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FOREWORD

It is with great pride and a profound sense of responsibility that I present Volume XV, Issue II (July 2026) of the Nirma University Law Journal (NULJ), a peer-reviewed and refereed journal. Each issue stands as a testament to the rigour, curiosity, and commitment to legal scholarship that our contributors, editors, and advisory board bring to the Journal.

As the legal landscape continues to evolve, shaped by shifting societal values, technological advancement, and global challenges, legal scholarship plays a crucial role in interpreting, critiquing, and guiding the application of law. In this edition, our authors explore a wide array of pressing legal issues and interdisciplinary perspectives.

Behind the scenes, producing this Journal demands meticulous attention to detail, spirited debate, and countless hours of research and editing. I am deeply grateful to our dedicated editorial team including Ms. Tanisha for their unwavering commitment, and to our faculty advisors and peer reviewers for their guidance and support. I am also happy to share those articles published in this Journal are indexed in HeinOnline, EBSCO, Manupatra, and SCC Online. The overwhelming response received from contributors following the publication of Volume XV, Issue II, has been a source of great encouragement to all of us.

To our readers, practitioners, academics, and students alike, I hope this issue provokes thought, challenges assumptions, and inspires dialogue. The pursuit of justice and the evolution of legal norms require not only practice but also persistent scholarly engagement. It is our belief that the Nirma University Law Journal continues to serve as a platform for that vital exchange.

Thank you for your continued support and readership.

Prof. (Dr.) Madhuri Parikh

Chief Executive, Nirma University Law Journal

Director and Dean

Institute of Law, Nirma University, Ahmedabad

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THE GAVEL AND THE GENE: REASSESSING THE JUDICIAL IMPASSE ON GENETICALLY MODIFIED MUSTARD IN INDIA

Dr. Grishma Bhavsar*

ABSTRACT

The split verdict by the Supreme Court in the year 2024 on the environmental release of Dhara Mustard Hybrid-11 (DMH-11) has brought biotechnology and environmental law to a crucial stage. Genetically Modified (GM) crops are modified in a manner by human intervention to get the desired result. Such crops have the ability to improve food security, may increase agricultural production and may have the capacity to stand strong in changing weather patterns. However, the acceptance of the same is still debated. This article examines the legal impasse created by the split verdict in the case on Gene Campaign v. Union of India¹ and also it analyses the implications for India's biotechnology regulatory environment. It also discusses the precautionary principle, how the environmental and scientific innovations are implemented and also highlights the concerns among environmental activists, researchers and farmers. It further assesses the legislative power of Genetic Engineering Appraisal Committee (GEAC), and State Government's role in the approval of GM crops as well as the challenges arising in the matter affecting agricultural biotechnology. It also examines international biosafety framework and comparative regulatory mechanisms, and proposes a

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¹ Gene Campaign v. Union of India, 2024 SCC OnLine SC 1793.

national policy on genetically modified crops which is consistent, and scientifically sound. It concludes that overcoming current legal and regulatory uncertainties necessitates a balanced governance system that protects environmental and public health issues while promoting scientific innovation and agricultural development.

Keywords: *Genetically Modified Crops, GM Mustard, Supreme Court of India, Precautionary Principle, Environmental Jurisprudence.*

I. INTRODUCTION

As per the report by United Nations (UN) the world population is expected to increase from 8.2 billion to approximately 10.3 billion during next fifty years.² The rapidly expanding population puts additional pressure on the global food system, which is currently experiencing challenges due to environmental concerns. The demand for food increases as the population grows. Climate change, drying out arable land, water scarcity, biodiversity loss, and other serious concerns have restricted the ability to meet the growing population's demand. These concerns have led to the search for innovative technologies capable of enhancing agricultural productivity while ensuring environmental sustainability. Among such innovations, Genetically Modified (GM) crops have emerged as a significant scientific development, having the capability to improve crop yields, enhance resistance to pests and diseases and strengthen climate resilience. Despite these benefits, GM crops remain the subject of debate due to concerns with respect to environmental safety, biodiversity conservation, public health, etc.³ In India this debate has gained significant attention due to the controversy of Dhara Mustard Hybrid-11 (DMH-11), a GM crop proposed for environmental release. The approval of DMH-11 has sparked debates about the need to promote

² U.N. Dep't of Econ. & Soc. Affs., Population Div., *World Population Prospects 2024: Summary of Results* (2024), United Nations Population Division Report.

