudence and philosophy more generally, as they try to apply their precepts to the world around them. Besides testifying to the enduring appeal of theory, this approach also invites us as readers and researchers to reflect upon the foundational role ideas play in shaping institutions, but also institutional frames of reference. A good journal brings to the fore such dynamics at work and nudges its readership to think and notice seemingly inconsequential occurrences in light of larger policy arcs. I find the current volume makes a decent foray in that direction.

I congratulate the Collective team in this endeavour and wish them the best for the upcoming volumes.

Prof. (Dr.) Dilip Ukey
Hon'ble Vice Chancellor, MNLU Mumbai

EDITORIAL NOTE

For over three decades now, the study and research of law in India has grappled with competing pulls of specialisation and interdisciplinarity. The national law schools best exemplify this tension. Even as they imagine and build unidisciplinary spaces focused around legal research, they also proactively weave in perspectives from the humanities and the social sciences as part of a robust curricular design. The Law Humanities and Social Sciences (LHSS) Collective, situated in Maharashtra National Law University Mumbai, enjoys a distinct vantage to train its focus on these exchanges between law and allied social sciences. Likewise, the LHSS Journal seeks to both archive and track in real time research in this field.

When planning for this inaugural volume, the editors made a conscious choice to allow for a wide and diverse range of articles instead of limiting them by theme. By its very nature, interdisciplinarity orients towards the eclectic, even the experimental. More so, when the base discipline is law. In theory, as in practice, law finds itself enmeshed in society, culture, politics, philosophy and history even before it transacts with them as a discipline. To really record this interaction, one must keep in sight not merely what gets exchanged but how. In other words, besides studying the substantive content of the disciplines as they interact, a sustained inquiry into the methodologies they bring to bear on one another is also in order. Does the study of philosophy, for instance, inflect how we evaluate legality as a concept? What techniques of interpretation and close reading can legal scholars glean from literary studies? In what ways does historiography animate the perception of law as a system? And of course, there are the oft-made explorations into the lives of law in political economy.

In our current volume, we try to feature authors who delve into some of these strands. Questions of how constitutional values underpin and inform institutional structures as also their interface with grassroots life figure in the articles by Prajakta Divekar, Shantanu Singh and Shraddha Mall (co-authors) and Ritikaa HR. An article and a book

review by Ansh Priy Srivastava and Akash Beradar (co-authors) and Simran Kaur respectively, explore how the law as an institution and practice finds its way into the most private and quotidian spheres of our lives. Relatedly, the ethical and intellectual foundations of policy and individual action inform Lawmsangpuia Ralte's review.

In curating together these articles and their areas of study between two covers, this volume sets the tone for more thematic forays in the subsequent editions.

Dr. Upamanyu Sengupta
LHSS Journal, Editor-In-Chief
Mumbai, 2026

CONTENTS

LOVE WITHOUT LABELS: EXAMINING THE LEGAL AND SOCIAL DIMENSIONS OF LIVE-IN RELATIONSHIPS

Ansh Priy Srivastava[±] *& Beradar Akash* [±]

Abstract: *This article delves into the complex, evolving nature of live-in relationships in India. While cohabitation is increasingly common, it remains subject to social stigma and legal ambiguity. The Supreme Court of India has recognised live-in relationships as legal under certain conditions, yet Indian law lacks specific legislation on their rights and protections. This article explores the constitutional rights to privacy, autonomy, and gender equality within such relationships through a comprehensive analysis of legal precedents. Key judgments like D. Velusamy v. D. Patchaiammal and Payal Sharma v. Nari Niketan have extended limited protections under the Domestic Violence Act, offering some legal security, particularly for women. Social perspectives vary widely, with greater acceptance in urban centres, though traditional norms continue to influence public opinion. By examining both the cultural resistance and gradual shifts toward inclusivity, the article emphasises the need for legal reforms and social awareness. Ultimately, it advocates for a more equitable legal framework that upholds the rights of individuals choosing non-traditional partnerships, aligning with broader goals of privacy, autonomy, and dignity.*

[±] Ansh Priy Srivastava is a Third Year B.A. LL.B. (Hons.) Student at Chanakya National Law University, Patna.

[±] Beradar Akash is a Fifth Year, B.B.A. LL.B. Student at Christ Academy Institute of Law, Bengaluru.

I. Introduction

"Living together is a right to life, and therefore, it cannot be held illegal." - Supreme Court of India[1]

Can love exist in the absence of legal and societal labels? Living together in India requires questioning the existing forms of marriage, personal freedom, gender, and state laws. On one hand, live-in relationships are increasingly common. However, the legal status of couples in such arrangements remains unclear, leading to ongoing social and legal challenges for those in live-in relationships. Even with the varying social attitudes in the changing world, India's framework of law still lacks legislation focused on the rights, protections, and obligations of individuals in such partnerships.

The disparity between legislative restriction and judicial innovation is essential to India's developing discourse on live-in relationships. The judiciary has tentatively

[1] S. Khushboo v. Kanniammal & Anr., (2010) 5 SCC 600.

acknowledged these partnerships as manifestations of personal autonomy, although the legislature persists in assessing them based on social morality and political acceptability. This contradiction illustrates two conflicting institutional responses to the identical socio-cultural transformation: one based on constitutional morality and the other on normative preservation.

This article aims to analyse the role that India's legal systems and social opinions regarding live-in relationships play in comparison to traditional marriages. This article embarks on a comprehensive examination of legal and sociological aspects of cohabitation unions in India, focusing on important judicial judgments, women's gender rights, and emerging trends of society. It explores constitutional provisions of privacy, autonomy, and gender equality rights for women within such relationships and critically evaluates the ongoing legal and social controversies surrounding the legality, recognition, and protection of live-in relationships. Thus, this article argues that with increasing social acceptance, there is a need for legal enlightenment, rules and regulations, and reforms to safeguard the interest of the parties involved in such relationships.

A. Definition of Live-in Relationships

A *live-in relationship* can therefore be defined as a cohabiting union or a formed and recognised union of two adults who decide to live together without going through the marriage formalities.[2] These relationships have been voluntarily entered into and involve people sharing their homes and beds without the sanction of civil or religious marriage.[3]

The term live-in relationship has no legal standard definition and is not recognised by the Indian legislature in any fashion. However, the courts of India have repeatedly

[2] Savita & Khan, A. G., *Studies on Sociological Impact of Live-In Relationship: A Critical Review*, 25(2, Series 3) IOSR J. of Humanities & Soc. Sci. 36–40 (2020).
[3] Pradeep Kumar, *Live in Relationship Neither a Crime nor a Sin: A Study with Reference to Right to Marriage*, 2(2) Journal of Legal Studies 46–61 (2014).

upheld the constitutional correctness of live-in relationships even as they see morality in the law.

B. Relevance in Indian Society

Although live-in relationships were not practised in India in the past, in recent decades, such relationships have become increasingly common in the city centres like Mumbai, Bengaluru and Delhi. A 2021 survey of the Indian National Family Health Study indicates that almost 1.1% of urban couples aged 20-40 said they lived together before marriage - a figure that represents a slow social approval. The rise in educational level, exposure to the world life, and a change in attitude towards individual choice and gender equality are the primary reasons for this trend. Nevertheless, a cohabiting relationship is still a socially stigmatised phenomenon in the countryside and in conservative households, which signifies the conflict between the traditional family order and contemporary life in the city.[4]

II. From Stigma to Social Shift: The Nature of Live-In Relationships

A. History: Traditional *vs. Modern Views*

Live-in relationships in India were once considered taboo and immoral, and have now reached the legal level. Traditionally, marriage has been viewed as the primary means of establishing a family and defining social roles in India. Legally married persons are the only people who have been considered as legitimate partners when it comes to procreation, inheritance, and discharge of family responsibilities. Relationships outside marriage existed but were largely hidden and socially condemned. After India's independence, cohabitation was widely condemned; however, with increased globalisation from economic liberalisation in the 1990s, Western ways were introduced, including changing perceptions towards cohabitation, mainly in the urban regions. Modern society is still unclear about the acceptance of alternative forms of partnership

[4] Indrayani Walokar, *Living Together Before Marriage: What Indian Couples Are Saying*, The Bridge Chronicle (July 1, 2025).

in many societies. Some jurisdictions have even provided legal protections to polygamous families, especially to protect the rights of women and children. However, family life is still regarded in most cultures as being the major structure based on the traditional institution of marriage, and cohabitation outside marriage is still lowly accepted by society. Today, while social acceptance varies, courts have granted legal protections to couples, particularly concerning women's and children's rights. In most developed countries like the United States, the United Kingdom, and most of Europe, cohabitation has legal standing where couples are accorded most of the rights that come with marriage. However, India's legal system has gradually emerged under the pressure of global tendencies and internal social processes.

III. Legal Framework Governing Live-S Relationships In India

A. Absence of Specific Laws

It is pertinent to note that India does not have a codified law directly on live-in relationships as a form of marriage. However, the judiciary has played an important role in slowly and steadily upholding the rights of live-in couples through some landmark judgments.

B. Key Judicial Precedents: The Evolution of Legal Reasoning

India has formed its legal policy toward live-in relationships by following judicial interpretations since various legislative attempts to regulate these relationships experienced delays or became incomplete. The justice system currently evaluates live-in relationships through frameworks of constitutional rights, gender justice, and legal protection.

C. Autonomy to Conditional Recognition

In *Payal Sharma v. Nari Niketan (2001),*[5] the Court held that a consenting adult had a basic right under Article 21 of the Constitution to live with a person of their choice. It

[5] Payal Sharma alias Kamla Sharma v. Superintendent, Nari Niketan, Agra & Ors., AIR 2001 All 254.

is believed that a man and a woman may live together without entering into a formal marriage, and that cultural disapproval or moral condemnation of such cohabitation does not constitute it criminal. At the same time, the Court noted that the judgment did not intend to introduce any legislative rights or obligations deriving from live-in relationships. The decision was confined to maintaining that adult cohabitation is not a criminal crime, without extending legal safeguards such as maintenance, inheritance, or property rights to live-in partners.

The scope of legal protection for live-in relationships was further examined in *D. Velusamy v. D. Patchaiammal (2010),*[6] where the Supreme Court interpreted the expression "*domestic relationship*" under the Protection of Women from Domestic Violence Act, 2005, to include not only legally wedded marriages but also a "*relationship like marriage*." The Court set out some guidelines for deciding when a live-in relationship could be considered one. These include that the pair must present themselves to society as spouses, be legally able to marry, live together for a long time, and share a home. The Court made it clear that not all live-in relationships are protected by law. For example, casual, short-term, or convenience-based arrangements are not covered by the Act. A woman in a live-in relationship may seek protection or maintenance under domestic abuse legislation if the specified criteria are met; nevertheless, the ruling did not equate all live-in relationships with formal marriages for all legal reasons.

D. Recognising Gender Vulnerability and Legal Protection

The case between *Indra Sarma* and *V.K.V. Sarma (2013)*[7] drew attention to the financial and social weaknesses experienced by women in such interpersonal connections. Such relationships cannot equal marriage, but according to the Supreme Court, women in

[6] D. Velusamy v. D. Patchaiammal, (2010) 10 SCC 469.
[7] Indra Sarma v. V.K.V. Sarma, (2013) 15 SCC 755.

dependent relationships should get legal protection through the Protection of Women from Domestic Violence Act, 2005 (PWDVA).

Live-in or marriage-like relationships are not crimes or sins, but they may be socially unacceptable in this country. The Court held that a "*live-in relationship*" can be considered a "*domestic relationship*" under the PWDVA if it satisfies the criteria of "*relationship in the nature of marriage*." In this case, since the relationship did not meet the criteria for a "*relationship in the nature of marriage*," the woman was found ineligible for relief under the Act.

IV. Social Acceptance and Stigma

While cohabitation outside marriage, more commonly known as "*live-in*" relationships, has slowly increased in cities in India, such relationships still carry a lot of social stigma, especially in traditional or rural settings.[8] Many conservative communities perceive live-in relationships as a threat to cultural values and the sanctity of marriage.[9]

As a result, some live-in couples, particularly women, might face social disapproval or family pressure or exclusion, thus creating situations of emotional stress, social isolation, or increased vulnerability to social violence.[10]

At the same time, the judicial decisions like *Payal Sharma v. Nari Niketan (2001)* and *Lata Singh v. State of U.P. (2006)* have held that consenting adults who live together are entitled to the constitutional safeguards of the right to life and personal liberty, and thus such relationships are not criminal.[11] Nonetheless, it is important to note that these

[8] Sanskar Krishnan & Ishita Srivastava, *Social and Cultural Implications of Live-In Relationships in India*, 6(3) Int'l Journal for Multidisciplinary Research (IJFMR) (2024).
[9] Ritika Khandelwal & Saumya Balyan, *Live-In Relationship: An Indian Perspective*, 5(1) Int'l Journal of Engineering, Management & Humanities 163–168 (2024).
[10] Bandita Abhijita, Ilambaridhi Balasubramanian, Susanta Kumar Padhy & Vikas Menon, *Inception and Evolution of Live-In Relationships in Contemporary India and Its Psychosocial Impact*, 3(3) Int'l Journal of Humanities Social Science & Management 529–533 (2023).
[11] Anand Singh Prakash, *Legal Conundrum of Live-In Relationship in India: A Judicial Approach*, 9(26) Law and World 47–54 (2023).

rulings, although removing the legal penalties, do not guarantee social acceptance of live-in relationships. Many couples still hide their relationship to avoid social backlash, and this is evidence that acceptance is still lagging legal recognition.[12]

A. Legislative Response

Although societal perceptions have posed significant barriers to the acknowledgement of live-in relationships, the response from the legislative front has remained equally cautious. The laws play a major role in creating social norms and protecting vulnerable groups; however, the legislative initiatives concerning live-in partnerships have been scant and inconsistent.

The legislative body has shown minimal concern regarding the moral disgrace associated with cohabitation. There exists no law that recognises or protects live-in partners from social prejudice.[13] Legislation reduces the disadvantages that live-in partners confront because of social discrimination, although laws cannot delete such biases. The Indian judiciary recognised live-in couples, yet no complete legal framework exists to protect them from discrimination when seeking housing or employment or qualifying for social welfare benefits. The *Malimath Committee Report (2003)* introduced legislation to equate long-term live-in relationships to marriage for certain legal purposes, and the *Maharashtra Government Proposal (2008)*[14] worked towards granting maintenance support to partners in live-in relationships.[15] The proposed recommendations for live-in couples remained unimplemented, thus creating a legal uncertainty that harms their status under the law. Social stigma maintains its

[12] Rajesh Kumar Tiwari, Rajesh Kumar Roy & Ishika Khaitan, *Live-In Relationships in India: Social, Legal, and Psychological Dimensions*, 9(10) Int'l Journal of Novel Research & Development 424–426 (2024).
[13] Anand Singh Prakash, *Legal Conundrum of Live-In Relationship in India: A Judicial Approach*, 9(26) Law and World 47-54 (2023).
[14] Gayathri G., *Explained: The Legal Status of Live-In Relationships in India*, The Analysis (Jan. 7, 2023).
[15] India Today, *Maharashtra Government to Legalise Live-In Relationships*, (Oct. 8, 2008).

practical impact on the rights of people in live-in relationships because there are no legal safeguards to protect them.[16]

The legislature's silence, even after repeated judicial acknowledgement of live-in relationships, signals a deliberate hesitation to formalise what is perceived as a disruptive social trend. Legislative reforms that extend anti-discrimination laws and break marital status dependency in legal rights may decrease the negative consequences faced by live-in couples because of societal discrimination.

B. Gender Bias

A deep-rooted gender bias exacerbates the stigma against live-in relationships, disproportionately affecting women.[17] People in society judge unmarried women who live together more harshly than married women because they link female virtues to marital status.[18] The families of women in live-in relationships frequently cut ties with them while simultaneously refusing inheritance rights and resorting to violent acts aimed at protecting their honour.

Sexual relationship rights for women in live-in partnerships generally receive inadequate legal protection, according to the Supreme Court in the case of *Indra Sarma v. V.K.V. Sarma (2013).*[19] The judgment failed to officially parallel live-in relationships to marriage status, so numerous women remain unprotected by legislation.

[16] Shraddha Suman Sahu, *Live In Relationship in India: A Socio-Legal Study*, 2(1) The Advocates League – (2023).
[17] Vartika Hansaria, *Live-In Relationships and Women: An Analysis*, 3(2) Indian Journal of Integrated Research in Law 17–27 (2023).
[18] Rajesh Kumar Tiwari, Rajesh Kumar Roy & Ishika Khaitan, *Live-In Relationships in India: Social, Legal, and Psychological Dimensions*, 9(10) Int'l Journal of Novel Research & Development 424–426 (2024).
[19] Indra Sarma v. V.K.V. Sarma, (2013) 15 SCC 755.

C. Legislative Response

The PWDVA allows some protection to women in "*relationships like marriage;*" however, courts use strict eligibility criteria when judging cases. The Act refuses protection to numerous women because their relationships fail to comply with court-defined requirements. The maintenance rights protection under Section 125 of CrPC extends only to legal wives, according to decisions made in *D. Velusamy v. D. Patchaiammal (2010)*[20] despite interpretations allowing live-in partners.

The lack of specific rights allocation for live-in partners by the legislature deepens gender-based discrimination, particularly toward women within these amatory unions.[21] Women who lack statutory protection face continued financial and social weakness while in such relationships.[22]

V. Legal Rights and Issues That May Be Faced By Live-In Couples

A. Right to Inheritance

While couples may be cohabiting as partners, the law does not give the cohabiting partners testamentary rights in the property of their partner unless provided in the will. This kind of couple, for one, does not have a legal marital framework to govern their succession and inheritance matters.

In *Vidyadhari v. Sukhrana Bai 2008,*[23] the Supreme Court recognised the children of live-in partners as legal heirs of their parents, although this recognition was already anticipated due to their inheritance rights. In addition, Section 16 of the Hindu Marriage Act, 1955, legalises the children born out of such a relationship.

[20] D. Velusamy v. D. Patchaiammal, (2010) 10 SCC 469.
[21] Amartya Bag, *Succession Rights in Case of Live-In Relationships: An Analysis in the Indian Context* SSRN, Mar. 30, 2011, pp. 1–11; posted Feb. 27, 2012).
[22] Shalu Nigam, *Violence Against Women in Live-In Relationships and the Legal Safeguards*, IMPRI Impact and Policy Research Institute (Dec. 29, 2022).
[23] Vidyadhari & Ors. v. Sukhrana Bai & Ors., (2008) 2 SCC 238.

B. Custody of Children

As in the case of children born in a live-in relationship, the custody of children is awarded on the principles of 'in the best interest of the child.' The courts ruled that children born out of wedlock to a couple living together in a relationship are legitimate and therefore entitled to rights under the Hindu Succession Act, 1956.[24]

C. Right to Property

The partners that live together do not have to inherit property rights, especially those that do not involve the concepts of 'joint ownership' and 'legal' contracts. This situation can lead to complications, particularly when partners separate and have disputes over property ownership.

D. Lack of Legal Recourse

Legal safeguards and the label of 'living together' often leave live-in relationships in a legal limbo. Solutions do not come easily for circumstances like the sharing of assets, proper rights after a couple breaks up, and children's rights, especially if there is no marriage bond certificate.

Judicial recognition lacks sufficient legal safeguards to protect live-in partners despite societal prejudice that exists against their relationships, especially for the practical needs of female partners. The following part analyses valid property rights together with maintenance and security provisions that Indian law currently lacks.

VI. Beyond the Marriage Contract: Legal Challenges For Live-In Couples

A. Marriage and Live-in

Indian law does not recognise live-in relationships as equivalent to formal marriage, and there is currently no comprehensive legislation governing such partnerships. Personal laws, such as the Hindu Marriage Act, 1955, persist in recognising solely marriages that have been legally solemnised. Judicial intervention has consequently played a limited

[24] Shalu Nigam, *Status of Children Born Out of Live-In Relationship*, The Society for Constitutional Law Discussion (2022).

yet meaningful role in expanding protections for individuals in long-term cohabitation, especially women, within particular statutory frameworks. Notably, courts have interpreted the PWDVA to encompass a "*relationship in the nature of marriage*," thereby permitting claims for protection and maintenance when the relationship is stable, consensual, and meets specific criteria such as cohabitation and public acknowledgement.

Despite these judicial developments, live-in couples do not acquire the automatic legal rights linked to marriage, such as inheritance, combined property rights, or spousal status, unless such rights are explicitly established through legal instruments or judicial decrees. This lack of formal recognition leads to legal ambiguity regarding property rights, maintenance obligations, and long-term security, frequently requiring judicial intervention on an individual basis. The absence of a standardised legal framework thus persists in differentiating live-in relationships from marriage, resulting in unresolved substantive issues concerning rights and obligations.

B. Social and cultural norms

Live-in relationships in India form a very complex, multifaceted pattern with many elements, thus reflecting the complexity of Indian society. Traditional values, religious views, gender dynamics, generational variances, and geographical variations shape the standards. The existence of live-in relationships in India is complicated; hence, knowing and understanding these norms is critical.

Religious or traditional values mould the public's view of cohabiting unions. Hindus make up most of India's population and perceive marriage as a sacred bond. Religious writings advocate conjugal faithfulness, family honour, and childbearing within the marriage bond.[25] Live-in relationships outside of marriage can be viewed as a violation of religious and ethical principles; they attract social ostracism and shame. Indian

[25] Sanskar Krishnan & Ishita Srivastava, *Social and Cultural Implications of Live-In Relationships in India*, 6(3) Int'l Journal for Multidisciplinary Research (IJFMR) 1–17 (2024).

society is also beset with *Ghosh*, the principle of castes. Such aspects play a significant role in the norms that are part of live-in relationships.[26]

Traditional expectations of gender roles further carve social perceptions toward live-in relationships. Traditional belief works upon patriarchal values wherein men enjoy a greater degree of freedom and autonomy in matters of relationships and sexuality. Women often receive stricter scrutiny and moral judgment, with chastity and virtue directly tied to familial honour and reputation. The gendered double standard further stigmatises women in live-in relationships and leads to the unfair distribution of power within a partnership.[27]

The regional differences in social attitudes toward living in relationships only accentuate the diversity of Indian society. Urban centres, with higher exposure to Western culture and cosmopolitan values, are likely to be liberal about cohabitation. On the contrary, rural and conservative regions probably would stress more traditional values and community norms and therefore resist and condemn cohabitation more.

VII. Legal Responses And The Gaps That Remain

A. Recognition of Live-In Relationships as Marriage: *Malimath Committee Report* and Maharashtra Government Proposal, 2008

The Malimath Committee Report[28]

Former Karnataka & Kerala HC Chief Justice V.S. Malimath's 2003 "*Report of the Committee on Reforms of the Criminal Justice System*" presented major criminal justice reforms for India, based on an analysis. It recommended official acknowledgement of the growing number of unmarried couples who live together. The committee noted that

[26] NDTV News Desk, *Live-In Relation Still a "Stigma" in Indian Culture: Chhattisgarh High Court* (May 8, 2024).
[27] Alexa Paynter & Campbell Leaper, *Heterosexual Dating Double Standards in Undergraduate Women and Men*, 75(7-8) Sex Roles 393–406 (2016).
[28] Committee on Reforms of Criminal Justice System, *Report of the Committee on Reforms of the Criminal Justice System* (Justice V. S. Malimath, Chair), Ministry of Home Affairs, Government of India, March 2003.

more and more cohabiting couples, without marriage, were increasing in number and hence suggested that their legal position be considered. It recommended that if any man and woman live together in a spousal-like relationship for a long period, it should be recognised as a marriage and provided with the same privileges and position as a marriage.

The Malimath Committee also recommended a change to the *1872 Indian Evidence Act* to enforce this recommendation. The couple would be presumed married if they lived together for two years, per this amendment. If either party denies marriage, the one denying it is bound to prove it. Yet with these concepts in mind, the Malimath Committee's reforms have not made their way to legislation. Marriages and living together remain inconceivable in the eyes of the law. Instead, interpretations of existing laws by courts give rights and benefits to the cohabiting couple and their children without considering them as married couples.

Maharashtra Government Proposal, 2008[29]

In 2008, the state of Maharashtra attempted an amendment in Section 125 of the CrPC based on the recommendations of the Malimath Committee. The surge of live-in relationships in Indian society, predominantly among youngsters who preferred live-in heterosexual relationships instead of getting married, compelled this aggressive step. Such an amendment was aimed at simplifying the law on live-in relationships by legalising them and thereby acknowledging the legality of their association in addition to the cognisance of their rights, particularly in cases of cohabitation without marriage.[30]

The Maharashtra administration fought tooth and nail, but the amendment was defeated and put on the back burner, with live-in status left unresolved.

[29] Maharashtra State Commission for Women, *Maharashtra State Proposal on Women's Safety and Security* (2008).
[30] India Today, *Maharashtra Government to Legalise Live-In Relationships* (Oct. 8, 2008).

Impact on Live-in relations brought by BNS, 2023

Section 69 of Bharatiya Nyaya Sanhita 2023 (BNS)[31] criminalises sexual intercourse that is achieved through deceitful means, like false promises of marriage or employment. Although this section does not explicitly mention anything fundamentally related to live-in relationships, it has the potential to be misused by women, leading to unfair victimisation of men when relationships turn sour. In the recent landmark case of *Jyoti v. The State Government of NCT of Delhi (2025)*[32], the court discarded the widespread stereotype about physical or mental abuse affecting only women in domestic relationships. It further emphasised that courts must avoid making judgments based on stereotypes since they must deliver fair judicial decisions for both genders.

The above-mentioned section's wide-ranging language creates a multitude of loopholes, potentially giving women an unfair advantage over men and trapping them in lengthy court proceedings disguised as false accusations. The lack of safeguards in the BNS exacerbates the problem.

Although the dictum provides that "*Innocent until proven guilty*" as per this section, the accused is already considered guilty from the beginning. It becomes a hardship for him to prove his innocence in a court of law when his guilt has already been determined without giving significance to any shred of evidence.

B. Judicial Evolution: From Scepticism to Conditional Recognition

The Indian judicial system has performed various roles in shaping the legal framework for live-in relationships, evolving from initial scepticism to granting limited legal recognition under specific conditions. Judicial opinions originating in the past refused

[31] Vaibhav Gandhi & Muskan Gandhi, *From Promise to Punishment: Analysis of Section 69 of BNS, 2023*, 6(6) Int'l Journal for Multidisciplinary Research (IJFMR) 1–17 (2024).
[32] Jyoti v. The State Government of NCT of Delhi, (2025) DHC 352.

to equate live-in relationships completely with marriage, but current judgments have established legal rights for individuals in these arrangements, especially for women.

The Supreme Court validated a live-in relationship through its decision in *Badri Prasad v. Dy. Director of Consolidation (1978)*[33] It was determined that prolonged cohabitation proved its validity. The court introduced a legal presumption about certain enduring partnerships, yet this presumption excluded numerous live-in relationships from its range of acceptance.

As previously discussed, landmark judgments like *Payal Sharma v. Nari Niketan (2001)*[34]*, D. Velusamy v. D. Patchaiammal (2010)*[35]*, and Indra Sarma v. V.K.V. Sarma (2013)*[36] have increasingly defined the legal dialogue on live-in relationships in India in the succeeding years. These were cases representing a shift in the judiciary from moral to rights-based reasoning, with conditional legal recognition for such forms of partnerships and limited protections, especially to women.

However, while these decisions were critical in recognising the social reality of cohabitants, taken together, they point to the judiciary's hesitant, fragmented process. The lack of a uniform legal standard grounded in a rule and a reference to appropriate case-by-case interpretation has led to inconsistent treatment of live-in partners. Such an outcome highlights the urgent necessity for a broad-based legislative reform aimed at bridging the gaps left unattended by the pronouncement of the judiciary and at offering individuals in live-in relations clear and equal rights.

[33] Badri Prasad v. Dy. Director of Consolidation & Ors., (1978) 3 SCC 527.
[34] Payal Sharma alias Kamla Sharma v. Superintendent, Nari Niketan, Agra & Ors., AIR 2001 All 254 : (2001) 3 CivCC 233.
[35] D. Velusamy v. D. Patchaiammal, (2010) 10 SCC 469.
[36] Indra Sarma v. V.K.V. Sarma, (2013) 15 SCC 755.

In the recent case of *Prabha Tyagi v. Kamlesh Devi (2022),*[37]the Supreme Court affirmed that PWDVA (*Protection of Women from Domestic Violence Act, 2005)* enables a woman to live in a shared household even if she lacks ownership rights or initial residence in that property, emphasising the Act's intent to safeguard women's interests in domestic relationships.

C. Judicial vs. Legislative Response: A Persistent Gap

Live-in relationships remain legally ambiguous because judicial and legislative responses to the same social reality differ in manner and consequence. Pleadings for protection, preservation, or recognition have forced the judiciary to interpret constitutional values to cover legislative gaps.

Recent court decisions demonstrate this interpretative shift. The Kerala High Court ruled in *Dr. Aswin v. Nair (2024)*[38] that Section 498A of the IPC cannot be used to punish a live-in partner since "*husband*" refers only to a legally married spouse. This ruling highlights how courts are altering old definitions to fit modern society, notwithstanding statutory rigidity. The Delhi High Court declared in *Prince Tyagi & Anr v. State of NCT of Delhi & Ors (2025)*[39] that consenting individuals have a right under Article 21 to choose a life partner and live happily, regardless of marital status. These judgments show that the judiciary adapts to changing societal norms and protects autonomy and dignity through constitutional reasoning.

In contrast, the legislature is cautious. Despite repeated court acknowledgement of cohabitation rights, Parliament has not passed a live-in relationship law. Inertia in legislation shows political sensitivity and respect for social norms. The same social anxieties that drive courts toward interpretive protection compel lawmakers toward restraint. Thus, while the judiciary transforms social change into a constitutional

[37] Prabha Tyagi v. Kamlesh Devi, (2022) 8 SCC 90.
[38] Dr. Aswin v. Nair v. State of Kerala & Ors., (2024) Ker 51429.
[39] Bar & Bench, *Family Disapproval Can't Curb Freedom of Two Adults to Choose Each Other as Life Partners: Delhi High Court* (Aug. 16, 2025).

opportunity, the legislature perceives it as a challenge to normative order. To bridge this division, codification must balance constitutional morality with democratic legitimacy and recognise developing relationships through judicial empathy and legislative clarity.

D. Rights of Partners in Live-In relationships

Intimate partnership in Indian law has evolved, making Indian live-in partners eligible for legal and social rights. Laws and judgments have given cohabiting couples some rights and protection under the law. This knowledge must be given to the non-marital couple seeking legal redress when conflicts arise or the relationship ends.

The right to privacy and dignity is safeguarded in live-in relationships by the Indian Constitution, various laws, and court judgments. Live-in couples are protected from state interference and social stigma so that their rights to quiet and dignified living may not be violated. People living in such non-marital unions should also be aware of and maintain these rights and take recourse under the law whenever they are violated.

This landmark justice ruling of *K.S. Puttaswamy v. Union of India 2017*[40] has established that the right to privacy is incorporated under Article 21 of the Indian Constitution. It implies that the freedom to select a partner and an accommodation without interference from the state or society has major consequences. Privacy includes physical space, human interactions, and choices, as ordained by the court.

Where decisions were made setting individual rights above conventional norms, live-in partners have benefited from much dignity. The courts have been progressive with personal relationships, considering that everybody has dignity, irrespective of whether they are or have been married.

This change, therefore, should, in its achievement, allow live-in partners to articulate rights without mistreatment or alienation in social circles. Legal discourse has adopted

[40] K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

the conception of autonomy. It does recognise that humans are capable agents who deserve to choose their partner. Conferral does create an environment where people may enter into a voluntary relationship free from compulsion or social pressure.

VIII. The Debate Over The Legalisation of Live-In Relationships

The debate over individual rights, particularly the right to privacy and self-autonomy, heavily influences the legalisation of live-in relationships. The Supreme Court's judgment in the case of *Khushboo v. Kanniammal (2010)*[41] upheld the concept of live-in relationships, affirming that individuals have the right to choose their living partners. It is, therefore, a personal freedom that makes live-in couples legal.

Pro-legalization arguments

1. **Being formalised, the advocates say, would give the partners much-needed legal protection**: This includes property rights, maintenance, and child custody after such a marriage. Legalising the relationship will prevent exploitation and treat the two partners similarly.
2. **Social Acceptance:** Legalisation may ensure greater social acceptance of live-in partnerships. Formalisation of such relationships will reduce the stigma attached and openly deliberate on various forms of relationship patterns in the changing social setup.
3. **Domestic Violence:** This would bring protection under domestic violence laws. Most victims of non-marital relationships cannot obtain legal assistance because the relationship is not legitimate.
4. **Responsible Relationships:** Official recognition might inspire couples to write out agreements stating their rights and responsibilities, contributing to responsibility.

[41] Khushboo v. Kanniammal & Anr., (2010) 5 SCC 600.

Against-legalization arguments

1. **Cultural Resistance:** Naysayers argue that allowing live-in relationships violates the traditional culture and tradition that bases family life on marriage. According to them, such changes will disturb the very fabric of society.
2. Legalising live-in relationships may increase the chances of **legalised exploitation of laws** passed to protect individuals from domestic violence and financial exploitation. They argue that this could potentially provide opportunities for unscrupulous partners.
3. **Legal complexity:** Live-in relationship laws may complicate marriage and family law. Complexity may confuse rights and duties.
4. **Societal Impact:** Promoting live-in relationships may decrease marriage rates and alter traditional family structures, which some consider detrimental to society.

Finally, the bringing together of such concepts suggests that there must be a sophisticated approach. Despite the judiciary's progress in protecting the dignity and rights of those in cohabitation agreements, there is no comprehensive legislation that resolves ongoing issues and differing interpretations. Legal reforms that define rights, responsibilities, and protections while also being sensitive to India's diverse social fabric are critical for protecting personal autonomy and promoting social harmony. As the cultural attitudes of society change, a more expansive legal framework can reconcile the ideals of the Constitution with lived realities, thereby safeguarding the privacy and dignity of all individuals participating in non-conventional relationships.

IX. Steps Taken By the Uttarakhand Government

The Uniform Civil Code Bill has been presented by the Bhartiya Janta Party-led government of Uttarakhand to standardise law on marriage, divorce, succession, live-in partnerships, and all related rules. The measure stipulates the minimum marriage age

and regulates live-in partnerships for all localities in the state. If passed, Uttarakhand will be the first Indian state to have such a code.

However, live-in relationship provisions brought privacy problems and attracted flak. Now, let's check the Uttarakhand UCC's live-in relationship policy. The Uttarakhand Uniform Civil Code (UCC) Bill requires live-in couples to file with the state government, as married couples do[42].

The bill binds a living couple, with or without residence in Uttarakhand, to make a declaration before the Registrar in whose jurisdiction he or she reside. Likewise, a resident of Uttarakhand who cohabits outside the state shall make a declaration before the appropriate Registrar. Simultaneously, the bill declares that children in live-in relationships are legitimate children.

The ongoing debate regarding the UCC extends to its core dimensions since incorporating new rights for live-in couples within a controversial bill itself creates issues with legal clarity. The sustainability of UCC to provide a base for new rights remains in doubt because of its possible influence on religious freedoms alongside diverse customary practices.[43] Using the UCC to protect the rights of people engaged in live-in relationships runs the risk of exposing those rights to fluctuations in the context of the Code's political and social acceptability.

A constitutional amendment that recognises live-in couples and protects their rights would provide a sustainable approach to fostering meaningful change. It would enhance these rights through nationwide protection against ordinary laws while securing their implementation across the country. Although a constitutional amendment presents

[42] Vasudha Khanna, *Will Uniform Civil Code Unite India?* 8 Indian Politics & Law Review Journal 271–277 (2023).
[43] Tahir Mahmood, *Uniform Civil Code: A Mirage?*, 25(4) Journal of the Indian Law Institute 514–524 (1983).

increased complexity, it manifests strong support for individual autonomy and equality that matches foundational privacy, dignity, and freedoms.

X. Recommendations

A few suggestions can be put forth in the mainstream of promoting equity, equality, and social justice relating to the legal issues of live-in relationships in India and the hurdles the parties concerned would face in being treated justly:

1. **Legislative Reform:** To regulate the rise of live-in relationships, governments would have to enact comprehensive legislation relating to partner rights and responsibilities. The legislation should address property rights, financial responsibilities, inheritance rights, and parental rights to help live-in couples resolve disagreements while also protecting their interests.

2. **Legal Recognition:** Their rights and protection under the eyes of the law should be treated equally, just as those of married individuals, since live-in relationships can receive legal recognition. A registration process or a legal framework that recognises the rights and obligations of live-in partners improves their legal status and guarantees fair treatment according to law.

3. **Awareness:** If the information and education on live-in relationships are spread, then stereotypes, stigma, etc., will be removed, and acceptance of such varied relationship forms will grow. The public and legal experts, through educational initiatives, can open up society to this more inclusive approach and acceptability.

4. **Legal aid and support services:** They empower their members to assert their rights and seek redress against disagreements or discrimination. It may take the form of legal clinics, helplines, or support groups for members of non-marital unions. These could provide legal information and counselling at the rudimentary level while referring members to appointed advocates or lawyers to represent them appropriately in courts if the need arises.

5. **Mediation and Alternative Dispute Resolution:** Since live-in relationships facilitate an amicable and in-time resolution to disputes emerging from such a living situation, mediation centres and family courts can facilitate communication, reconciliation, and agreement between partners outside of marriage through professional services.

6. **Safeguards against domestic violence:** Strengthening the laws and regulations would protect people in live-in relationships against domestic abuse. The laws on domestic abuse would cover partners outside of marriage and provide shelters, counselling, and legal remedies for them, thus protecting vulnerable persons while promoting gender equality in partnerships.

XI. Conclusion

Live-in relationships in India are a complex and emerging issue that calls for sensitive reflection and action by politicians, lawyers, civil society bodies, and communities.

Despite these negatives, one area of expansion that holds great promise is this. India may well move towards becoming an even more just and egalitarian society that recognises, respects, and protects all unions if it can remove the legal vagaries, social stigma, and structural impediments that live-in couples face today.

Changes in the law are also necessary to bridge the loopholes in the laws governing live-in relationships. There must be apt legislation on aspects such as rights over properties, rights to financial support, rights in case of inheritance, rights over a child, and other similar matters. Such a law must treat and protect live-in partners on par with marriage by granting them similar rights, obligations, and responsibilities.[44]

What is required would be legislation reform, an awareness-raising campaign, support services, and finally, community engagement. By a concerted effort toward solving the

[44] A. B. Nair & T. Ranjith, *Live in Relationships in Indian Law: Perspectives and Implications from Legal Professionals*, 4(2) GAP Indian Journal of Forensics and Behavioural Sciences 20–24 (2023).

hurdles and barriers facing the constituents of non-marital unions, India will attain its vision of a more inclusive, equitable, and compassionate society where every person, regardless of their marital status, is treated with dignity, respect, and equality under the law.

OLD SWORD IN NEW SHEATH: AN ANALYSIS OF SECTION 152 OF BHARATIYA NYAYA SANHITA

Shraddha Mall[±] & Shantanu Singh [±]

Abstract: *The new sedition law, Section 152 of the Bharatiya Nyaya Sanhita (BNS), ostensibly enacted to rid Indian criminal law of colonial vestiges, has merely perpetuated and expanded the sedition framework of its predecessor, Section 124A of the Indian Penal Code (IPC). The imprecise and sweeping language of Section 152 BNS not only retains the core repressive spirit of the sedition law but also broadens its interpretative scope, increasing its potential for misuse. This paper asserts that the broader ambit of Section 152 BNS represents a regressive step, intensifying the risk of abuse. It also critiques the Kedar Nath Singh judgment, which upheld the constitutionality of sedition laws, as outdated and incompatible with contemporary constitutional standards such as the Test of Proportionality and the New Doctrine under Article 14. This judgment is increasingly irrelevant in the face of modern legal principles. In response, it offers reformative suggestions tailored to current Indian realities, aiming to balance national security with fundamental freedoms.*

[±] Shraddha Mall is a 4th year B.A. LL.B. Student at Institute of Law, Nirma University, Ahmedabad

[±] Shantanu Singh is a 4th year B.A. LL.B. Student at Dr. Ram Manohar Lohiya National Law University, Lucknow.

I. Introduction

The Rajasthan High Court in *Tajender Pal Singh v. State of Rajasthan*[1] made an insightful observation, stating, "*Section 152 BNS has its genesis to section 124A (sedition) of repealed IPC*." To the court it *prima facie* appears a reintroduction of section 124A (sedition) under a different name. Most striking is the court's cautionary note: "*one must stay mindful that the provision is used as a shield for national security and not a sword against legitimate dissent*."

"*The laws in their current form will be used as a pretext to violate the rights of all those who dare speak truth to power*" was the bold statement given by Amnesty International India's chair, Aakar Patel, while commenting on the implementation of new Criminal Laws. Patel, apprehensive of the newer form of Sedition Law, stated that the new Indian laws reintroduce and expand on previous sedition regulations, despite claims of their removal, criminalizing acts that endanger the nation's sovereignty, unity, and integrity. He hints that the new laws are not in line with international human rights standards and fears that they could be used to curb dissent in the country.[2]

Home Minister Amit Shah, on the other hand, stated in the Lok Sabha that the new Bill was such that the sedition law *"will be completely repealed.*"[3] Further, Shah hailed "*[its aim to] provide justice, not to punish*."[4] However, former Supreme Court Justice Madan B. Lokur said that Section 152 of Bharatiya Nyaya Sanhita (BNS)[5] is no different than

[1] Tajinder Pal Singh v. State of Rajasthan, [2024:RJ-JD:34845].
[2] Amnesty International, (2024, July 01), *India: Authorities must immediately repeal repressive new criminal laws,* https://www.amnesty.org/en/latest/news/2024/07/the-laws-in-their-current-form-will-be-used-as-pretext-to-violate-the-rights-of-all-those-who-dare-speak-truth-to-power/.
[3] India Today, (2023, August 11), *Sedition law to be scrapped, says Amit Shah, punishment enhanced in new provisions* https://www.indiatoday.in/law-today/story/sedition-law-repeal-amit-shah-parliament-indian-criminal-laws-overhaul-2419568-2023-08-11.
[4] Ministry of Home Affairs, (2024, July 01), *Press Release*, https://pib.gov.in/PressReleaseIframePage.aspx?PRID=2030088.
[5] Bharatiya Nyaya Sanhita, 2023, §152.

earlier sedition laws under repealed Indian Penal Code (IPC).[6] The new criminal laws are old wine in new bottles, doing little to separate India from its colonial past.[7] It persists to be retributive and perpetrator centric. Hence, the government's claim of upending the colonial inheritance within the criminal legal framework through these acts lacks merit.

The Supreme Court of India, in *Shreya Singhal v. Union of India,*[8] itself concluded that when it comes to democracy, liberty of thought and expression is a cardinal value that is of paramount significance under our constitutional scheme. Following the same principle, Supreme Court, in *S.G. Vombatkere v. Union of India,*[9] put an indefinite stay on the usage of Section 124A of IPC.[10] It was decided to keep all the trials, appeals and proceedings under Section 124A in abeyance until such time as further directions are issued in this regard. The government on one hand claims that the sedition law has been repealed. However, in reality, even in the reference tables provided to police forces, there exists no Section adjacent to 124A IPC, which purports that the law has not been retained.[11] Section 152 of BNS is in pith and substance same as section 124A IPC.[12] The names are different, but they are the same and one.

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[6] Srishti Lakhotia, *Sedition Law has not changed with BNS: Justice Lokur*, (August 13, 2024) https://timesofindia.indiatimes.com/city/kolkata/justice-lokur-highlights-sedition-law-and-prison-reform-in-india/articleshow/112478780.cms#:~:text=Section%20150%20of%20Bharatiya%20Nyaya%20Sanhita%20was%20no%20different%20from%20the%20earlier%20sedition%20law%2C%20retired%20Supreme%20Court%20judge%20Justice%20Madan%20B%20Lokur%20said%20on%20Monday.

[7] Mira Patel, *The colonial history of the Indian Penal Code and how its influence extends to the BNS, (*July 12, 2024) https://indianexpress.com/article/research/the-colonial-history-of-the-indian-penal-code-and-how-its-influence-extends-to-the-bns-9448954/.

[8] Shreya Singhal v. Union of India, (2015) 5 SCC 1, at 8.

[9] S.G. Vombatkere v. Union of India, (2022) 7 SCC 433.

[10] Indian Penal Code, 1860, § 124A.

[11]UP Police, *Corresponding Section Table Of Bharatiya Nyaya Sanhita 2023, (BNS),* https://uppolice.gov.in/site/writereaddata/siteContent/Three%20New%20Major%20Acts/202406281710564823BNS_IPC_Comparative.pdf.

[12] Shrushti Taori & Tatva Damania, (2024, June 02), *Balancing Free Speech And National Security: A Critical Analysis Of Section 152 Of The Bhartiya Nyaya Sanhita And Section 124-A Of The IPC*, https://www.livelaw.in/lawschool/articles/balancing-free-speech-national-security-critical-analysis-section-152-bhartiya-nyaya-sanhita-section-124-a-ipc-259465#:~:text=Even%20though%20the,the%20different%20name.

This paper focuses on how sedition laws used by the government of democratic India are similar to those used by colonial rulers i.e., to suppress dissenting opinions of individuals. The literature review section of the paper deals with different viewpoints with regard to sedition law. We then trace the origin and aim of sedition law, identify the main issue with the newly enacted Section 152 of BNS, and argue that the sedition law does not survive the newfound tests of constitutionality, and make recommendations in light of recent developments.

II. Literature Review

The law of sedition has been a subject of controversy for centuries.[13] There exist three viewpoints with regards to the fate of Sedition. First, the pro sedition outlook that supports the existence of the law in its pure form. Second viewpoint rallies for the abolition of the law. Third one provides for the existence of the law, but with a very narrow scope for enforcement. It is indispensable for us to deal with the flaws and virtues of each of these viewpoints.

In a piece titled "*A Case in Support of Retaining Section 124A*"[14] author Prabhat Singh argues that the law against sedition is requisite for a government to safeguard itself from subversion. The author further argues that the law is a reasonable restriction that prevents speeches that have serious implications on the security of the state. Similar was the dissenting opinion of Justice Fazl Ali in the case of *Brij Bhushan & Ors v. State of Delhi,*[15] where he held sedition to be an offence against the public tranquillity[16], and hence a viable restriction under article 19(2). In this paper, we argue that sedition is not the sole tool with the government to curb violence against the state,[17] and though it is

[13] Geoffrey R. Stone, Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism (WW Norton, 2004).
[14] Prabhat Singh, *A Case in Support of Retaining Section 124A*, RMLNLU Law Review Blog https://rmlnlulawreview.com/2022/07/24/needforseditionlaw/.
[15] Brij Bhushan v. State of Delhi, 1950 SCC 449
[16] Brij Bhushan v. State of Delhi, 1950 SCC 449, at 460.
[17] Law Commission of England and Wales, Working Paper No. 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), 41.

purported to be a shield against a greater evil,[18] it is a broadsword used for the massacre of dissenting opinions.

Nivedita Saksena and Siddhartha Srivastava in their paper titled "*An Analysis of the Modern Offence of Sedition*" argue that a law against sedition could not be brought out of the pit of vagueness, and due to its undefinable boundaries, it has a chilling effect on freedom of expression.[19] They further argue that the provision is unnecessary given the availability of other laws which could be efficiently employed for curbing acts that constitute sedition. This paper finds merit in the argument, and holds Section 152 BNS, to be violative of fundamental rights due to its arbitrariness and vagueness.

Gautam Bhatia, in his book, "*Offend, Shock, or Disturb: Free Speech under the Indian Constitution*"[20] calls for narrowing of the scope of sedition, restricting it to cases where the threat of incitement to violence is imminent, as postulated in the case of *Brandenburg v. Ohio*.[21] As the subjectivity of the word 'imminent' could still leave space for ungenuine application, this paper, in an attempt to alleviate the same, suggests the requirement of a well-reasoned permission from the Government for registering FIR, along with the application being limited to cases of incitement of imminent violence.

III. Origin and Aim of Sedition

Rulers of England saw the printing press as a threat to their authority in the 13th century. Series of measures were used to control the press, which included acts considered *Scandalum Magnatus* and the offence of Treason. *Scandalum Magnatus* created the offence of defamation, making it illegal to spread 'false news,' either spoken or written, about the monarch. In addition, a person would become guilty of the offence of Treason

[18] 65th Cong, 2d Sess, in 56 Cong Rec S 4783 (Apr 8, 1918).
[19] Nivedita Saksena & Siddhartha Srivastava, *'An Analysis of the Modern Offence of Sedition'* (2014) 7 NUJS L Rev 121.
[20] Gautam Bhatia, Offend, Shock, or Disturb: Free Speech under the Indian Constitution (OUP India, 2016).
[21] Brandenburg v. Ohio, 395 U.S. 444 (1969).

if they committed an act that was detrimental to the interests of the rulers. The scope of this offence was expanded from requiring only *overt act* to including speech as constituting treason. This was known as constructive treason.[22]

The rulers failed to curb expressions of undesirable opinion despite implementing the above-mentioned measures. The offence of *Scandalum Magnatum* acknowledged 'expression of fact' and truth as valid defences. Moreover, the offence of treason had several safeguards, including exclusive jurisdiction by common law courts. Further, a procedure was required for securing an indictment before a trial by the jury. In the beginning, it was difficult to secure conviction due to the prerequisite of an *overt act.* However, after the scope of the offence was widened, by including speech to crime, this defence was unavailable. Hence, the offence of seditious libel was developed in court of Star Chamber to overcome such procedural and substantive obstacles.[23]

Sedition law or section 124A IPC was first included in Macaulay's Draft under Section 113 of Penal Code 1837. It was due to an oversight that Sedition was omitted from the IPC, as noted by James Stephens.[24] However, it was not on whim that the British decided to bring Sedition in India. The need was felt during the revolt of 1857. During the Revolt, the British Government in India enacted the State Offence Act,[25] to counter any offence against the state, without clearly stating what these offences were. The need for the law against offence of Sedition was again felt during the Wahabi Movement,[26] which aimed at establishing an Islamic state. The British Treason Felony Act of 1848[27] was deemed to be excessively harsh for dealing with seditious activities, as it provided for

[22] William T. Mayton, Seditious Libel and a Lost Guarantee of a Freedom of expression, 84 Column. L. Rev. 92 (1984).
[23] Mayton, Seditious Libel and a Lost Guarantee of a Freedom of expression (1984).
[24] Walter Russell Donogh, *A Treatise on the Law of Sedition and Cognate Offences in British India*, Thacker, Spink & Co., (1911).
[25] State Offence Act, 1857.
[26] Tariq Ahmad, *Sedition Law in India*, Library of Congress (October 1, 2012) https://blogs.loc.gov/law/2012/10/sedition-law-in-india/.
[27] Treason Felony Act, 1848.

punishment of transportation for life for the mere thought of seditious activity against the British Crown. The inadequacy of the laws to properly curb acts against the state aimed at bringing it into contempt proved to be the final push towards enactment of section 124A.[28]

Sedition law had been liberally put to use during Indian National Movement, claiming as its victims the stalwarts like Mahatma Gandhi and Bal Gangadhar Tilak.[29] Even after attaining independence in 1947, Section 124A IPC continued to be in operation. The right of freedom of speech and expression was rampantly curbed by means of this provision, despite Constituent Assembly expressly rejecting it as a ground for limiting such fundamental right.[30]

The Supreme Court gave guidelines for proper implementation of the law in the case of *Kedar Nath Singh v. State of Bihar,*[31] while holding it to be constitutional. The rationale for upholding erstwhile section 124A valid does not stand with the newfound standards of civil liberties in India, as discussed later in the paper. While learning the background of sedition law it becomes clear that it was introduced in India to suppress any dissenting opinion against the colonial government which had the potential to threaten their rule in India.[32]

IV. Contemporary Issue

Section 152 BNS primarily targets the criminalisation of **"***acts endangering sovereignty unity and integrity of India,***"** specifically addressing *secessionism, separatism, and a*

[28] Chitranshul Sinha, *The Great Repression: The Story of Sedition in India* 47 (Penguin Random House, India, 2019).
[29] EPW Engage, *Sedition in India: Colonial Legacy, Misuse and Effect on Free Speech,* available at /engage/article/sedition-india-colonial-legacy-misuse-and-effect.
[30] Constitutional Assembly Debates, December 7, 1948, speech by S.H. Singh, available at http://164.100.47.132/LssNew/constituent/vol7p21.pdf.
[31] Kedar Nath Singh v. State of Bihar, 1962 SCC OnLine SC 6, at 26.
[32] Tanu Kapoor, *Sedition Law: A comparative view in India with other countries,* 6 International Journal of Law 61-65 (2020).

call for armed rebellion. Though terms like "*contempt*" or "*hatred*" against the Government of India have been omitted, it still retains the essence of the previous sedition law i.e., Section 124A of IPC.

Gist of section 124A IPC is '*that the offence of "sedition" is incitement to violence or the tendency or the intention to create public disorder by words spoken or written, which have the tendency or the effect of bringing the Government established by law into hatred or contempt or creating disaffection in the sense of disloyalty to the State.*[33] Numerous instances mentioned further in this article show the rampant misuse of vague terms like *disaffection*, *hatred*, or *contempt* for pruning freedom of speech and expression. The law was sent into abeyance by the Supreme Court of India in the case of, *S.G. Vombatkere v. Union of India,*[34] in which it considered the misuse of sedition law.

In *Tajinder Pal Singh v. State of Rajasthan,*[35] the High court rightly pointed out that though the offence of sedition under section 124A of IPC has been abolished, but lawmakers in the Parliament have reintroduced it as a new provision under Section 152 BNS, which is similarly worded. It seems like a strategic rebranding of an outdated and controversial law. Furthermore, the reliance of court on the jurisprudence of the repealed Section 124A to interpret Section 152 BNS suggests that, despite the legal changes, the essence of sedition law remains intact.

Section 152 BNS retains the traditional methods of committing sedition, such as through "*words, either spoken or written, or by signs, or by visual representation*" while introducing new methods like "*electronic communication*" and "*financial means*." In contrast, the IPC Section 152 does not provide clarifications on the scope of financial

[33] Kapoor, *Sedition Law: A comparative view in India with other countries* 25 (2020).
[34] S.G. Vombatkere v. Union of India, (2022) 7 SCC 433.
[35] Tajinder Pal Singh v. State of Rajasthan, [2024:RJ-JD:34845].

assistance that would be considered while utilizing "*financial means*" to commit the offense.[36]

Moreover, insertion of the phrase **"***endangering sovereignty, unity and integrity of India***"** under this section has further widened the ambit of interpretation and created a fertile ground for its misuse. The absence of a clear list of activities or illustrations that fall within its purview grant significant discretion to authorities in determining what may constitute sedition under this provision. This could lead to the abuse of charges.[37] Further, Section 124A IPC considers the government as a separate entity while Section 152 BNS broadens the offense by considering nation which is an abstract idea, difficult to define affecting the threshold of harm required to constitute sedition.[38] Furthermore, instead of requiring incitement to violence or disruption to public order as prerequisites for invoking the charges, the proposed Section 152 continues to criminalise any act that **"***excites or attempts to excite***"** secessionist activities or "*encourages feelings of separatist activities*." The law has been given a new face, but in truth, it is an upgraded version of section 124A IPC.

In *Tajinder Pal Singh*, the court highlighted its dilemma regarding which of these two provisions i.e., the one repealed (sedition) or the one reintroduced is more stringent. Punishment for Sedition under IPC was either life imprisonment or imprisonment which could extend up to 3 years. BNS has increased the range of punishment to life imprisonment or imprisonment which could extend up to 7 years. While Shah stated

[36] Project 39A, (2023, September), *Criminal Law Bills 2023 Decoded #8: Sedition, Recast – Implications of Clause 150 of the BNS 2023*, P39A Criminal Law Blog.
[37] Chandni Chandel, *Old Sedition law Vs new Bharatiya Nyaya Sanhita (Bill), 2023 –What's the difference?* The Statesman (August 12, 2023) https://www.thestatesman.com/india/old-sedition-law-vs-new-bharatiya-nyaya-sanhita-bill-2023-whats-the-difference-1503211007.html.
[38] Project 39A, (2023, September), *Criminal Law Bills 2023 Decoded #8: Sedition, Recast – Implications of Clause 150 of the BNS 2023*, P39A Criminal Law Blog.

that the aim will be to provide justice and not to punish[39], this Section not only gives an expansive scope to the erstwhile "*Sedition*" law but also an enhanced punishment.[40]

V. Ungenuine Application of Sedition Law

Jayshree Bajoria, co-writer of a Human Rights Watch Report on **"**Stifling Dissent**"**[41] in India says, "*The charges of sedition have rarely stuck in most of the cases, but the process itself becomes the punishment*."[42] Genuine use of provision is not to be expected but enforced and regulated by legislature and judiciary. While *Kedar Nath Singh* judgement provided guidelines for using the law, it still left room for misuse. Further paragraphs deal with instances of sedition law being used against the constitutional spirit.

According to a NCRB study, sedition charges increased by 160% between 2016 and 2019. However, the conviction rate fell dramatically, from 33.3% in 2016 to only 3.3% in 2019. Twenty-one cases were closed owing to "*insufficient evidence*" or "*lack of clues*," while two were considered "*false*." Also, six cases were identified as legal conflicts based on the final police reports[43]. The NCRB report clearly depicts that the popular transient state authorities throw dissenters under the teeth of 124A.

Protests are the most important means of expressing dissatisfaction with the government's policies. It is a right protected by the Constitution under Article 19. Anything that restricts or even discourages the freedom to protest must be carefully

[39] Press Release, Press Information Bureau (July 01, 2024) pib.gov.in/PressReleaseIframePage.aspx?PRID=2030088

[40] Ashima Obhan & Manasi Singh, *Changes In Law Pertaining To Sedition, Defamation And Inciting Religious And Communal Disharmony,* Mondaq, *(*July 18, 2024) available at https://www.mondaq.com/india/libel-defamation/1494090/

[41]Human Rights Watch, *Stifling Dissent The Criminalization of Peaceful Expression in India*, (May 2016), available at india0516.pdf (hrw.org)

[42] *Why India needs to get rid of its sedition law, (*August 29, 2016) BBC, https://www.bbc.com/news/world-asia-india-37182206#:~:text=%22The%20charges%20have,in%20India.

[43] Rahul Tripathi, *Arrests under sedition charges rise but conviction falls to 3%,* Economic Times, (February 17, 2021) https://economictimes.indiatimes.com/news/politics-and-nation/arrests-under-sedition-charges-rise-but-conviction-falls-to-3/articleshow/81028501.cms?from=mdr.

scrutinized in the light of constitutional standards. Unfortunately, this is not the case. During the anti-CAA protests, police filed 25 sedition cases against 3,754 people, of which only 96 were identified and the remainder were "*unidentified.*[44]

In India, there have been instances[45] which show people being charged with sedition without its essential ingredients being fulfilled and their convictions being consequently set aside, bail granted, or acquittal rendered. Instances such as persons convicted for listening to cassettes inculcating speeches of seditious nature,[46] seven youth charged with sedition in Kerala for refusing to stand up during national anthem at movie theatre,[47] 60 Kashmiri students charged for cheering for Pakistan in a cricket match against India,[48] cartoonist Aseem Trivedi charged with sedition by accusing his cartoons of mocking the Indian Parliament and the National Emblem,[49] S.A.R. Geelani charged with sedition for organizing an event where anti-national slogans were made including calls for independence of Kashmir state,[50] folk singer S. Kovan arrested under the sedition law for two songs that criticized the state government for allegedly profiting from state-run liquor shops at the expense of the poor,[51] thousands of protestors campaigning against construction of Kudankulam Nuclear Plant held for "*waging war*

[44]Abhishek Hari, *Explainer: How the Sedition Law Has Been Used in the Modi Era,* The Wire, (May 11 2022) https://thewire.in/law/explainer-how-the-sedition-law-has-been-used-in-the-modi-era#google_vignette.
[45] Human Rights Watch, *Stifling Dissent The Criminalization of Peaceful Expression in India*, (May 2016), available at india0516.pdf (hrw.org).
[46] Balbir Singh v. State of U.P., (1999) 5 SCC 682.
[47] *High Court bail to youth facing sedition,* Times of India (September 23, 2014) http://timesofindia.indiatimes.com/city/kochi/High-court-bail-to-youth-held-for-sedition/articleshow/43189878.cms.
[48] Sandeep Rai, *Kashmiri students charged with sedition, freed after controversy erupts,* Times of India (March 07, 2014) https://timesofindia.indiatimes.com/india/kashmiri-students-charged-with-sedition-freed-after-controversy-erupts/articleshow/31553407.cms.
[49] Saurabh Gupta*, Aseem Trivedi's Cartoons Didn't Incite Violence, Says Bombay High Court on Sedition Charges*, NDTV (March 18, 2015) available at https://www.ndtv.com/india-news/aseem-trivedis-cartoons-didnt-incite-violence-says-bombay-high-court-on-sedition-charges-747471.
[50] Kaunain Sheriff M, *DU professor Geelani gets bail: 'Keeping him in Tihar has no fruitful purpose*, IndianExpress (March 20, 2016) http://indianexpress.com/article/india/india-news-india/sar-geelani-bail-sedition-delhi-university-afzal-guru event/.
[51] The Hindu, SC dismisses TN govt's plea for police custody of Kovan, The Hindu (November 30, 2015) http://www.thehindu.com/news/national/sc-dismisses-tn-govts-plea-for-police-custody-of-kovan/article7932967.ece.

against the state" and sedition,[52] student leader Kanhaiya Kumararrested and charged with sedition for allegedly shouting anti-India slogans, etc. are a common occurrence in the country.

In the recent case of *Vinod Dua v. Union of India,*[53] the Petitioner was a journalist who was charged with Sedition for speaking against Prime Minister Narendra Modi and the Central Government on his YouTube show. However, the Supreme Court quashed the FIR lodged against the Petitioner. It upheld the right of citizens to criticize the government. In the case of *State v. Disha A. Ravi,*[54] the accused was a climate change activist who was charged with sedition for her involvement with an online toolkit related to Greta Thunberg during Indian farmers protest. However, she was released by the court on the ground of lack of evidence to prove that she was connected to the Khalistani separatists. Sedition law has no clear boundaries, and it suffers from the vice of vagueness,[55] leaving room for interpretation.[56] Due to its vague meaning, sedition law is used bogusly by the police to unjustly charge people.[57] Shockingly, the vagueness is so preposterous that it is used as tool to further caste discrimination.[58] The law is used at the whim of the authorities, and the charges seldom stick.[59]

[52] "*Report of the Fact-Finding team's visit to Idinthakarai and other villages on September 20-21, 2012,"* September 26, 2012, http://www.countercurrents.org/koodankulam260912.pdf.
[53] Vinod Dua v. Union of India, 2021 W.P. (Crl.) 154/2020.
[54] State v. Disha A. Ravi, 2021 W.P. (Cri.) 2297/2021.
[55] Project 39A, (2023, September), *Criminal Law Bills 2023 Decoded #8: Sedition, Recast – Implications of Clause 150 of the BNS 2023*, ,P39A Criminal Law Blog.
[56] Law Commission of India, Usage of the Law of Sedition, Report No.279, 77 (April, 2023).
[57] Observer Research Foundation, *Sedition law: A threat to Indian democracy*? (July, 2021), available at https://www.orfonline.org/expert-speak/sedition-law-threat-indian-democracy.
[58] EPW Engage, Sedition in India: Colonial Legacy, Misuse and Effect on Free Speech, (February, 2021) https://www.epw.in/engage/article/sedition-india-colonial-legacy-misuse-and-effect.
[59] Rahul Tripathi, *Arrests under sedition charges rise but conviction falls to 3%,* Economic Times (February 17, 2021) https://economictimes.indiatimes.com/news/politics-and-nation/arrests-under-sedition-charges-rise-but-conviction-falls-to-3/articleshow/81028501.cms?from=mdr.

Such instances lead us to conclude that despite attempts at narrowing the scope of sedition laws, the same are ignored to silence dissenting voices. The broad scope[60] of terms used in Section 152 of the BNS could lead to an even greater potential for misuse, creating fertile ground for wrongful or ingenuine application of the sedition law.

VI. Sedition Law and Constitutional Conundrums

Debate over the validity of sedition laws in presence of the constitutional sieve has been around since the dawn of independence[61] and even before the trumpets of freedom were rung, there was constant criticism of this abhorrent and manifestly arbitrary law.[62] This law both passively[63] and actively limits the right to freedom of speech and expression of citizens in the "*Democratic Republic*" of India. Active Limitations are the prosecutions and charges of sedition being pressed on those criticizing the government or their policies. Passive limitations include engendering avoidance of speech and expression by the public, which would have been otherwise made but for the fear of being swept under the law of sedition. The court of law might absolve those charged with sedition, but the initial prosecution creates enough deterrence for others.

[60] Chandni Chandel, *Old Sedition law Vs new Bharatiya Nyaya Sanhita (Bill), 2023 –What's the difference?,* The Statesman (August 12, 2023) https://www.thestatesman.com/india/old-sedition-law-vs-new-bharatiya-nyaya-sanhita-bill-2023-whats-the-difference-1503211007.html.

[61] Ankesh, *The origins and validity of Sedition Law in India*, Manupatra (Apr 16, 2024), https://articles.manupatra.com/article-details/The-origins-and-validity-of-Sedition-Law-in-India#:~:text=This%20moment%20was,speech%20and%20expression.

[62] Shariq Us Sabah, *Sedition Law: Crushing Dissent in India since 1833*, Citizens for Justice and Peace (September 07, 2018) https://cjp.org.in/sedition-law-crushing-dissent-in-india-since1833/#:~:text=Various%20leaders%20like%C2%A0Mahatma%20Gandhi%2C%20B.G.%20Tilak%20were%20charged%20with%20sedition.%20In%20the%20response%20of%20the%20charges%2C%20Mahatma%20Gandhi%20had%20said%2C%C2%A0%E2%80%9CSection%20124A%20under%20which%20I%20am%20happily%20charged%20is%20perhaps%20the%20prince%20among%20the%20political%20sections%20of%20the%20IPC%20designed%20to%20suppress%20the%20liberty%20of%20the%20citizen.%E2%80%9D.

[63] Human Rights Watch, *Stifling Dissent The Criminalization of Peaceful Expression in India*, 01, (May 2016), available at india0516.pdf (hrw.org).

The law has been misused rampantly, violating India's commitments to International Covenant on Civil and Political Rights (ICCPR),[64] Article 19 of which stipulates that freedom of expression is an innate right of every human being which should not be interfered with. It provides conditions necessary for curbing the right of free speech and expression. Article 19(3) of ICCPR holds that for limiting freedom of expression, the restriction should "(*a) be provided by law*; and (b) *satisfy the test of necessity in art 19(3)."*[65] The necessity of sedition, with such manifest prohibition, and existence of other penal laws, which efficiently counter offences constituting sedition, is a question much pondered upon. Alas, this pondering has not resulted in much change in the Indian scenario.

The mother of our state machinery, the Constitution of India itself provides for the Fundamental Right of Freedom of Speech and Expression under article 19(1)(a). There also exist conditions entitling the state to restrict free speech, but it is a balanced equation, and the right must not be curbed at the whim of the state. The law is justified citing article 19(2) of Constitution,[66] where it is stipulated that reasonable restrictions on freedom of speech and expression might be put *in interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence*.

The Supreme Court, in Kedarnath Singh[67], held the law to be constitutional and protected by the reasonable restriction under clause (2) of article 19, opining that it '*strikes the correct balance between individual fundamental rights and the interest of*

[64] *Sedition Law in India*, Free Law (September 14, 2022) available at https://www.freelaw.in/legalarticles/Sedition--Law-in--India#:~:text=The%20International%20Covenant%20on%20Civil%20and%20Political%20Rights%20(ICCPR)%2C%20which%20establishes,provisions%20that%20penalize%20%E2%80%9Cdisrupting%20the%20public%20order%E2%80%9D%20or%20%E2%80%9Coverthrowing%20the%20government.
[65] Australian Law Reform Commission, *Review of Sedition Laws,* Discussion Paper 71, 88 (May 2006).
[66] The Constitution of India, 1950, Art. 19(2).
[67] Kedar Nath Singh v. State of Bihar, 1962 SCC OnLine SC 6, at 26.

public order.' They also restricted it to instances where individuals through their speech and expression disrupt the law or provoke and incite violence. As apparent from the above instances of ungenuine use, not much has changed.[68] This continuous misuse was finally halted by the Supreme Court, in the *S.G. Vombatkere*[69] case, which put a stay on all Sedition proceedings and use of sedition law. Further, the Union of India was asked to issue directions to prevent misuse of the sedition law[70].

Although Section 124A of the Indian Penal Code is not reproduced verbatim as Section 152 of Bharatiya Nyaya Sanhita, the essence of the law, as discussed above remains the same. In *Tajinder Pal,*[71] even the Rajasthan High Court highlighted that section 152 of BNS finds origin in the erstwhile Sedition provision and that it is similarly worded. The court also utilised precedents on Section 124A to decide the case at hand but failed to consider that Sedition was sent into abeyance by the Supreme Court vide *SG Vombatkere*.

In *Bengal Immunity Co. v State of Bihar,*[72] it was held that if a law is re-enacted in the same words, the judicial precedents of the original provision remain binding. The legislature has overruled the order of the Apex Court in *SG Vombatkere* which necessitated issuance of guidelines to prevent misuse of Sedition, by enacting Section 152 of BNS. The vices of Section 124A have only been aggravated, which amount to overruling the judgment by a legislative fiat which is invalid.[73] Hence, the scope of *Bengal Immunity* case should be broadened to make binding precedents of original provision on similarly re-enacted law. This would prevent the legislature from invalidly

[68] Ananya Kuthiala, *Sedition and the Right to Freedom of Speech and Expression,* SCC OnLine (December 12, 2017) https://www.scconline.com/blog/post/2017/12/12/sedition-right-freedom-speech-expression/#_ftn7:~:text=Thus%2C%20prevailing%20present%20day%20practices%20are%20not%20in%20accordance%20with%20the%20judicial%20intention%20at%20the%20time%20of%20articulation%20of%20the%20Kedar%20Nath%20judgment.
[69] S.G. Vombatkere v. Union of India, (2022) 7 SCC 433.
[70] S.G. Vombatkere v. Union of India, (2022) 7 SCC 433, at 5.
[71] Tajinder Pal Singh v. State of Rajasthan, [2024:RJ-JD:34845].
[72] Bengal Immunity Co. v. State of Bihar, 1955 INSC 36.
[73] Baharul Islam v. Indian Medical Association, 2023 LiveLaw (SC) 57.

overruling the decisions of the court by re-enacting provisions and simply rephrasing them. Thus, the order putting a stay on all Sedition proceedings in *SG Vombatkere* should be made applicable on Section 152 of BNS.

The standard threshold of constitutionality of laws curbing Fundamental Rights have, since *Kedarnath Singh*, been raised so as to broaden the scope of these rights. The test of proportionality propounded in *Puttaswamy* judgement and test of arbitrariness are two major developments countering legislations against Fundamental rights. These newfound standards call for a reconsideration of the Sedition law.

VII. Test of Proportionality

The Test of Proportionality lays down the essentials which limit the discretion of State in hedging Fundamentals rights. These essentials state that the law so brought 'must be necessary in a democratic society for a legitimate aim, it must be proportionate to the need for such interference and there must be procedural guarantees against the abuse of such interference.'[74]

Sedition law is not necessary in a democratic society because other laws, not prone to rampant misuse, exist which are sufficient for dealing with seditious activities. The British Law Commission in its 1977 Working Paper[75] suggested repealing Sedition law as it could encroach upon the political rights of the citizens. It also stated that common law offences of Conspiracy, Abetment, Attempt, Unlawful Assembly, and Incitement would suffice in penalising acts constituting the offence of Sedition. In India, allowing the blatant misuse and arbitrary implementation of Sedition law, when we have other laws to deal with seditious acts, is an unaccountable exercise.

The law is disproportionate as its aim is now redundant while it still puts a spear through the shield of Fundamental rights. Sedition was brought in colonial India to silence

[74] K.S. Puttaswamy (Privacy-9J.) v. Union of India, (2017) 10 SCC, 638.
[75] Law Commission of England and Wales, Working Paper No. 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), 41.

voices against the Imperial government, so that their authority remains unchallenged. Independence rid us of such autocratic rulers and established efficient democracy, where questioning the government is of vital importance. The question of proportionality presumes advantages and disadvantages of a certain law. Advantageousness of a law could only be measured if it has a valid purpose to which it actually contributes. But the law of Sedition or the re-enactment of the same under Section 152, BNS, serves no real purpose in India, other than being a tool of oppression. Thus, the disadvantages of this law are far heavier than the vacuum of advantages that it provides, thereby rendering it disproportionate.

Sedition is put to misuse, more often than not.[76] This clearly means that enough safeguards are lacking. Even the Law Commission of India, in its 279th report titled 'Usage of The Law of Sedition', primarily recommended that there should be procedural safeguards against abuse of Sedition Law before filing of FIR.[77]

Further, in *Gujarat Mazdoor Sabha v State of Gujarat,*[78] court added the fifth prong to the test of proportionality which stipulates that '*the State should provide sufficient safeguards against the abuse of such interference.'* This fifth prong was used in the case of *Ramesh Chandra Sharma v State of Uttar Pradesh,*[79] where it was held that wide and vague provisions that pose a threat to Fundamental Rights must be enacted through guidelines brought into the delicate balance of constitutionality. There exists a vast potential of abuse under Section 152 due to its broad worded provisions, and with no guidelines in this regard, the law is violative of the fifth prong as well. Hence, sedition fails the test of proportionality and legitimacy and is, thereby unconstitutional.

[76] Prasanna S, *Why sedition law has lost meaning,* IndianExpress *(*September 14, 2019) https://indianexpress.com/article/opinion/columns/why-sedition-law-has-lost-meaning-supreme-court-democracy-5993643/.
[77] Law Commission of India, Usage of the Law of Sedition, Report No.279, 77 (April, 2023).
[78] Gujarat Mazdoor Sabha v. State of Gujarat, (2020) 10 SCC 459.
[79] Ramesh Chandra Sharma & Ors. v. State of UP & Ors., [2023] 2 S.C.R. 422, 51.

VIII. Test of Arbitrariness

Further, the arbitrary nature of Sedition law was not considered by the Supreme Court in 1962[80] as the new doctrine[81] under Article 14 had not yet been postulated. Arbitrariness of sedition is manifest in the rampant use it is put to by transient governments.

In *Sharma Transport v. Govt. of A.P.*,[82] the Supreme Court discussed at length the application of the doctrine of arbitrariness. As to what would render a provision arbitrary, they held that '*in order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression 'arbitrarily' means in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.'* In *Shayara Bano* case[83], the Apex court held that a legislation is liable to be struck down if it is manifestly arbitrary, i.e., *'when it is not fair, not reasonable, discriminatory, not transparent, capricious, biased, with favouritism or nepotism and not in pursuit of promotion of healthy competition and equitable treatment. Positively speaking, it should conform to norms which are rational, informed with reason and guided by public interest, etc.'*

As discussed above, the law is used unreasonably to silence dissenters. Its vagueness allows it to be used capriciously, at pleasure and will, to bolster caste domination. The provision is not guided by public interest and is against the tenets of democracy. Hence, the law is manifestly arbitrary. It is thereby violative of Article 14, rendering it unconstitutional.

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[80] Padmakshi Sharma, *Sedition Law Challenge | Supreme Court Says 1962 Kedar Nath Singh Decision Didn't Consider Article 14 Aspect*, LiveLaw (September 16, 2023) https://livelaw-nlul.refread.com/top-stories/sedition-law-challenge-supreme-court-says-1962-kedar-nath-singh-decision-didnt-consider-article-14-aspect-237945?fromIpLogin=80504.76339186497.
[81] E.P. Royappa v. State of T.N., (1974) 4 SCC 3, 85.
[82] Sharma Transport v. Govt. of A.P., [2001] Supp. (5) S.C.R. 390.
[83] Shayara Bano v. Union of India and Ors., AIR 2017 SC 4609.

Instances of the ungenuine application of the above-mentioned law demonstrate that it is discriminatory, as it causes apprehension among, and is used against, people who protest, or are critical towards, government or their policies. This is called viewpoint discrimination.[84] Hence, the very existence of sedition is against the principles of equality under Article 14, which makes it unconstitutional. Sedition has been used at the whims of the state authorities to tread on dissenters. The possibility of future misuse of this law, now that it has been brought back with bigger teeth and sharper fangs, is palpable to the feeblest of minds. Hence, sedition, in its new attire, is in violation of the supreme law of the land and it should not be retained in the newly implemented criminal laws.

IX. Suggestions

Sedition should be read down from the Bhartiya Nyaya Sanhita as it is arbitrary and unconstitutional. Existence of the law which was used against those laying the foundation of independent India is a blemish on their legacy and the principles they stood for. The true aim of sedition law is safeguarding the unity and integrity of the nation, which could be efficiently guarded using other statutory provisions, as discussed above.

Even if the law is not abolished, it should be given a very narrow interpretation by the Constitutional Courts, so that it is only used in genuine cases, and not to bully citizens into silence. This has been done in the USA.[85] India should adopt the ratio of *Brandenburg v Ohio,*[86] where it was held that for laws criminalising advocacy of illegal conduct, there should be express advocacy of law violation, the advocacy must call for immediate law violation, and the law violation must be likely to occur. If sedition is

[84] Ivan Hare*, Method and Objectivity in Free Speech Adjudication: Lessons from America*, International and Comparative Law Quarterly, 54(1), 49–87 (2008). https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/abs/method-and-objectivity-in-free-speech-adjudication-lessons-from-america/0F5DAE25751ECFBC66ED265ACB4890B1.
[85] Brandenburg v. Ohio, 395 U.S. 444 (1969).
[86] Brandenburg v. Ohio, 395 U.S. 444 (1969).

interpreted in this light, the misuse will cease. Keeping the law narrow and creating accountability for its ungenuine use would deter authorities from misusing the law.

Following the Law Commission's recommendation,[87] amendments should be made to Section 173 of BNSS, which relates to the registration of FIR, so that the preliminary investigation is conducted to ensure the genuineness of the complaint. Based on the report submitted on such preliminary investigation, the Central Government, or the State Government, would sanction registration of FIR. This would ensure two things: firstly, that *prima facie* bogus cases of sedition are not made and secondly, that the State or Central Government would be held accountable, if they sanction cases not befitting the charge without applying their mind.

X. Conclusion

While the world moves towards a more liberal society, Bharat is circling around the abyss of repression and arbitrariness. Sedition is violative of Constitutional Rights and a weak link in the democracy of our nation. It should have been done away with, instead of giving it a wider ambit. It has no role to play in a democratic society and is antithesis to freedom of speech and expression. It is high time that the menace of this law be stopped, by abolishing it or giving it a narrow interpretation and putting in place necessary procedural safeguards. The sword of sedition falls on those who dare oppose the government and its policies and deters others. There is no need for such law in the "*Democratic Republic*" of Bharat, and this sword must be sheathed for ever.

[87] Law Commission of India, Usage of the Law of Sedition, Report No.279, 77 (April, 2023).

PLURALISTIC HERITAGE GOVERNANCE IN MAHARASHTRA: A CASE OF RAIGAD FORT CONSERVATION

Prajakta Divekar ±

Abstract: *This paper investigates how the state of Maharashtra fulfils its constitutional mandate for heritage conservation within a pluralistic legal and institutional framework. While the central government governs only the national monuments, Indian states like Maharashtra oversee a complex and often fragmented heritage landscape that includes state-protected monuments, World Heritage Sites, urban heritage, and vernacular sites. The paper traces the layered legal and administrative apparatus that shapes heritage governance in Maharashtra and highlights the influence of colonial-era laws, postcolonial federal dynamics, and the ontological politics of heritage. Through a detailed case study of Raigad Fort—recently inscribed as part of the Maratha Military Landscape World Heritage Site—the paper demonstrates how multiple institutions, including the Archaeological Survey of India, Directorate of Archaeology, Raigad Development Authority, district-level bodies, and grassroots collectives (Gad Premi), coexist and contest authority over heritage. The analysis reveals that heritage in Maharashtra is not only regulated and preserved through statutory means but is also continuously redefined through affective practices, local activism, and political mobilisation.*

± Prajakta Divekar is a Research Fellow at Humanities and Social Sciences Department, Indian Institute of Science Education and Research, Pune. This paper is based on a part of the author's ongoing doctoral research.

I. Introduction

In 1960, Maharashtra was created based on a primary unifying factor: its linguistic identity. However, its built heritage reflects a diverse cultural history, as manifested in an impressive array of heritage structures ranging from rock-cut temples and Buddhist caves to grand forts and colonial-era buildings. Today, the officially recognised built heritage in Maharashtra includes 7 World Heritage Sites, 286 Monuments of National Importance, 376 state-protected monuments, and hundreds of locally listed heritage sites under regional and urban planning frameworks.[1] These multiple categories of heritage coexist within a single geographical and political space but are governed by distinct legal regimes and administrative structures that often overlap and interact. While the state government has a dedicated law and institutional apparatus for managing state-protected monuments, it also plays a role in overseeing other categories of heritage sites through coordination with central or local authorities. Heritage governance at the state level thus operates within a complex and pluralistic legal and institutional framework.

This paper examines how the state of Maharashtra fulfils its constitutional mandate for heritage conservation within a pluralistic governance framework. It argues that this framework is shaped not only by the legacies of colonial-era legislation and the decentralising imperatives of postcolonial federalism but also by the ontological politics of heritage, as manifested through popular memory and affective vernacular heritage practices. Focusing on the ongoing conservation efforts at Raigad Fort, this paper explores how multi-scalar heritage governance functions in practice, revealing that

[1] The 7 World Heritage Sites in Maharashtra include six cultural and one natural site. These are, Ajanta Caves (1983), Ellora Caves (1983), Elephanta Caves (1987), Chhatrapati Shivaji Maharaj Terminus (formerly Victoria Terminus) (2004), Victorian Gothic and Art Deco Ensembles of Mumbai (2018) and Western Ghats (2012) in natural category. In 2025, the Maratha Military Landscapes of India became the sixth cultural World Heritage Site to be inscribed from Maharashtra. For a detailed list of World Heritage Sites in India visit https://whc.unesco.org/en/statesparties/in.

heritage is not merely regulated and preserved but also lived, contested, and continuously redefined by multiple actors.

II. Constitutional Framework

The Constitution of India offers two approaches to the governance of heritage that have shaped the governance framework in Maharashtra.[2] First, in the spirit of cooperative federalism, the Indian Constitution grants both central and state governments the power to independently and jointly legislate and execute heritage matters.[3] It thus distinguishes between two legal categories of heritage sites: monuments of national importance, to be protected and preserved by the central government, and state-protected monuments under the jurisdiction of individual states.

Further, national heritage protection is an *obligation* of the nation-state, implying that there is a hierarchy in heritage with national monuments being prioritised over other kinds of heritage.[4] While the central government solely controls national heritage, the states are responsible for protecting national monuments as well as preserving and managing their own state-protected heritage.

Second, the Constitution also roots principles regarding heritage in two key pillars: fundamental rights and duties. It empowers Indian citizens with the right to protect their unique cultural heritage,[5] while placing a responsibility on them to value and preserve

[2] Krishnan Mahajan. (2018). *Legally victimising national monuments: Role of Parliament, Union Government & Supreme Court*. Notion Press. This paper draws on Mahajan's (2018) formulation of two constitutional approaches to heritage- 'monuments-as-objects' and 'monuments-as-cultural heritage'. Mahajan argues that the central government, in its treatment of national monuments, has predominantly adopted an object-centric approach, viewing monuments as physical entities rather than shared cultural heritage. In contrast, this paper applies Mahajan's framework to the context of state-level heritage governance in Maharashtra, to demonstrate how the Indian Constitution allows for ontological pluralism, enabling diverse interpretations and practices that shape heritage governance at the state level.

[3] India Const., Schedule VII, List I, Union List, Entry 67; List II, State List, Entry 12; and List III, Concurrent List, Entry 40.

[4] India Const., Art. 49: "*It shall be the obligation of the state to protect every monument or place or object of artistic or historic interest, declared by or under law made by Parliament, to be of national importance, from spoilation, disfigurement, destruction, removal, disposal or export, as the case may be.*"

[5] India Const., Art. 29(1).

India's diversity in heritage.[6] These provisions, read along with Article 49, have expanded opportunities for non-state actors, such as community and civil society groups and citizens, to actively engage in safeguarding heritage. This form of social advocacy has played a crucial role in shaping state-level heritage governance frameworks. Maharashtra serves as a prime example of this, being the first Indian state to implement urban heritage regulations, including specific rules for hill stations. *Chainani* gives a detailed account since the 1970s of the sustained efforts by Mumbai-based civil society groups in lobbying with governments both at the centre and the state level to foster collaborative action for heritage, and the subsequent passing of the first urban heritage regulations in India.[7]

Constitutional principles, when translated into legal instruments at the state level, produce a governance framework for heritage that is both hierarchical in design and fragmented, revealing cracks in intergovernmental coordination. As seen in the case of Maharashtra, the state-level framework reflects negotiated approaches that must reconcile the demands of urbanisation, regional identities, and community participation.

III. Legal and Institutional Framework

At the apex of Maharashtra's legal hierarchy is the Central Ancient Monuments and Archaeological Sites and Remains (AMASR) Act of 1958 and the 1959 Rules that govern the national monuments within the state. This Act is a postcolonial reformulation of the colonial-era legislation: the Ancient Monuments Preservation Act of 1904. The Archaeological Survey of India (ASI), also a colonial era legacy now an attached office of the Ministry of Culture, is the principal implementing agency for national monuments. In Maharashtra, national monuments are managed by three ASI Regional Circles: Aurangabad (75 sites), Mumbai (117 sites), and Nagpur (94 sites). These

[6] India Const., Art. 51(a).
[7] Shyam Chainani. (2007). *Heritage and environment: An Indian diary*. Urban Design Research Institute.

Circles work in silos and seldom collaborate with the state archaeology department for conservation work.

Over time, urban expansion and infrastructure development pressures led to the Ancient Monuments and Archaeological Sites and Remains (Amendment and Validation) Act of 2010, which introduced prohibitory (100m) and regulatory (200m) zones around monuments and created the National Monuments Authority (NMA), a quasi-judicial body working alongside the ASI, tasked with overseeing development controls.

Despite having no jurisdiction over the national monuments, the state government, in line with its constitutional mandate, assists ASI in governance matters, including demarcation of buffer zones around national monuments and removal of encroachments. In 2024, the Maharashtra government assisted ASI in the removal of 2594 unauthorised constructions in prohibited and 1778 in regulatory zones around national monuments in the state.[8] It also plays a critical role in managing tourism, providing security, facilitating land acquisitions, assisting excavations, and implementing development initiatives around national monuments. Yet, despite this critical role, there has been little meaningful decentralisation or systematic coordination between the ASI and state governments. Multiple government reports have highlighted these shortcomings, calling attention to the ASI's operational limitations and the urgent need for reform.[9] Further, when juxtaposed with the governance of state-protected monuments, where resource constraints have prompted more adaptive mechanisms and negotiated practices, the deficits in intergovernmental coordination for national monuments become more apparent. The 376 state-protected monuments in Maharashtra are governed by the Maharashtra Ancient Monuments and Archaeological Sites and

[8] Ministry of Culture. (2024, December 12). *Re-Demarcation of Prohibited/Regulated Boundaries of Protected Monuments.* Press Information Bureau. https://www.pib.gov.in/PressReleseDetailm.aspx?PRID=2083767&reg=3&lang=2.

[9] NITI Aayog. (2020). *Working group report: Improving heritage management in India*. Government of India; Comptroller and Auditor General of India. (2013). *Report on performance audit of preservation and conservation of monuments and antiquities*. Government of India.

Remains Act (MAMASR Act) of 1960 and its 1962 Rules. This legislation was primarily enacted in reaction to the circumstances prevailing at the time of state formation, to manage monuments inherited from the princely state of Hyderabad and delisted national monuments that were under the repealed 1904 Act. It has not been substantively amended in over six decades.

The nodal agency for implementing the MAMASR Act is the Directorate of Archaeology and Museums, whose work is divided across six regional divisions: Ratnagiri, Nashik, Pune, Aurangabad, Nanded, and Nagpur. Unlike the ASI, the Directorate is not autonomous but functions under the state government's Department of Cultural Affairs, with limited decision-making authority and must seek approval and permission from the parent department for the initiation and execution of conservation projects. The Directorate is chronically understaffed, inadequately funded, and has limited conservation capacity.[10] The conservation activities of the Directorate often go beyond structural preservation, extending to multiple stakeholder facilitations, public-private partnerships, political negotiations, collaborations,[11] and conflict-resolution.[12]

To enhance the conservation efforts, the state government has introduced the public-private partnership (PPP) model for guardianship of monuments through schemes like the 2007 '*Maharashtra Vaibhav*- State Protected Monuments Conservation Scheme.' However, this initiative raises concerns about the privatisation of public heritage,[13] and

[10] Kulkarni, D. (2017, June 8). *Need funds to conduct excavations: Maharashtra's archaeology dept*. DNA India. https://www.dnaindia.com/india/report-need-funds-to-conduct-excavations-maha-s-archaeology-dept-2465084.; NDTV. (2019, December 10). *Maharashtra has only 80 watchmen to guard 375 heritage monuments: Report*. https://www.ndtv.com/india-news/maharashtra-has-only-80-watchmen-to-guard-375-protected-monuments-report-2146430.

[11] Sandeep Dighe. (2022, May 25). State govt allots ₹109cr for Jejuri temple upkeep. *The Times of India.* https://timesofindia.indiatimes.com/city/pune/state-govt-allots-109cr-for-jejuri-temple-upkeep/articleshow/91775956.cms.

[12] Solapur historians, State Archaeology Dept in clash over temple inscription. (2017, October 1). *Pune Mirror*.https://punemirror.com/others/solapur-historians-state-archaeology-dept-in-clash-over/cid5133239.htm#google_vignette.

[13] See Naldurga, Heritage. (2024, November 25). *Bombay Environmental Action Group.* https://beag.in/naldurg.

risks undermining state accountability and constitutional responsibility for long-term stewardship.[14]

Apart from national and state protected monuments, Maharashtra has designated World Heritage Sites (WHS) whose management adheres to rigorous international standards.[15] These sites are governed under existing multilevel legal and institutional frameworks, including international advisory bodies (e.g. ICOMOS), the ASI, the state government, and local municipal authorities.

While the World Heritage status enhances global visibility and provides an added layer of protection, it also introduces new governance challenges, such as managing tourism influxes, balancing international expectations with local realities, and integrating diverse stakeholders with conflicting interests.[16] The gap in capacity and coordination between different levels of government remains a persistent issue even in the case of WHS. Nonetheless, the international framework provides opportunities for reimaging heritage governance, as can be seen in the case of Raigad Fort Conservation, where World Heritage status has introduced new governance innovations that are causing a shift away from the traditional preservationist perspective embedded in the national and state frameworks to a more dynamic view of heritage that embraces transformations and community participation.

In parallel, Maharashtra has also pioneered urban heritage regulations through the Maharashtra Regional and Town Planning (MR&TP) Act of 1966, which provides for designating a distinct category of 'Listed' heritage sites and integrating heritage

[14] 2*8 monuments in district under adoption scheme*. (2022, July 21). *Deshdoot.*. https://deshdoot.com/28-monuments-in-district-under-adoption-scheme/.

[15] In 1977 India became a signatory to the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, also known as World Heritage Convention (WHC), Maharashtra's Ajanta and Ellora caves were among the first Indian sites to be recognized for their 'Outstanding Universal Value'. See https://whc.unesco.org/en/statesparties/in.

[16] Press Trust of India. (2025, January 7). *Tourist footfall decreases at Ellora, other ASI sites in Chhatrapati Sambhajinagar*. *Deccan Herald*. https://www.deccanherald.com/india/maharashtra/tourist-footfall-decreases-at-ellora-other-asi-sites-in-chhatrapati-sambhajinagar-3345072#google_vignette.

conservation into the urban and regional planning framework. In 1995, Mumbai became the first Indian city to offer legal protection for heritage sites. This was the result of a sustained civil society advocacy and protracted efforts by activists like Shyam Chainani, Cyrus Guzder, Dr. Forrokh Wadia, Heta Pandit, and Architect Vikas Dilawari, who played a crucial role in lobbying and collaborating with both central and state governments, thereby fostering a participatory approach to heritage conservation.[17] These movements have emerged in response to the challenges of balancing urban growth with preserving the city's unique cultural legacy. The urban heritage framework was extended to Pune, Nagpur, Chhatrapati Sambhajinagar, Nashik and others, where its implementation has been inconsistent with heritage committees existing only on paper, heritage lists un-notified, and legal protections weakly enforced.

In 2018, the Unified Development Control and Promotion Regulations (UDCPR) introduced under the MR&TP Act marked a shift in heritage governance at the district, regional and local level as it mandated the formation of Heritage Conservation Committees (HCCs) under each planning authority and provided guidelines for listing, grading, and managing heritage buildings.[18] However, under UDCPR, the listed heritage properties remain the responsibility of private owners, with little financial or institutional support from the state government, unlike the national or state protected monuments.

A crucial yet understated role in Maharashtra's heritage governance is played by the District Planning Committees (DPC) that are established under the Maharashtra District Planning Committees (Constitution and Functions) Act of 1998. Although there is no specific mandate for heritage governance, DPCs are involved with the protection and

[17] Shyam Chainani. *Heritage and environment: An Indian diary*. Urban Design Research Institute (2007).
[18] Unified Development Control and Promotion Regulations (UDCPR). (2023). *Section 14.5*. https://www.mmrda.maharashtra.gov.in/sites/default/files/2023-10/UDCPR_compressed_2.pdf. Based on the National Building Code and Model Building Byelaws provided by the Ministry of Urban Development, incorporating heritage preservation into planning.

conservation of both protected and unprotected heritage sites. DPC, a pivotal institution for inter-departmental coordination for implementation of development activities in the district, is led by the District in-charge Minister with the Collector as its secretary. 3% of the annual District Planning budget is to be earmarked for the conservation of state-protected monuments, creating a modest dedicated fund to ensure greater consistency and continuity in conservation work across districts.

Taken together, Maharashtra's heritage governance framework reflects the plurality of conservation approaches and legal perspectives on heritage. While this framework is marked by institutional fragmentation, weak enforcement, and inter-governmental tensions, evident in governance challenges spanning national, state and local heritage, the framework further becomes more hybrid as it intersects with the ontological politics of heritage as seen in the case of Raigad Fort.

Heritage sites are political landscapes, wherein civil society and communities do not merely advocate but also compete for custodianship. As seen in the case of Raigad, heritage often accrues meanings beyond its designation by the state. Fort become sites where memory, identity, power, and preservation intersect, and where the boundary between participatory governance and populist appropriation is often blurred.

IV. Different Legal Meanings of Built Heritage

The legal definitions of heritage vary across different categories of heritage. The national and state monuments, although governed by separate laws, have an overlapping definition. This includes ancient and historical monuments, such as rock-cut structures, caves, inscriptions, monoliths, and sculptures, along with their remains and surrounding areas. A key distinction between these sites is that centrally protected monuments are recognised as being of "*national importance*," a term that, however, is not explicitly

defined in the central legislation.[19] Neither central nor state archaeological law mentions the term 'heritage', but the definition almost exclusively focuses on the historical, archaeological or artistic significance of monuments, as well as their age: national monuments are typically over 100 years old, while state monuments are at least 50 years old. Both national and state archaeological laws are influenced by colonial-era law and do not integrate with other post-independence heritage protection laws.

The World Heritage Convention offers a relatively broad understanding of heritage, which includes both natural and cultural aspects. It defines "*cultural heritage*" under three categories: monuments, groups of buildings and sites that have an 'Outstanding Universal Value' (OUV) based on their significance for art, architecture, science, history, archaeology, aesthetics, ethnology and anthropology.[20] There is no specific age value required for designating WHS. Despite the broad and extensive definition of heritage, in practice, applying the OUV principle in the World Heritage framework has been challenging.[21]

The category of 'listed' heritage sites protected under the MR&TP Act of 1966 are defined in terms of 'heritage building' or 'precinct', which is any structure or area with architectural, aesthetic, historic, or cultural value, officially designated so by the relevant planning authority. Additionally, the UDCPR, mandated under the MR&TP Act, expands this definition further to include heritage buildings with 'environmental value'. These regulations do not offer a fixed age value for heritage.

[19] Sanjeev Sanyal, Jayasimha K. R., & Apurv Kumar Mishra. (2023). *Monuments of national importance: The urgent need for rationalization* [PDF]. Economic Advisory Council to the Prime Minister, Government of India. https://eacpm.gov.in/wp-content/uploads/2023/04/Monuments-of-National-Importance.pdf.
[20] See UNESCO. (1972). *Convention concerning the protection of the world cultural and natural heritage.* https://whc.unesco.org/en/conventiontext/.
[21] See Tanja Vahtikari. (2017). *Valuing world heritage cities*. Routledge. for further discussion on the ambiguities and lack of global consensus on the definition of OUV and its application in World Heritage Convention.

The legal definitions discussed here, although slightly varying across regulatory frameworks, limit the idea of heritage to the material realm, making it legible and thus governable. In the process, heritage sites are transformed into legal entities, acquiring new identities shaped by the regulatory frameworks rather than lived practices. These legal constructions frequently dominate public discourse on heritage, marginalising alternative ways of knowing, remembering, and engaging with heritage sites. This creates a persistent tension between what is legally recognised as heritage and the diverse, often affective ways in which communities relate and interact with it.

Further, when formal governance frameworks prove weak or fragmented, the resulting gaps are often filled in by political groups, creating ambivalent spaces where alternative associations with heritage become entangled with processes of governing. The case of Raigad Fort demonstrates how these multiple layers of constitutional mandates, colonial legal legacies, decentralised institutions, and vernacular meanings of heritage converge, sometimes reinforcing and often conflicting in the practice of governing heritage.

V. Case Study: Raigad Fort Conservation

The conservation of Raigad Fort, one of the 48 centrally protected forts in Maharashtra, and recently inscribed (2025) as a part of the *Maratha Military Landscape of India* World Heritage Site, offers a compelling lens through which one can examine the layered and contested terrain of heritage governance in postcolonial India. [22] This case illuminates how Maharashtra negotiates its heritage stewardship through intersecting institutional, legal, affective, and political frameworks. Raigad not only reveals a multi-scalar governance structure involving the ASI, Directorate of Archaeology, newly established authorities like the Raigad Development Authority (RDA), and district-level

[22] Ministry of Culture Government of India. (2025, July 11). *Maratha military landscapes of India inscribed in the UNESCO World Heritage List as India's 44th entry*. Press Information Bureau. https://www.pib.gov.in/PressReleasePage.aspx?PRID=2144154.

bodies, but also foregrounds the vernacular claims and ontological framings of grassroot stakeholders who contest and reconfigure the meaning and management of heritage.

VI. Historical Trajectories and Roots of Vernacular Heritage Stewardship

Raigad's symbolic centrality dates to its selection by Chhatrapati Shivaji Maharaj as the capital of the Maratha kingdom and the site of his coronation in 1674. As a hill fort, it exemplifies the strategic use of rugged terrain, fortified elevation, and architectural self-sufficiency that characterise the Maratha hill fort typology.[23]

Despite its relative stability for nearly a century after the death of Chhatrapati Shivaji Maharaj in 1680, the fort was bombarded and significantly damaged following the British conquest in 1818. Its subsequent neglect, despite its centrality in Maratha memory, was publicly highlighted in 1880 by Mahatma Jyotirao Phule, who is credited for rediscovering Shivaji's *samadhi* (memorial) and began celebrating his birth anniversary at the fort.[24] James Douglas (1883) too wrote about this neglect when he described the fort as being in shambles.[25] Early formal efforts at memorialisation and restoration were spearheaded by nationalist figures such as Lokmanya Tilak, who established the Shri Shivaji Raigad Smarak Mandal (SSRSM) in 1895. While these efforts channelled public sentiment through initiatives like the "*Shivaji Fund*," substantive restoration only began in 1926, reflecting a disjuncture between the affective reverence and institutional action.

VII. Multilevel Governance: Legal and Institutional Interfaces

Raigad was designated a centrally protected monument in 1909 and remains under the jurisdiction of ASI, Mumbai Circle. The fort's conservation is governed by the AMASR

[23] Directorate of Archaeology and Museums, Maharashtra, & Archaeological Survey of India. (2024). *Overarching management plan for the Maratha Military Landscapes of India* (World Heritage Convention Document) https://whc.unesco.org/en/documents/209713.

[24] Hari Narke. (2022, June 20). *Shivaji Maharajanchi samadhi Mahatma Phuleanni shodhūn sundar keli hoti: Dr. Hari Narke* [The tomb of Shivaji Maharaj was discovered and beautified by Mahatma Phule: Dr. Hari Narke]. *Sarkarnama*. https://sarkarnama.esakal.com/mumbai/hari-narke-says-shivaji-maharajs-samadhi-was-discovered-and-beautified-by-mahatma-phule-rm82.

[25] James Douglas. (1883). *A Book of Bombay*.

Act (1958). The ASI carries out periodic conservation interventions, often under challenging conditions given the fort's location on a steep hill and its vulnerability to natural forces. The NMA regulates the prohibited (100 meters) and regulated (200 meters) zones around the monument, as per the provisions of the Central Act.[26]

However, given the fort's symbolic stature and public attention, the government of Maharashtra has repeatedly sought greater participation in the governance of Raigad, including a demand for the transfer of the site's custodianship to the state. This culminated in a tripartite Memorandum of Understanding between the Government of India, ASI, and the Government of Maharashtra in 2016. This agreement led to the creation of the Raigad Development Authority (RDA).[27] The RDA oversees infrastructural and tourism development in the broader 88-acre Raigad Fort Complex Heritage Precinct, including 21 villages.[28] While the ASI retains control over the core archaeological site, leading excavations and structural conservation work, it collaborates with RDA on advanced documentation, digital surveys, and landscape planning.[29] Over 300 archaeological sites within the fort precinct have been identified for phased excavation, expected to continue over multiple decades.

In parallel development, the Maharashtra government reinvigorated the Fort Conservation Committee, initially established in 2015, expanding its mandate to include documentation of unprotected forts, preparing comprehensive development plans, and engaging community actors in preservation and promotion of forts. Additionally, district-level committees led by District Collectors and including police, local planning

[26] Public Information Bureau, Government of India. (2024, December 19). *Progress and challenges of conservation, restoration and excavation of Raigad Fort* [Press release]. https://pib.gov.in/PressReleaseIframePage.aspx?PRID=2086005.

[27] RDA is headed by a political leader, Sambhaji Shahu Chhatrapati, who is a descendent of Chhatrapati Shivaji Maharaj and belongs to the royal family of Chhatrapati Shahu of Kolhapur. Until 2022, he was a Rajya Sabha Member of Parliament. See:- https://shahuchhatrapatikolhapur.in/

[28] See https://www.raigadpradhikaran.com/master.php.

[29] For more information on RDA's work and projects, see: https://raigadpradhikaran.com.

authorities, ASI and state archaeology officials, have been set up to counter illegal encroachments at historic forts and promote coordinated enforcement.[30]

This layered model of governance, though procedurally complex, demonstrates a negotiated balance between central authority, state initiative and community participation. Raigad's recent World Heritage status has catalysed inter-departmental convergence and long-term planning, although formal legal jurisdictions often remain blurred and contested.

VIII. Heritage Management Challenges and Adaptive Institutional Responses

Despite institutional convergence, Raigad's conservation presents acute logistical and environmental challenges. The construction of the Raigad Ropeway in 1994, a private-public initiative with SSRSM support, greatly increased visitor accessibility, leading to infrastructural strain and risk to archaeological integrity due to crowding, especially during public holidays and commemorative events.[31] Seasonal hazards like landslides, monsoon erosion, blocked natural drainage, and rockfalls exacerbate the vulnerability of built heritage.

To address these issues, a site-specific management plan was developed involving both the state-level apex advisory committee and the district-level monitoring body, chaired by the Raigad District Collector, including representatives from the ASI, Directorate of Archaeology, and the tourism department, and drawing on engineers and conservation specialists.[32] This model suggests an incremental shift towards decentralised planning. However, statutory constraints under the AMASR Act, especially those concerning the

[30] *Preserving Maha heritage: District level committees to combat fort encroachments*. (2025, January 18). *Daijiworld.* https://daijiworld.com/news/newsDisplay?newsID=1263505.
[31] See Raigad Ropeway. (n.d.)https://raigadropeway.com/founder.html.
[32] Directorate of Archaeology and Museums, Maharashtra, & Archaeological Survey of India. (2024). *Overarching management plan for the Maratha Military Landscapes of India* (World Heritage Convention Document). https://whc.unesco.org/en/documents/209713.

regulated zones, and bureaucratic proceduralism at all levels, delayed responsiveness, reflect the limits of technocratic legalism in heritage governance.

IX. Ontological Politics and Vernacular Heritage Practices

While Raigad is formally governed as a national monument, it also functions as a sacred and political landscape. Grassroots actors, collectively referred to in Maharashtra, in broad terms, as *Gad Premi* (Fort Lovers), venerate Chhatrapati Shivaji Maharaj not merely as a historical ruler but as a divine figure and symbol of regional pride. These groups, including informal trekking communities, youth mandals, cultural organisations, and political outfits, enact a parallel model of stewardship. They engage in activities that transcend *conservation-as-policy* and invoke *heritage-as-devotion*. These include pilgrimage treks to Raigad, cleanliness drives, flag hoisting, and ritual commemorations at Shivaji's *samadhi* (memorial), all of which embody an ontological framing of heritage as something lived, embodied, and venerated, and this often clashes with formal conservation discourse.[33] Such affective practices challenge the supposed neutrality of technocratic regulatory practices of the state.

The *Gad Premi* groups have emerged as crucial stakeholders in the conservation discourse through their relentless advocacy-manifested in campaigns, petitions, and media mobilisation, that have pressurised the state to take cognisance of long-standing neglect and allocate resources for fort conservation. In this sense, they serve as an informal accountability mechanism, compensating for institutional inertia and catalysing state action. However, this role is also ambivalent, as in the absence of structured engagement channels and clear state-led conservation strategies, these diverse groups also engage in unauthorised restorations, constructions, and commemorations that sometimes cause physical damage to fragile archaeological

[33] *Fort conservation work to start soon*. (2018, January 8). *Times of India*. https://timesofindia.indiatimes.com/city/kolhapur/fort-conservation-work-to-start-soon/articleshow/62420625.cms. In 2018, The Shri Shiv Pratishtan Hindustan, an outfit led by Sambhaji Bhide, a Hindutva activist had announced installation of Shivaji's throne in gold at Raigad.

remains.[34] These actions, though well-intentioned, frequently conflict with conservation principles and regulatory norms laid down by state institutions.[35] Many of these organisations are aligned with or supported by political parties and wield considerable influence at the local and regional levels.[36] As a result, the state agencies often find themselves navigating a delicate balance between responding to popular pressure and safeguarding professional conservation standards. As per a recent initiative by the Maharashtra government, local youth from *Gad Premi* communities will be trained and formally integrated as certified guides at Raigad.[37] This represents an attempt to co-opt vernacular actors in the formal framework, marking a shift toward hybrid governance. Yet, the state's challenge lies in managing the inherent tensions of allowing locally meaningful engagements while upholding regulatory discipline and scientific standards of conservation.

X. Conclusion

This paper has demonstrated that heritage governance in Maharashtra is characterised by pluralism of legal meanings, institutional actors, and affective claims. Far from being a top-down, state-centric enterprise, heritage conservation in the state operates across multiple levels and categories, from national legislation and UNESCO norms to regional planning regulations and vernacular practices. The case of Raigad Fort shows how formal institutions like ASI and the Directorate of Archaeology coexist with, and

[34] *Swords were drawn at the event on Sarasgad*.. (2020, December 28). *ETV Bharat Marathi*. https://www.etvbharat.com/marathi/maharashtra/state/raigad/swords-were-drawn-at-the-event-on-sarasgad/mh20201228161503943.

[35] Neha Madaan. (2024, February 25). *Pratapgad fort restoration hit over 'incorrect' use of material*. *The Times of India*. https://timesofindia.indiatimes.com/city/pune/pratapgad-fort-restoration-halted-due-to-use-of-incorrect-material/articleshow/107979582.cms.

[36] *Vishalgad violence: 500 booked for arson and rioting after Chhatrapati Sambhaji's call for anti-encroachment; Kolhapur MP Shahu Maharaj condemns violence.* (2024, July 31). *Hindustan Times.* https://www.hindustantimes.com/cities/pune-news/vishalgad-violence-500-booked-for-arson-and-rioting-after-chhatrapati-sambhaji-s-call-for-anti-encroachment-kolhapur-mp-shahu-maharaj-condemns-violence-101721067158516.html.

[37] Purnima Sah.(2025, July 26). *After UNESCO recognition, Maharashtra to train locals as guides at Maratha forts*. *The Hindu.*

are often challenged by grassroots actors who articulate heritage through embodied regional pride and devotion. These parallel frameworks of custodianship underscore the ontological plurality inherent in heritage governance.

The interaction of these frameworks creates a hybrid governance model, such as Raigad's tripartite custodianship and community participation, which seems more inclusive in form. Yet, such a hybrid model reveals frictions between professional conservation ethics and emotive claims to heritage. Maharashtra's experience calls for a more adaptive and reflective approach to heritage governance, one that recognises not just the legal status of monuments but also the layered meanings and role of non-state actors and their association with heritage. As states shoulder greater responsibility for heritage protection, understanding these pluralistic and negotiated terrains become vital for shaping more democratic and resilient heritage futures.

POPULISM AND CONSTITUTIONALISM: ANALYSING JUDICIAL APPOINTMENT REFORMS IN INDIA AND ISRAEL

Ritikaa HR ±

Abstract: *This article explores the intersection of constitutionalism and populism through a comparative analysis of judicial independence in India and Israel. By examining the judicial reforms in these nations, it highlights the tensions between populist governments and the judiciary, a key institution in liberal democracies. The study underscores how populist leaders, driven by majoritarian mandates, often attempt to weaken judicial checks to consolidate power, which threatens the foundational principles of constitutionalism. In Hungary and Poland, populist regimes have successfully undermined judicial independence through legislative reforms, while in India, attempts to alter judicial appointments were thwarted by the Supreme Court invoking the "basic structure" doctrine. Israel presents a more complex scenario where incremental changes in the judicial appointments process, although not immediately threatening, suggest a gradual erosion of judicial autonomy. The article argues that while populism presents significant challenges to constitutionalism, the resilience of judicial institutions varies across contexts. It calls for enhanced transparency, stronger constitutional safeguards, and global cooperation to protect judicial independence. This comparative study provides critical insights into how different legal frameworks respond to populist pressures, offering a roadmap for safeguarding constitutional democracy in an era of rising populism.*

± Ritikaa HR is a third year B.A. LL.B. student at Damodaram Sanjivaya National Law University.

I. Judicial Independence And Populism

The concept of constitutionalism entails the existence of a separation of powers, yet does not prescribe a significant degree of divergence beyond this fundamental principle. It should be acknowledged, however, that constitutionalism itself is understood in various ways by scholars,[1] with differing emphasis placed on elements like the rule of law, fundamental rights protection, and specific procedural guarantees, making a single rigid definition elusive. However, there is one notable exception often highlighted across these interpretations: the interpretation and application of legislation must be conducted by an independent judiciary, free from the influence of the legislative and executive branches.[2]

A law can only be applied to an individual when it is consistent with a reasonable interpretation of the law. This implies that the courts must interpret the law in order for it to be applied. The majority of contemporary constitutions permit the courts to declare statutes unconstitutional or to "*disapply*" them in specific cases, although this is not a universal feature.[3] The majority of constitutions permit the courts to declare executive actions unlawful in instances where such actions are not authorised by either the constitution itself (in cases where the executive utilizes "*decrees*" to exercise prerogative powers) or by statutes (in cases pertaining to a distinct category of "*decrees*" as employed in civil law systems, "*secondary legislation*" in the United Kingdom, or "*regulations*" in the United States). Furthermore, the majority of constitutions direct courts to interpret statutes in a manner consistent with the constitution, provided that such interpretations fall within the bounds of reasonable interpretation.[4]

[1] Tom Ginsburg, Aziz Z. Huq & Mila Versteeg, *The Coming Demise of Liberal Constitutionalism?*, 85 U. Chi. L. Rev. 239 (2018).
[2] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962).
[3] Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. Pub. L. 279, 285 (1957).
[4] Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* 140 (1992).

Notwithstanding the fact that constitutional review is authorised in certain instances, it is not always comprehensive. It is not uncommon for courts to decline to hear certain constitutional claims. For instance, they may do so if the challenger would not gain from a favourable ruling on the constitutional issue in question or if the constitution itself has committed the matter in dispute to the resolution of the political branches. This is known as the 'political questions' doctrine.[5] Furthermore, some constitutions permit legislative bodies to override judicial decisions declaring statutes unconstitutional through the application of ordinary majority voting procedures.

In the context of constitutionalism, understood broadly as a system of limited government under law,[6] the domain of the courts encompasses the interpretation of statutes and, to a limited extent, the evaluation of statutes and executive actions for conformity with the Constitution. In light of the aforementioned considerations, what is the appropriate conduct for courts within this domain? The prevailing view is that the principle of constitutionalism entails the necessity for judicial independence.[7] However, this response is clearly incomplete. One example of a lack of judicial independence is what is known as "*telephone justice*," in which a judge calls a politician before deciding a case to request a desired outcome.[8] Furthermore, the concept of judicial independence becomes intricate when one considers that judges must also be answerable to a higher authority, while maintaining their independence. Accountability is a crucial aspect of judicial independence, as it ensures that judges are not unduly influenced by personal biases or idiosyncratic views when enforcing the law. Without accountability, there is a risk that judges may rely on a distorted interpretation of a clear statute, potentially

[5] Bernstein, Anya and Staszewski, Glen, "*Judicial Populism*," (2021). Minnesota Law Review. 3298. https://scholarship.law.umn.edu/mlr/3298.
[6] Gunther Teubner & Anna Beckers, *Expanding Constitutionalism*, 20 Ind. J. Global Legal Stud. 523 (2013).
[7] J. Clifford Wallace, *An Essay on Independence of the Judiciary: Independence from What and Why*, 58 N.Y.U. Ann. Surv. Am. L. 241 (2001).
[8] Massimo Tommasoli, *Rule of Law and Democracy: Addressing the Gap Between Policies and Practices*, XLIX Delivering Justice No. 4 (2012).

enforcing the law based on personal biases against one of the parties or on idiosyncratic views about what constitutes good public policy.[9]

It is surprisingly challenging to articulate a precise definition of accountability. One aspect appears relatively straightforward: judges should be held to account in accordance with the law. The rationale behind their decisions must be derived exclusively from the legal system itself. This is one reason why telephone justice is problematic. It causes judges to make decisions based on "*politics*" in a narrow sense, which is not a valid basis for legal decisions.[10] No legal system that is worthy of the name (or at least no legal system that satisfies the requirements of constitutionalism, however specifically defined) includes such reasons within the set of permissible ones.

Complications emerge beyond the fundamental principles. Some legal systems permit judges to consider policy implications when interpreting statutes, whereas others require that judges rely solely on the text of the statute, a task that is itself complex. Furthermore, some legal systems permit judges to reference unwritten principles of fundamental human rights when assessing a statute's constitutionality, whereas others require adherence only to the written text.[11] In general, the concept of a legal decision is understood in different ways across different legal cultures.

The concept of constitutionalism necessitates that judges substantiate their decisions by invoking the types of reasons that are deemed legitimate within the framework of their legal culture. It is inevitable that there will be reasonable disagreements about what the law actually requires. Those who oppose a decision may claim that a judge is merely feigning reliance on legal reasons, and on occasion, this criticism may have merit.

[9] United Nations Office on Drugs and Crime (UNODC), Judicial independence as a fundamental value of the rule of law and of constitutionalism, available at https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-14/key-issues/1--general-issues--judicial-independence-as-a-fundamental-value-of-the-rule-of-law-and-of-constitutionalism.html.

[10] Enide Maegherman, *Accountability in Legal Decision-Making*, 29 Psychiatr. Psychol. L. 345 (2022).

[11] Raeesa Vakil, *Constitutionalizing Administrative Law in the Indian Supreme Court: Natural Justice and Fundamental Rights*, 16 Int'l J. Const. L. 475 (2018).

Nevertheless, the distinction between pretence and reasonable disagreement is frequently a matter of political rather than legal analysis.

In light of the aforementioned variety, it is not feasible to specify any further than that constitutionalism permits (and may require) a reasonable form of judicial accountability to the public. It is common for questions regarding judicial independence and accountability to emerge when politicians propose alterations to the manner of judicial appointment or removal.[12] On occasion, detractors characterise such modifications as threats to judicial independence, despite representing a transition from one reasonable form of accountability through appointment to another that would have been deemed acceptable had it been in place from the outset. Such criticisms raise a broader issue for constitutionalism, namely the problem of retrogression.[13]

Populists often claim that courts obstruct the "*will of the people*" by upholding constitutional constraints on majoritarian rule. They may specifically critique the prevailing judicial interpretation of constitutionalism as being out of step with popular sentiment or overly focused on minority protections. This narrative facilitates efforts to curtail judicial independence through legislative reforms, appointments of sympathetic judges, or attempts to bypass judicial review. The comparative experiences of India and Israel demonstrate how judicial institutions respond to these pressures and highlight the effectiveness of constitutional safeguards in preserving judicial autonomy.

II. How Global Judiciaries Navigate and Respond to the Rise of Populism

Populist leaders often characterise judicial institutions as elitist and unaccountable, portraying them as barriers to the "*will of the people*."[14] Populists seek to centralise

[12] Shivaraj S. Huchhanavar, *Conceptualising Judicial Independence and Accountability from a Regulatory Perspective*, 110 (2023).
[13] John C. Jeffries, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 Cal. L. Rev. 1211 (1998).
[14] Yaniv Roznai & Amichai Cohen, *Populist Constitutionalism and the Judicial Overhaul in Israel*, 56 Isr. L. Rev. 502 (2023).

power by limiting judicial review, restructuring appointment processes, and curtailing judicial oversight. This dynamic creates an inherent conflict between the judiciary's role in upholding constitutionalism and populist efforts to erode institutional checks and balances.

Scholars such as *Erica Frantz* highlight that undermining the courts is a critical tactic used by leaders in declining democracies, as it removes institutional checks on executive power.[15] Similarly, *Samuel Issacharoff* argues that populist regimes view the judiciary as an obstacle to their agendas, leading them to challenge counter-majoritarian institutions that uphold democratic principles.[16] This trend is evident in countries like Poland and Hungary, where reducing judicial power was central to the populist agenda. Other governments, including those in South Africa and Argentina, have also sought to limit judicial oversight, using political rhetoric to delegitimise the judiciary.

In the contemporary context, judiciaries across the globe are confronted with substantial challenges in the face of mounting populist movements.[17] These populist movements, typified by their mistrust of established institutions, aspire to assert heightened political influence over the judiciary, often under the guise of enhancing democratic legitimacy. In response, judiciaries have adopted a range of strategies, encompassing legal fortification, institutional resistance, and strategic accommodation. The efficacy of these responses is contingent on the prevailing constitutional framework, the robustness of democratic norms, and the extent of public support for judicial independence.[18]

[15] Erica Frantz, 'Opinion dated 11 August 2023' in Suzie Navot and others, *Opinion on the Annulment of Judicial Review of Governmental and Ministerial Decisions for Unreasonableness*, Israel Democracy Institute, Annex B, 112, https://www.idi.org.il/knesset-committees/51189 (in Hebrew).

[16] Samuel Issacharoff, *Democracy Unmoored: Populism and the Corruption of Popular Sovereignty* Oxford University Press (2023).

[17] Amichai Cohen and Yuval Shany, *'Reversing the "Constitutional Revolution": The Israeli Government's Plan to Undermine the Supreme Court's Judicial Review of Legislation*', Lawfare, 15 February 2023, available at https://www.lawfaremedia.org/article/reversing-the-constitutional-revolution-the-israeli-government-s-plan-to-undermine-the-supreme-court-s-judicial-review-of-legislation.

[18] Mark Landler, *'Appeals Court Rejects Request to Immediately Restore Travel Ban'*, The New York Times, 4 February 2017, available at https://www.nytimes.com/2017/02/04/us/politics/visa-ban-trump-judge-james-

Comparative examples illustrate that democratic decline does not occur through a single law but rather through a gradual weakening of independent institutions, particularly the judiciary. Poland and Hungary serve as key examples, where judicial erosion was followed by attacks on the media, civil society, and academia, further consolidating government control.

A salient response of the judiciary to populist pressures is the reinforcement of legal safeguards and procedural checks.[19] Courts frequently rely on constitutional provisions that protect judicial independence, invoking these legal guarantees to resist executive encroachments. For instance, in Poland, the Supreme Court and the European Court of Justice have repeatedly challenged judicial reforms promoted by the populist government, contending that these changes violate European Union standards for judicial independence. By leveraging international legal mechanisms and constitutional provisions, judiciaries can counteract efforts to erode their autonomy; however, this strategy requires robust institutional support and international backing, which may not always be present.

Another significant response is institutional resistance through judicial activism. In certain instances, judicial bodies have adopted an assertive posture, proactively issuing rulings that contradict populist policies that are detrimental to democratic principles. In the United States, for instance, the judiciary has played a crucial role in blocking certain executive orders perceived as unconstitutional, such as travel bans targeting specific nationalities.[20] While the judiciary's activism can be a potent instrument in the struggle against populist encroachments, it carries the risk of further politicising the judiciary,

robart.html; Alan Rappeport, *'That Judge Attacked by Donald Trump? He's Faced a Lot Worse'*, The New York Times, 3 June 2016, available at https://www.nytimes.com/2016/06/04/us/politics/donald-trump-university-judge-gonzalo-curiel.html.

[19] Amichai Cohen, Yuval Shany "*The Fight Over Judicial Appointments in Israel"* Lawfare*"* (2023) https://www.lawfaremedia.org/article/the-fight-over-judicial-appointments-in-israel.

[20] James Slack, *'Enemies of the People*', The Daily Mail, 4 November 2016.

rendering it a target for populist leaders who accuse it of being an unelected, elitist body obstructing the will of the people.

In contrast, some judiciaries adopt a strategy of cautious accommodation, seeking to maintain their relevance by adapting to the political climate without completely surrendering their independence. This approach involves the judicious concession to the prevailing government while maintaining the fundamental principles of the judicial system. For instance, in Hungary, the judiciary has, in certain instances, sought to engage in negotiations with the populist leadership to preserve a measure of autonomy rather than engaging in direct confrontation. This pragmatic approach, however, is not without its risks, as it may result in a gradual erosion of judicial independence if concessions become excessive or if the judiciary loses its credibility as an impartial arbiter.[21]

Finally, public engagement and coalition-building have emerged as vital strategies for judicial institutions seeking to withstand populist challenges. Judicial institutions have come to acknowledge the significance of public perception and have thus pursued strategies to enhance public trust through initiatives promoting transparency, outreach programmes, and collaborative efforts with civil society organisations. In countries such as Brazil and South Africa, judicial figures have been active participants in public discourse, emphasising the judiciary's role in upholding constitutional values. The cultivation of public support can function as a pivotal bulwark against populist assaults, as evidenced by instances where mass protests and civil society activism have effectively safeguarded judicial independence.

The manner in which judiciaries respond to populist tides is ultimately contingent on the broader political and institutional landscape. While legal fortification, judicial

[21] Zoltán Fleck, *"Judges under Attack in Hungary"*, Verfassungsblog, 14 May 2018, available at https://verfassungsblog.de/judges-under-attack-in-hungary.

activism, cautious accommodation, and public engagement each offer different pathways, the most resilient judicial systems are those that effectively combine these strategies. A judiciary that remains adaptable yet firm in its commitment to constitutionalism stands the best chance of preserving democratic governance in the face of populist pressures.

In light of the mounting challenges to judicial independence observed in global trends, it is imperative for courts to undergo continuous evolution to ensure the preservation of the rule of law amidst the evolving populist political landscape. The battle between judicial independence and populist movements is emblematic of a larger struggle over the rule of law. Courts must navigate this delicate balance, employing activism, public engagement, and strategic adaptation to safeguard democratic principles.

III. India: Creating A Judicial Nominating Commission

The Indian judiciary has long maintained its independence through a unique system of judicial appointments, where judges select their successors via the collegium system. An analysis of such independence of the judiciary illuminates the manner in which populist influences interact with constitutional structures and the resilience of judicial institutions across the various dimensions of our independence matrix[22] (Appointment Process, Tenure Security, Scope of Power, Institutional Autonomy, including case assignment, Protection from Undue Influence, and Public Legitimacy).

In terms of the matrix, the Indian system heavily prioritised *Protection from Undue Influence* and judicial control over the *Appointment Process*, aiming to insulate selections from the executive.[23] This practice, while ensuring autonomy from political

[22] Frans van Dijk & Geoffrey Vos, *A Method for Assessment of the Independence and Accountability of the Judiciary*, 8 no. 2 International Journal For Court Administration 1 (2018).
[23] P. J. Malysz, *Nemo iudex in causa sua as the Basis of Law, Justice, and Justification in Luther's Thought*, 100(3) Harv. Theological Rev. 363 (2007).

influence, has been criticised for its opacity and lack of accountability (a weakness within the *Appointment Process* dimension regarding transparency and accountability).

In April 2015, the 99th Amendment to the Constitution of India was adopted by the Parliament of India. As evidenced by the number of amendments that have been made, it is relatively straightforward for a parliamentary majority to amend the constitution. The amendment established a judicial nominating commission to select candidates for appointment to high courts in India's states and to the national Supreme Court. Six months later, the Supreme Court ruled the amendment unconstitutional, stating that it violated the principle of judicial independence, which was an unchangeable part of the constitution's "*basic structure*."[24] The Court's reasoning centred on the perceived threat the NJAC posed primarily to the *Appointment Process* dimension, arguing that executive involvement would compromise the judiciary's ability to function without political interference, potentially impacting future *Security of Tenure* indirectly and increasing vulnerability to *Undue Influence*. The current Indian government is often described as populist, and the Supreme Court's decision can be seen as an example of how a populist government may attempt to alter the balance within the judicial independence matrix, specifically targeting the *Appointment Process*.

The perception of the Supreme Court (SC) as an entity dominated by a select group of elites was, at the time, only limited in its accuracy. The SC currently has an authorised membership of 34, although there are frequent vacancies. Nevertheless, some cases with constitutional-like overtones pertain to the formal interpretation of statutes or allegations of administrative misconduct. In such instances, the case may be heard by a smaller panel. The panel system has resulted in a lack of coherence and consistency in the development of precedent on a range of significant legal issues.[25] The legal status

[24] Supreme Court Advocates-on-record Association v. Union of India 2015 INSC 787.
[25] Vishnu Parshad & Vishnu Prasad, *Independence of Judiciary in India*, 25 no. 3 Indian Journal of Political Science 307 (1964).

of a given matter at any given time is frequently contingent upon the identity of the judges who constitute the most recent panel to address the issue.

Furthermore, beyond the external appointment process handled by the collegium, another significant aspect impacting the practical independence and perception of the Indian judiciary relates to the internal assignment of cases within the dimension of *Institutional Autonomy*. The 'Master of the Roster' system,[26] where the Chief Justice holds the sole prerogative to constitute benches and allocate cases, has also faced considerable criticism for its opacity. This concentration of administrative power, while potentially promoting efficiency, lacks transparency and structured accountability, making it difficult even for other judges, let alone the public, to discern the rationale behind specific bench compositions for sensitive cases. This internal mechanism, crucial for *Institutional Autonomy*, can potentially affect *Decisional Independence* if perceived (or actually used) to steer cases towards particular benches or away from others, thereby creating vulnerability. In the context of populist challenges that often thrive on critiquing perceived elitism or lack of transparency in established institutions, such opaque internal processes can undermine *Public Legitimacy*.

While proposing definitive solutions is complex, enhancing this aspect of *Institutional Autonomy* in line with principles of transparency could be crucial for bolstering judicial independence against such critiques.[27] Relevant approaches, pertinent to the core argument of maintaining judicial integrity against populist pressure, might involve developing clearer, pre-established, and publicly accessible criteria or guidelines for case assignment, potentially incorporating principles of random allocation for certain categories of cases, or exploring models for greater collegial consultation regarding the

[26] Sudhir Krishnaswamy and Advay Vora, "*Master of the Roster: Securing Process Legitimacy of the Supreme Court"* Supreme Court Observer, (13th Sep 2024) available at https://www.scobserver.in/75-years-of-sc/master-of-the-roster-securing-process-legitimacy-of-the-supreme-court/.
[27] Aditya Manubarwala, *'From Master of the Roster to Master of all Judges?'* The Hindu, (30 May 2023) https://www.thehindu.com/opinion/op-ed/from-master-of-the-roster-to-master-of-all judges/article66907927.ece.

principles (not specific assignments) governing roster management.[28] Addressing this internal opacity, thereby strengthening perceived fairness and reducing potential avenues for manipulation, could be as vital for maintaining *Public Legitimacy* and resilience as safeguarding the external appointment process.[29]

As the public and the judges observed the historical context of the 1975 emergency rule, it became evident that the judges had been unduly subordinate to the government, exhibiting a high degree of political accountability.[30] The solution was to reduce the accountability of the judges, and the mechanism by which this was achieved was to convert the constitutionally required "*advice*" that the judges gave to the president into a rule that the president was obliged to follow. In effect, the judges were able to select their own successors.[31] By the early 2000s, the system had reached this point: senior justices on the SC convened as what was known as the "*collegium*" and selected "*nominees*" for the SC and state High Courts.[32] The collegium was entirely opaque (again, highlighting the transparency deficit in the *Appointment Process*), providing no information to the public regarding the judges' considerations or the rationale behind their decisions.[33]

One guideline was consistently adhered to: a candidate for the SC must be a relatively senior judge on another court. In conjunction with the mandatory retirement age of sixty-five, this guideline resulted in SC Justices typically remaining in office for a mere six or seven years. The implications of a particular judicial nomination are therefore

[28] Supreme Court (Practice and Procedure) Act, 2023, (Act 17 of 2023).
[29] Shivam Sethi & Shivangi Singh, *Power of Chief Justice of India as a Master of Roster in India*, S no. 1 International Journal of Law Management & Humanities 287 (2019).
[30] Arghya Sengupta, *Judicial Primacy and the Basic Structure: A Legal Analysis of the NJAC Judgment*, 50 no. 48 Economic & Political Weekly 27-30 (2015).
[31] Scott E. Graves & Robert M. Howard, *Ignoring Advice and Consent? The Uses of Judicial Recess Appointments*, 63 no. 3 Political Research Quarterly 640 (2010).
[32] Dr. Anil Gopal Variath & Ms. Kopal Garg, "*Role of Chief Justice as Master Of Roster - Time To Revisit"* 4 no. 5 Journal Of Legal Studies And Research, 248-259 (2018).
[33] C Raj Kumar, "*Future of Collegium System: Transforming Judicial Appointments for Transparency*" 50, no. 48 Economic and Political Weekly 31–34 (2015).

relatively inconsequential. In conclusion, the court's composition remains elitist overall. Judges who serve long enough on state high courts to develop a reputation among legal elites, to the point where they are serious candidates for consideration by the collegium, tend to move in culturally elite and secular circles. This is not a universal phenomenon; however, the choices made by the collegium tend to favour individuals who are elite and secular.[34] Furthermore, the collegium is entirely unaccountable politically. Nevertheless, its actions, despite the lack of transparency, appear to demonstrate a certain degree of sensitivity to the surrounding political environment.[35] It can be argued that this degree of unaccountability is unique in the world, or at the very least, highly unusual.

The court invoked judicial independence as the rationale for its decision to declare the 99th Amendment unconstitutional. As with numerous judgments handed down by the Indian SC, the precise rationale behind this decision remains opaque. The fundamental premise appears to have been that government-appointed members would possess an excessive degree of authority, or, in other words, that the role of government-appointed members on the commission would render the judges they selected excessively politically accountable, thereby compromising the core independence needed for impartial *Judicial Review* and heightening vulnerability to *Undue Influence*. It is challenging to evaluate this assertion in isolation. Two out of six is not a majority, yet the dynamics of small committees may indeed afford two individuals acting together an excessive degree of power. However, the rationale for this assertion is not evident, particularly in light of the potential for the coordinated authority of the three judges on the commission to serve as a counterbalance.

[34] Prashant Bhushan, "*Scuttling Inconvenient Judicial Appointments*" 49, no. 28 Economic and Political Weekly 12–15, (2014).
[35] Unknown, "*Court vs Government: Independence of the Judiciary Is Not the Issue in the Current Stand-off; It Is Control over Appointments*" 50, no. 43 Economic and Political Weekly 8–8 (2015).

The Indian case study is now incorporated into our broader narrative. Does it demonstrate how populist governments imperil the independence of the judiciary? I propose a definitive response of "*Perhaps, perhaps not*." The following components of the story are considered to be of particular significance and are presented in no particular order. It seems probable that the Indian government proposed the amendment as a result of a long-standing, though arguably misguided, perception of injustice towards a court that had previously impeded its progress.[36] It is likely that the amendment was, at least in part, driven by a flawed motivation.

The collegium system is an ineffective mechanism for selecting high court judges because it lacks structural guarantees that the appointment process will consider political accountability (failing on one aspect of the *Appointment Process* dimension, even while excelling on insulation). The amendment may represent a step towards more accountable governance. The size of the commission and the role of the two government-appointed members may be cause for concern, particularly if there are India-specific factors that have not been taken into account and that make these two features particularly problematic.[37] Furthermore, the amendment enjoyed substantial cross-party support, indicating that it was not solely a project of the ruling government attempting to advance a controversial policy without consensus. However, the Court weighed the perceived threat to independence, particularly concerning future *Appointment Processes* and *Protection from Undue Influence*, as greater than the potential benefits of enhanced accountability.

The decision to invalidate the NJAC reflects concerns that increased government influence in judicial appointments would undermine the judiciary's role as a check on

[36] Dixit, Vinod, "*Role of Non-Legal Facts in Judicial Process"* 60, no. 1 Journal of the Indian Law Institute 32–57 (2018).
[37] Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India*, 49 14(1) Law and Ethics of Human Rights (Forthcoming), London School of Economics, Law School, pp. 13-18 (2019).

executive power (safeguarding the *Scope of Judicial Power and Review*). This ruling exemplifies how constitutional safeguards (affecting *Security of Tenure* and *Scope of Judicial Power*) can thwart populist attempts to diminish judicial autonomy externally. However, it also raises questions about the balance between judicial independence (across multiple matrix dimensions, including internal ones like *case assignment*) and accountability (within the *Appointment Process* and potentially internal administration), a debate that continues in Indian legal discourse.

IV. Israel: Changing A Judicial Appointments Commission

Unlike India's abrupt attempt to reform judicial appointments, Israel's approach has been more gradual. The Israeli judiciary has historically played a powerful role in reviewing government actions and shaping constitutional norms despite the absence of a formal constitution. Its strength has relied significantly on a robust interpretation of the *Scope of Judicial Power and Review* and a generally respected, though contested, *Public Legitimacy*, despite lacking the formal constitutional entrenchment seen in India.

In this case, Israel provides an example of hegemonic self-preservation, whereby a dominant cultural and political elite anticipates the imminent end of its political dominance and increases the power of constitutional review, which it will continue to control due to the discrepancy between political and judicial time. The controversy surrounding the protection of religious freedom in a state whose Proclamation of Independence declared the nation to be Jewish and to observe the fundamental principles of democracy has resulted in the obstruction of the adoption of basic laws dealing with individual rights.[38] Nevertheless, the SC of Israel has succeeded in establishing a corpus of quasi-constitutional law regarding individual rights.[39] Its most prominent technique is a robust version of the *ultra vires* doctrine. A fundamental tenet

[38] Amichai Cohen and Yuval Shany, *'Reversing the "Constitutional Revolution": The Israeli Government's Plan to Undermine the Supreme Court's Judicial Review of Legislation'* Lawfare (2023).
[39] Joseph Laufer, "*Israel's Supreme Court: The First Decade: A Book Report*" 17 no. 1 Journal of Legal Education, 43–62 (1964).

of administrative law is the ultra vires doctrine, which states that actions undertaken by executive officials are considered unlawful unless they are expressly authorised by legislation.[40] In instances where actions might be regarded as unconstitutional infringements on civil liberties in other systems, the SC has required that they be expressly authorised by a clear statute.[41]

Kremnitzer and *Shany* evaluate these developments, along with others, in comparison to the situation in Hungary and Poland.[42] All three countries appear to exhibit a proclivity towards the adoption of more nationalistic policies and a populist discourse, which serves to justify the liberal pressures that they face, and which can be addressed through traditional democratic checks and balances. Despite the observation that less had been achieved in Israel than in Hungary and Poland, *Kremnitzer* and *Shany* nevertheless conclude that "*at least part of the story is the pursuit of an illiberal agenda, aimed against all independent gatekeepers, representing a rejection of traditionally liberal notions of checks and balances."* In this section, we will examine the specific form this concern takes.

Kremnitzer and *Shany* acknowledge that Israeli judges continue to enjoy complete independence (suggesting high *Protection from Undue Influence* in individual cases and strong *Security of Tenure* formally). Modifications to the judicial selection process could be characterized as minor adjustments designed to enhance the political accountability of judges at the appointment stage, while maintaining their independence in adjudicating cases.

[40] Assaf Meydani, "*The Supreme Court as a Political Entrepreneur: The Case of Israel*" 27, no. 2 Israel Studies Review 65–85 (2012).
[41] Triger, Zvi. "*Freedom from Religion in Israel: Civil Marriages and Cohabitation of Jews Enter the Rabbinical Courts.*" 27 no. 2 Israel Studies Review, 1–17 (2012).
[42] Mordechai Kremnitzer, Yuval Shany, *Illiberal Measures in Backsliding Democracies: Differences and Similarities between Recent Developments in Israel, Hungary, and Poland*, 14(1) Law & Ethics of Human Rights*;* 125–152 (2020).

The proposed judicial overhaul seeks to diminish the Supreme Court's power by altering the judicial selection process (directly impacting the *Appointment Process* dimension by increasing political control) and restricting judicial review over Basic Laws (directly curtailing the *Scope of Judicial Power and Review*).[43] Additional measures, such as restructuring legal advisory roles and removing the binding authority of the Attorney General's opinions, further erode legal oversight, making it easier for the government to operate without checks on its power.[44]

This judicial overhaul aligns with a broader populist constitutional project observed in various democracies, where elected leaders manipulate legal frameworks to entrench their power while maintaining a façade of democratic legitimacy. The government's approach reflects a populist strategy characterised by extreme majoritarianism, instrumental use of the constitution, and a fundamental hostility toward judicial oversight.[45] By framing judicial review as an obstacle to the will of the people, the ruling coalition seeks to legitimise sweeping legal changes without a broad consensus.[46] This rapid push for reform disregards the principle of democratic continuity, where governance should allow for periodic shifts in power and corrective mechanisms. Instead, the government's haste to implement these changes mirrors the populist impulse for immediate and absolute control, undermining democratic resilience and potentially setting Israel on a path of constitutional instability.[47]

[43] Navot S, *An Overview of Israel's 'Judicial Overhaul': Small Parts of a Big Populist Picture*, 56(3) Israel Law Review; 482-501 (2023).
[44] HCJ 5658/23 *Movement for Quality Government in Israel v The Knesset* (3 September 2023), Response on behalf of the Attorney General (in Hebrew).
[45] HCJ 8948/22 *Ilan Sheinfeld v The Knesset* 20–21 (18 January 2023).
[46] Tamar Hostovsky Brandes, *The Constitutional Overhaul and the West Bank: Is Israel's Constitutional Moment Occupied?* 56 Israel Law Review 415 (2023).
[47] Yaniv Roznai, Rosalind Dixon and David Landau, *Judicial Reform or Abusive Constitutionalism in Israel* 56 Israel Law Review 292 (2023); Kim Lane Scheppele, *'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work'* 26 Governance 552 (2013).

Nobel laureate Daniel Kahneman, in an interview, described the Israeli judicial overhaul as a "*disaster*," warning that undermining judicial independence could lead to democratic backsliding.[48] Similarly, various sources highlight how the battle over judicial appointments in Israel mirrors global attempts to consolidate political power at the expense of independent institutions.[49]

More than 200 proposed bills and policy decisions target key democratic institutions, including the media, academia, and civil society.[50] Efforts include politicising higher education governance, limiting independent media funding, expanding the powers of religious courts at the expense of civil courts, and restricting foreign funding for NGOs.[51] These broader efforts create a political climate hostile to independent institutions, indirectly pressuring the judiciary and potentially affecting its *Public Legitimacy* and practical ability to operate freely, even if formal *Security of Tenure* remains. These steps mirror patterns seen in other populist regimes, where the weakening of judicial independence serves as a precursor to broader democratic erosion.[52] If these reforms continue unchecked, Israel risks following the trajectory of other nations where democratic institutions have been systematically dismantled.

However, when viewed in the context of other policy changes, *Kremnitzer* and *Shany* express concern. They perceive the developments in Israel to be analogous to those observed in India by *Khaitan*, namely that the judicial reforms represent a series of incremental challenges to the constitutional order. As previously stated, it is our

[48] Hila Weissberg and Idan Eretz, "*Kahneman: The judicial reform is a disaster*", Globes, (2023) available at https://en.globes.co.il/en/article-kahneman-the-judicial-reform-is-a-disaster-1001436559.
[49] Dror Feuer, *End of democracy or democracy manifest? Two Nobel laureates debate judicial reform*, Net News available at https://www.ynetnews.com/magazine/article/bklp4i0082.
[50] HCJ 4267/93 *Amitai, Citizens for Good Administration and Integrity v Prime Minister* (8 September 1993); HCJ 4646/08 *Lavie v Prime Minister* (12 October 2008).
[51] CivA 6821/93 *Bank Ha'Mizrachi and Others v Migdal* (9 November 1995), https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/United%20Mizrachi%20Bank%20v.%20Migdal%20Cooperative%20Village_0.pdf.
[52] Landau, David, *Abusive Constitutionalism,* 47 UC Davis Law Review, 255-257 (2013); Kim Lane Scheppele, *Autocratic Legalism*, 85 University of Chicago Law Review, 545 (2018).

contention that the other policies, which are inherently illiberal in nature, are the driving force behind these developments. Consequently, I believe that incremental adjustments to the judicial selection process, with the aim of enhancing political accountability, do not inherently possess an illiberal character.

V. Comparative Analysis of India and Israel

Despite the occurrence of endeavours to curtail judicial independence in both India and Israel, a comparative analysis of the judiciary in these two nations reveals significant disparities in the approaches, institutional responses, and outcomes. These disparities can be attributed to the distinct legal and constitutional frameworks characteristic of each nation. A comparative analysis of judicial reforms in these countries illuminates the manner in which populist influences interact with constitutional structures and the resilience of judicial institutions.

A. Nature of Reforms: Direct vs. Incremental Approach

The present study sets out to explore the nature of the reforms pursued by India and Israel in their attempts to overhaul their respective judicial appointment processes. The Indian approach was direct and structural in nature (targeting the *Appointment Process* via constitutional amendment), as evidenced by the 99th Constitutional Amendment, which sought to replace the collegium system with the NJAC. This constituted a significant shift, as it introduced executive and legislative influence into judicial appointments.

By contrast, Israel's judicial overhaul (altering the *Appointment Process*, limiting the *Scope of Judicial Power and Review*, and potentially impacting *Institutional Autonomy*) has been pursued through a gradual, incremental process rather than a single constitutional amendment. The proposed changes in Israel include altering the judicial selection process, limiting judicial review powers, and enabling the legislature to override Supreme Court decisions with a simple majority. While India's attempt was

abrupt and met with strong judicial resistance, Israel's reforms are evolving, making their long-term impact more uncertain.

B. Judicial Response and Constitutional Safeguards.

The Indian judiciary's decision to invalidate NJAC demonstrates the efficacy of constitutional safeguards impacting the *Appointment Process* and affirming the judiciary's *Scope of Judicial Power*. The Supreme Court of India invoked the basic structure doctrine, asserting that judicial independence is an integral component of the Constitution and cannot be compromised (viewed holistically across the matrix). This ruling underscores the judiciary's capacity to safeguard against political encroachment.

In contrast, Israel's legal framework is characterised by the absence of a formal written constitution, with judicial precedent and Basic Laws serving as the primary mechanisms for ensuring judicial independence. This institutional difference renders the Israeli judiciary more vulnerable to political interference, as it does not have entrenched constitutional safeguards similar to India's basic structure doctrine.

C. Public and Political Reactions.

In India, the NJAC enjoyed bipartisan support from the executive and legislature, yet was ultimately rejected by the judiciary. This outcome reflects high institutional standing (*Public Legitimacy*) and has led to ongoing debates concerning collegium's transparency (*Appointment Process*) and internal opacity (*Institutional Autonomy/Case Assignment*). While the judiciary successfully resisted the reform, concerns regarding the opacity of the collegium system persist.

In Israel, judicial reforms have triggered widespread protests, both domestically and internationally, with critics warning of a potential erosion of democratic checks and balances. This reflects a strong societal engagement defending judicial independence, impacting the *Public Legitimacy* dimension. In contrast to India, where the judiciary has been known to overturn reforms independently, the proposed changes in Israel have been resisted by means of public mobilisation and civil society engagement.

D. Institutional Resilience and the Role of Legal Frameworks.

The judiciary in India is widely regarded as remaining largely independent, in no small part due to the constitutional protections that serve to prevent political overreach in judicial appointments. The basic structure doctrine, in this context, serves as a formidable safeguard, ensuring that no constitutional amendment can undermine the independence of the judiciary. However, its resilience faces internal challenges related to transparency in the *Appointment Process* (collegium) and *Institutional Autonomy* (case assignment).

By contrast, Israel faces greater challenges in maintaining judicial autonomy, due to the absence of a codified constitution, making dimensions like the *Appointment Process*, *Scope of Judicial Power*, and potentially even *Institutional Autonomy* more susceptible to political manipulation. The absence of a foundational legal framework renders Israeli judicial institutions more susceptible to political manipulation, as evidenced by the government's endeavours to reconfigure the judiciary's role.

E. Long-Term Implications for Judicial Independence.

The Indian case demonstrates that a strong constitutional foundation and an assertive judiciary can act as a bulwark against populist encroachments, particularly preserving *Security of Tenure* and the fundamental *Scope of Judicial Power*, even if debates persist regarding the optimal *Appointment Process* and the need for greater transparency in internal *Institutional Autonomy* (like case assignment). While debates over judicial transparency and accountability persist, the judiciary's ability to strike down legislative overreach remains intact.

In contrast, Israel's judiciary is at a crossroads, as the gradual implementation of reforms could weaken its ability to act as an effective check on government power. The ongoing calls for judicial restructuring in Israel give rise to concerns regarding the long-term democratic stability of the country, particularly in the absence of constitutional safeguards such as those present in India.

The judicial reforms in India and Israel demonstrate the varied strategies employed. This comparative analysis, utilising our matrix of independence dimensions, underscores the significance of legal safeguards (affecting *Tenure*, *Scope of Power*), public engagement (affecting *Legitimacy*), institutional design (particularly the *Appointment Process*), and internal judicial procedures (*Institutional Autonomy/Case Assignment*) in safeguarding judicial independence.

VI. Conclusion

In conclusion, the case studies of India and Israel demonstrate a complex interplay between populism and constitutionalism, illustrating how populist governments can challenge, reshape, and in some instances, undermine the principles of liberal constitutionalism. In India, the proposed establishment of a Judicial Nominating Commission through the 99th Amendment illustrates the inherent tension between the twin objectives of ensuring judicial independence and enhancing political accountability. Although the amendment enjoyed considerable political support, it was ultimately invalidated by the Supreme Court on the grounds that it contravened the 'basic structure' doctrine, thereby reinforcing the court's role as a guardian of constitutional principles. This case study demonstrates the difficulties populist governments encounter when attempting to reform the judiciary, particularly in a system with robust constitutional safeguards.

Israel offers a more complex illustration, where gradual alterations to the judicial selection process have been shaped by evolving political circumstances and the waning influence of a formerly dominant cultural elite. Although these changes have increased political accountability in judicial appointments, they have not yet undermined judicial independence in any fundamental way. However, the broader context of illiberal policies gives rise to concerns that these reforms may be part of a larger trend towards the weakening of liberal democratic institutions. While populism presents significant challenges to constitutionalism, there are pathways to the preservation of the integrity

of democratic institutions. By reinforcing constitutional safeguards, promoting transparency, and fostering international cooperation, democracies can resist the encroachment of populism and ensure that their judicial systems remain independent and robust defenders of the rule of law.

BHARADWAJ, SUDHA. *FROM PHANSI YARD: MY YEAR WITH THE WOMEN OF YERAWADA*. JUGGERNAUT PUBLICATION. 2023

Simran Kaur [±]

In Indian society, prisons are taboo. They are spaces that evoke curiosity, disgust and fear. Whoever enters a prison, whether convicted or not, carries the social stain of incarceration for life. Society perceives it as a place that needs to be kept segregated, people who need to be punished and locked up. Hence, what goes inside those walls is unknown to most, or to put it differently, ignored by most. Prisoners' rights, or prisons themselves, are absent from election manifestos or legislative actions. Rarely is any active attempt made to rehabilitate, and most changes come by way of public action litigation. But what really goes on inside those walls? Are the people there really so dangerous to be locked away from the rest of society? What makes a person a prisoner? These are the questions that Sudha Bharadwaj's book, '*From Phansi Yard: My Year with the Women of Yerawada'* answers, offering a rare, empathetic window into the everyday realities of incarceration.

Bharadwaj, a trade unionist, human rights lawyer, and one of the accused in the *Bhima Koregaon case*, spent over a year in Pune's Yerawada Jail between 2018 and 2020 under the draconian Unlawful Activities (Prevention) Act. However, this is not a book about her own case; instead, it is the lived realities of seventy-six women inmates she met, observed, and came to understand through the bars of *Phansi Yard*, a high-security wing typically meant for death row convicts.

The book is divided into six parts, structured around the passing of seasons, reflecting the repetitive, cyclical nature of prison life. This structure depicts the slow and dull

[±] Simran Kaur is an LL.M. student at National Law University, Delhi.

movement of time in jail. How the changes are only felt in terms of weather and not in days or hours because of the monotony of prison life where the prisoners are often forgotten and ignored by the world outside. Bharadwaj jots the lived experiences of these incarcerated women with great attention and care, showing how their experiences are a reflection of the larger society than just individual incidents. It lays bare the deeply rooted caste inequalities, structural oppression, and religious tensions that exist, of which prisons are only a small reflection. It shows how despite all these differences, prisons become a site of resilience, solidarity and the human will to find happiness even in the toughest moments. Each anecdote carries profound grief and raises questions about the criminal justice system's efficiency and utility.

The opening section, titled "*Introduction*," begins with the author's own journey from giving up her American citizenship to her days in *Phansi Yard* and after. Her account of working with the labour rights movement and her experiences with the *Chhattisgarh Mukti Morcha* show her genuine commitment to grassroot change. She describes growing up with a Jawaharlal Nehru University (JNU) professor mother, on the JNU campus, among Marxist study groups and heated discussions over political topics during JNU elections. The chapters following the introduction talk about various aspects of prison life, from food to religion, fights, friendship, tolerance, legal aid, health, education, festivals, children, overcrowding, isolation, menstruation and many more.

The book goes beyond stating the structural limitations of jails; more importantly, it highlights the institutional and systematic failure which criminalises women already failed by social systems. Sudha Bharadwaj portrays these women to make them more than just inmates, but a *'victim'* of a larger systemic failure. It nudges the reader to look beyond their *"offences"* and empathise with their struggles. It lays bare the patriarchal lens of the judicial system and the gendered indifference.

It also brings forth the enormity of caste and class hierarchies in such spaces. Caste doesn't dissolve inside prison walls, but rather becomes an important determinant of

everything from daily life to dignity. It decides what a person eats, wears, what work they have to do, and even how their children are treated. The book makes one realise that prisons are brutal, but it intensifies for those coming from backward and marginalised backgrounds. The author describes how old traditions like *'Kundawalis'*[1] still continue in slightly modified forms. How, even in modern prisons, tasks like cleaning toilets, swabbing the corridors, bathing the disabled prisoners, washing the mats and bedding, carrying out minor repairs, disposing of dead rats or cats, and other odd jobs are always carried out by women from backward and marginalised backgrounds. Anecdotes in the book highlight the strong prevalence of caste prestige in prisons. *Ravikant Kisna* and *Durga Hole* also describe the criminal justice system as a site where caste oppression is most prominent.[2] They point out the *"over-representation"* of Scheduled Castes (SCs) and Scheduled Tribes (STs) among the under trails.[3] They bring an additional dimension to this by showing how prison research conducted by *'dwij-savarna researchers'* is distorted, often mitigating the centrality of caste.[4]

Many instances from the book highlight the poor state of legal services in Indian prisons. People from higher classes get access to better lawyers, hence, better justice. However, those who cannot pay suffer. The book shares instances where some women are forced to remain in jail for years, even lifetimes, because they cannot afford bail securities. Those who do not have the money pay with their labour. They have to take up menial jobs, doing someone else's work for basic canteen supplies. Even after the introduction of legal aid reforms and various judicial actions, the condition of legal aid in prisons remains questionable, with significant inefficiencies in implementation.

[1] Dalit women who cleaned and disposed of human excreta.
[2] Ravikant Kisana & Durga Hole (2023). *Yes caste is important, (but)': examining the knowledge-production assemblage of Dwij-Savarna scholarship as it invisibilises caste in the context of women's prisons in India*. Gender & Development, *31*(2–3), 323–337.
[3] Kisana & Hole. (2023) pg. 323–337.
[4] Kisana, R., & Hole, D. (2023), pg. 323–337.

There is only 1 lawyer for 161 inmates on average, with the number going as high as 1 over 500 in states like Kerala and Bihar.[5]

Bharadwaj's account of how femininity is strictly imposed on women inmates to prevent any "*lesbian*" incidents reveals the deep roots of heteronormativity in the criminal justice system. Clothing, bodily expression, and intimacy inside prison become sites of control and oppression. As *Arvind Narrain* argues in *"The Articulation of Queer Rights: The Emerging Right to Sexual Orientation and Gender Identity,"* Indian law has historically functioned as a tool of moral regulation, policing bodies that deviate from heteronormative expectations. The prison becomes an extension of this moral control, where strict monitoring is done in the name of "*discipline*," but in fact enforces conformity to a strict gender binary. The fact that men are not allowed to keep children with them in male prisons, even if it's a male child, shows the deep-rooted heteronormativity embedded in the justice system. One doesn't have to scratch below the surface to see how patriarchal the justice system is. A report by the International Commission of Jurists in 2017 shows the role of police in harassing queer individuals in society and prisons.[6] It states that the police is one of the biggest barriers for queer individuals to access justice.

The strict gendered norms of punishment extend to how women are treated on release. She notes, "*If you are a woman prisoner without a respectable family receiving you on your release, you may not be released at all but sent to a sanstha*." In some cases, women are incarcerated not for their own crimes, but because of their relationships with

[5] Dhananjay Mahapatra. (2020). *Legal aid little help as 1 lawyer for 161 inmates*. The Times of India. https://timesofindia.indiatimes.com/india/legal-aid-little-help-as-1-lawyer-for-161-inmates/articleshow/73749128.cms

[6] International Commission of Jurists. (2017). *Unnatural Offences: obstacles to justice in India based on sexual orientation and gender identity*. https://www.icj.org/wp-content/uploads/2017/02/India-SOGI-report-Publications-Reports-Thematic-report-2017-ENG.pdf

men, as the author points out, "*many women are held here almost as judicial hostages for their criminal husbands, fathers and boyfriends*."

Parts of the book at times feel as though Bharadwaj is observing these incarcerated women as case studies rather than as humans with complex, real emotions and non-linear challenges. She tends to oversimplify the problems they face, problems that may not be visible by distant observation alone. Her limited interaction with some of the inmates she writes about gives an incomplete picture of the other side, *their* side. At times, it takes the *"I"* out from the person and otherizes them. *Mahmood Farooqui*, who writes on Indian prisons, critiques Bharadwaj's depiction of *"criminals"* or people convicted of crimes as being somehow different from *"normal"* people.[7] *Farooqui* mentions that greed, lust, anger, or envy are not emotions exclusive to *"criminals"* but are just as present in anyone else. They point out that these criminalised behaviours are prone to change with time as the understanding of *"crime"* changes, and some are punished for it while some escape the garb of the law.[8]

Why is this important for people interested in law and policy? The book is an essential read for those working in law and policy. The struggles these women face, and the system that repeatedly fails them, are shaped, and often worsened, by the actions of lawyers, judges, and the law itself. Sudha Bharadwaj draws attention to the impact of poor and negligent legal aid on human lives. Too often, lawyers and law students forget to assess the human consequences of their work. This book offers a hard reality check. It shows that legal arguments are not just about theory or precedent; they have direct consequences for freedom, dignity, and survival. It is not only important for people in law and policy, but for society at large, to recognise that prisons are not what Bollywood or popular imagination makes them out to be. The real prison is shaped by class, caste,

[7] Mahmood Farooqui (2024). *Review: From Phansi Yard by Sudha Bharadwaj*, Hindustan Times. https://www.hindustantimes.com/books/review-from-phansi-yard-by-sudha-bharadwaj-101712943766530.html.
[8] Farooqui (2024).

gender, bureaucracy, and everyday cruelty, and unless we look closely, we remain complicit in its silence.

To conclude, *From Phansi Yard* is an essential reading. It reveals the *'secret'* world of prisons, the lives of women who live there, the lost childhoods of their children, and the systemic oppression they face, both within prison walls and outside them. It is, at once, a joyful account of resilience and strength, and also a cry of helplessness and frustration. Bharadwaj does not sensationalise; she listens. Through her words, we are asked to see prisoners not as numbers or offenders, but as people failed by institutions that were meant to protect them. The book reminds us that legal work is never neutral, it has consequences, and that prisons are not simply sites of punishment, but mirrors of the society outside. It lays bare the truth about caste, class, money, power, and gendered bias. As Bharadwaj reflects from her own experience: "*It is not as if I was unaware of the injustices prisoners were subjected to, and their suffering... I knew many laws were unreasonable, even draconian... But being imprisoned made one understand the enormity of it all, the serious implications of these things on real human lives. And above all, the urgency for reform*." Empathy is essential to justice, and that is what makes this book so important.

MEHRA, KUSHAL. *NASTIK: WHY I AM NOT AN ATHEIST*. BLUONE INK. 2024.

Dr. Lawmsangpuia Ralte [±]

In the present globalised age, where almost every sphere of society is being aided by Artificial Intelligence (AI), religion has started to have little impact on individuals. The world has started to shift from the traditional belief of a *'Supreme Being'* to relying more on machines and AI. This has further encouraged a sense of individuality, placing the individual at the forefront and emphasising the urge to live independently. The religious doctrine which preached the gospel of God's creation of the universe and everything that lives in it has been slowly replaced by Western atheism, which demonises religion in all possible ways. This book by Kushal Mehra has arrived at a timely moment, which depicts and navigates the reason why he does not believe in atheism and follows the Hindu religion. It is presented in a well-written manner.

The author has stated that the Hindu philosophy of the realisation of *Brahman* is the way to achieve the ultimate goal of life, and the state of liberation is the highest spiritual attainment, which cannot be sought in the realm inhabited by artificial intelligence. The author further states that since *Brahman* is the fundamental concept in Hindu philosophy, it is described as the essence of all existence. In this sense, the author does not believe in placing individuals at the forefront and denying religion, but instead stresses more about the relevance of religion as it transcends both the physical and material worlds. The author has also traced the origin of religion, thus proving the point of the existence of a "*God*", which in turn denies the concept of "*atheism*." The origin and existence of a "*God*" and religion may have been proven through the integration of archaeological and historical analysis. The author further states that traces of religious

[±] Dr. Lawmsangpuia Ralte is a Guest Faculty at ICFAI University Mizoram.

behaviour were found in the Upper Palaeolithic period (around 50,000-10,000 BCE). The cave paintings found in various regions around the world may also suggest symbolic, ritualistic or spiritual purposes, and the burial practices, specifically by the Neanderthals, have also suggested the beliefs of the ancestors in an afterlife or forms of worship. These findings, as argued by the author, are enough proof of the existence of a Supreme Being, which has convinced the author to be religious and not follow "*atheistic*" beliefs.

In the book, the author differentiates between *Nāstika*, *Nirīśvaravāda* and atheism in the West. *Nāstikas* reject the authority of the Vedas wholly. *Nirīśvaravāda* has been described by the author as a philosophical idea with an origin in Indian philosophy, and its equivalent term in English is that of "*atheism*." This school of thought denies the existence of an all-powerful being in the universe who is the creator of all life on earth. The *Nirīśvaravādīs* have concentrated on investigating *"The nature of reality, the self, and the human predicament without referring to the existence of a divine being…"* (p 7). Atheism in the West denies the origin of a divine being as well and challenges the religious authorities to the fullest extent. The author has classified the differences between Western and Eastern atheism, where atheism in Western societies emerged as a negative reaction to counter theistic beliefs which arose from the longing to have *"…secularism and individual autonomy…"* (p 44). However, Eastern atheism has more of an open-armed attitude as compared to Western atheism, which completely rejects religious ideologies. Eastern atheism has a more inclusive and pluralistic set of beliefs in terms of spirituality. These differences help open the eyes of the readers and help them understand how atheism is understood across different contexts. Even though Eastern atheism rejects religious ideologies, it still maintains a close connection to its cultural and philosophical roots (p 217). *"What is new about neo-atheism…"* is a question raised by the author and in providing the answer, the author has stated that there is not much "*new*" to atheism when comparing old and new beliefs in atheism.

New atheism does not bring much new material, even though it has been contested in religious debate for millennia.

However, the missed opportunities in this instance alone are that the author does not explain in detail the exact reason why someone follows atheistic beliefs and practices. The definition of Western and Eastern atheism is vague, and the author could have expanded the definitions and rooted his arguments more firmly in religious contexts and foundations.

On the other hand, the author has defined neo-atheism and said that it is a part of this rapidly changing world, which is dominated by science, technology and globalisation. These advancements have led the young minds of the global world to question their faith and religious doctrines. The historical context and debate to support the rise of neo-atheism have been clearly stated by the author in a thought-provoking manner.

The impact of neo-atheism on Muslim communities and societies has been written but the relevance of neo-atheism could have been expanded to include its impact on other communities and societies like Christianity and Judaism, as these religions have monotheistic beliefs in a Supreme Being as well.

The author then traces the origin of Hinduism, and this reflects the thoroughness and dedication of the author to bring forth his arguments. His addition of the history of the religion helps the readers understand the religion even more, as Hinduism is a vast concept and often a complicated term for laymen to understand. The author has expressed Hinduism as *'…The Hindu way is not just a religious path but a complex philosophical system allowing a broad spectrum of beliefs…'* (p 246). He argues that Hinduism does not completely reject or oppose materialistic understanding but instead combines it with spirituality in a harmonious manner. Another reason stated by the author as to why he is not an atheist is that India has a huge role to play in this instance. In this country, as the author recalls, everyone from all sectors of life and religion can

find a home and find their space. The existence of different religions in close harmony with one another encourages the author to embrace the different religious contradictions. The author then states that even though he was born a Hindu due to the religious ideologies of his parents, he remained a Hindu by his own personal choice. The identification with the Hindu religion is purely his decision as a result of the firmness and calmness associated with Hinduism. His growing age made him realise that Hinduism is not merely a religion but is more of a worldview that shows the correct path and lifestyle to individuals. The wisdom and comfort found in the verses of the *Bhagavad Gita* and *Upanishads,* along with the *Ramayana,* give him a sense of calmness and comfort, feelings and sensations that cannot be given to him by artificial machines and technologies. These factors play an important role in making the author follow the Hindu religion and abstain from being an atheist, despite the author's deep sense of intellectual engagement and connection with modern lifestyles and development.

India has a long-standing history of following a pluralistic culture wherein different religions coexist in peaceful harmony, thus adding to the notion of unity in diversity. The religious boundaries are rather fluid, and cultural practices and festival celebrations are often shared across the religious communities. Indians are often assumed to be Hindus due to the inherent pluralism and inclusivity of Hinduism, and the author has said that Hinduism absorbs and integrates the elements of various cultures and religions, which leads non-Indians to assume all Indians follow Hinduism. The religious Sufi shrines in India are visited frequently by both Hindus and Muslims, and in terms of festivals, Indians unitedly celebrate festivals with roots in Hinduism, such as Diwali, Holi, Pongal and Raksha Bandhan. These festivals unite Indians, giving them ample opportunities for family gatherings and bonding. Most religions in India are often fluid and act as a cultural system rather than functioning strictly within religious events, the result of which, as stated by the author, promotes unity amongst Indians. This leaves little chance for the progress of atheism in India.

The religious roots of Hinduism, such as yoga and meditation, are also incorporated by non-Hindus who adopt these practices as tradition-based practices, which in turn shows the fluidity of religion in India. As against the religious harmony of Indians witnessed in India, scholars like *Duile & Aldama*[1] have stated that in Western contexts, each religion strictly exhibits a stratified and articulated presence amongst their respective followers only, which leads them to follow paths which are different and often yield varied outcomes. This practice leaves wide room for the progress of atheism in Western culture, as religious harmony is close to impossible in their society. Hence, Mehra's book firmly stands with the religious harmony in India as a sole reason for atheism's low chances of progress. Aligned with the scope of Mehra's arguments, *Ahmad & Kang,*[2] in their book, they have also supported the constant failure of the progress of atheism in India as being due to the nationalist grounding of Indian religious frameworks and the fluidity of all Indian religions, which leaves wider room for community gatherings and interaction, keeping the idea of atheism at bay.

The book has pointed out that Hinduism is not just a religious path. It also allows a broad spectrum of beliefs as permitted by its complex philosophical system. A study by *Amarasingam*[3] has also stated that the broadness of religious philosophies leaves lesser scope for deviation into an atheistic lifestyle. *Caglar*[4] argues that intellectuality and the constant striving for passion in scientific advancements weaken faith and religiosity, which is exactly what Western societies are currently witnessing. This has led to the deterioration of their foundation in religion, which has led many people to turn to atheism. *Binder*,[5] in his study on atheism in India, has also stated that even though less

[1] Timo Duile & Prince Aldama, *Seeing through the lens of atheism: plural societies, religion and harmony ideology in Southeast Asia*. Secularism & Nonreligion*, 13* (4) (2024).
[2] (2022). *The Nation Form in the Global Age Ethnographic Perspectives*, edited by Irfan Ahmad & Jie Kang. Palgrave Macmillan.
[3] Amarnath Amarasingam, *Religion and the new atheism*. Brill. (2010).
[4] Mustafa E Caglar, *Why does intellectuality weaken faith and sometimes foster it?* Humanities and Social Sciences Communication, 7 (2020).
[5] Stefan Binder (2020). *On the impossibility of atheism in secular India*. Global Diversities.

prevalent in India, atheism and atheists indeed exist in India, but their numbers are few and are largely marginalised and side-lined in academic discourse and by society in general. This is the result of society's perceptions of atheism as a product of foreign traits or Western influence. Thus, India's religions, having deep roots in nationalism, traditions and culture, offer flexibility in community engagement, which often leaves positive inculcation of positive religious doctrines in the minds of the people, thus leaving less scope for deviation into atheistic philosophies.

A missed opportunity which the author could have highlighted in his book includes the exact way the Hindu religion comforts him. He could have presented it in a step-by-step manner, instead of briefly stating it in a general manner. Religious individuals often talk about the close connection they have with God and the religion that they follow, but many do not explain the steps to follow to attain this salvation and calmness. This exact issue is found in the book as well, as the author could have expanded the steps through which one can attain calmness, which led him to attain divine intervention and divine experiences from his religion. Overall, this book adds to the richness of religious studies and can offer a strong standpoint for scholars and readers to cement their arguments on why being an atheist in today's world is irrelevant, as opposed to staying true to one's preferred religion.

ABOUT LHSS COLLECTIVE

The LHSS Blog of MNLU Mumbai, initiated in January 2022, metamorphosed into The LHSS Collective after 11 months of its inception, as the founding vision of the blog stirred us to expand our operations, outreach and team. The LHSS Blog was formed due to an observable lack of platforms in the global south which were dedicated to studying the intersection between Law and Social Sciences, a vision that received formal approval from MNLU Mumbai. The Collective functions under the guidance of its Faculty-in-Charge, Dr. Upamanyu Sengupta.

Available research on the intersection of law with the humanities and social sciences remains focused on and originates from the Global North. Perspectives from the Global South remain marginal to such discussions. The Collective seeks to redress this imbalance in its own small way by providing a platform for expression and exchange of ideas and insights that craft and critique interdisciplinarity from a Global South perspective. The Collective strives to mentor interested contributors and readers, provide insights on research and writing skills, thematically collate resources and organise monthly reading groups and panel discussions.

LHSS aimed to function uniquely. Apart from functioning as a regular blog, LHSS successfully consolidated and curated the relevant literature produced in monthly roundups, apart from creating content like editorials, podcasts and such other forms, while actively commissioning and soliciting content from well-known personalities in this field, among other things. The Collective today delivers on all goals of the blog apart from a renewed approach to collaborating with like-minded sister organisations. The Collective conducts an annual two-day international symposium focusing on discourses in Law, Humanities & Social Sciences.

In a bid to contribute more comprehensively to the conversation around interdisciplinarity in Law, Humanities & Social Sciences, the LHSS Collective plans to start the Law, Humanities and Social Sciences Journal (LHSS-J). In the coming days,

the journal aspires to furnish a platform for emerging research in the field while also harbouring expertise from fields such as history, philosophy, political science, sociology and literature in their engagement with law. At the same time, it would also strive to expand the horizons of readership for interdisciplinary research beyond the borders of conventional academic spaces.

With this in mind, the Collective presents the LHSS Journal's First Issue of the First Volume.

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MNLU MUMBAI

2nd and 6th Floors,
CETTM-MTNL Building, Technology Street,
Hiranandani Gardens, Powai, Mumbai,
Maharashtra, 400076, India.