³ Krishan Kumar et al., *Genetically Modified Crops: Current Status and Future Prospects*, 251 *Planta* 91 (2020).

⁴ Satyajit Saurabh, *Genetically Modified Crops: Advances, Biosafety, and the Quest for Sustainable Food*, 14 *J. Applied Biology & Biotechnology* 23 (2026).

scientific innovation while ensuring the protection of the environment and public health.

Beyond scientific and agricultural concerns, the debate over GM crops have also raised concerns over the issue relating to law, governance and environmental ethics. The use of genetically modified organisms (GMOs) in agriculture has also raised concerns about biosafety regulations, risk management, transparency in the approval process of GM crops, and the precautionary principle.⁴ The supporters of GM crops claim that biotechnology can play an important role in alleviating problems relating to hunger and agricultural concerns, on the other hand the critics pointed out long-term ecological and health implications that may not be completely recognized during its commercialization. The GM crop regulatory system in many countries try to bridge the gap between technological innovations, environmental protection and public safety.⁵ International instruments such as the Cartagena Protocol on Biosafety recognised the sovereign right to regulate the transboundary movement and environmental discharge of living modified organisms, while emphasizing the importance of precaution in situations involving scientific uncertainty. In result, the regulation of GM crops has become a highly debated legal and policy issue in many jurisdictions.

For India's economic growth, food security and rural livelihood, agriculture continues to be the most essential instrument. In addition to this, India has a rich biodiversity and a commitment to environmental preservation. These factors make the regulation of GM crops more sensitive. The Genetic Engineering Appraisal Committee (GEAC), the in-charge of assessing biosafety and environmental concerns, is one of the scientific and regulatory organizations involved in the process of approving GM crops. However, rulings relating to GM crops have frequently been challenged in court due to the concerns regarding transparency, scientific responsibility, and adherence to environmental laws. The issue over DMH-11 shows these conflicting

⁵ Mohd. Ahamad & S. Krishna, *The Genetically Modified Crop Debate: India's Dilemma and Way Forward*, 3 Food, Nutrition & Health 17 (2026).

interests. Supporters of DMH-11 have seen the crop as a significant step towards increasing domestic mustard production and lowering the dependency on edible oil imports, while opponents question the efficacy of biosafety trails and its impact on biodiversity and environmental sustainability.⁶ The subsequent legal conflicts have made DMH-11 an important case study for studying the link between scientific innovation, environmental protection and judicial control.

II. EVOLUTION OF GM CROP REGULATION IN INDIA

The GM crop adoption in India is the result of scientific research and agricultural innovation. In late 1990s India has started exploring biotechnology to increase agricultural production and recreated the achievement made during the Green Revolution. However, transferring a seed from a laboratory to farmer's field prove to be extremely complex thing. Over a period of time GM crops have evolved from a strict scientific matter to a major and social conflict. This transition has shown a significant battle in India to strike a balance between biotechnological advancement, environmental safety and agricultural sustainability.

(A) Development of biotechnology and GM crops:

Agricultural biotechnology is about removing traditional farming problems with modern techniques to get the desired results. Traditional farming has always relied upon cross-breeding plants to get better results, however that process takes generations and is mostly left to chance. GM technology changes the game by acting like a precise '*cut-and-paste*' tool for DNA. Scientists identify a specific gene that carries some useful traits – such as the ability to stay strong in changing climate, able to fight off a pest. Such identified traits can directly be inserted into a plant's genome to get the desired result which the plant could never develop this on its own.

⁶ Chandra S. Nuthalapati, David Zilberman, Matin Qaim & Prabhu Pingali, Hybrid Mustard and Biotechnology: Pathways for Doubling Farmers' Incomes and Nutritional Security, 58 Econ. & Pol. Wkly. 47 (No. 43, 2023).

The real world experience with this technology in India is defined by a single crop: Bt Cotton. Bt cotton was genetically engineered by introducing one or more cry genes derived from the soil bacterium *Bacillus thuringiensis* (Bt), enabling the plant to produce proteins toxic to certain insect pests, particularly the cotton bollworm which had been damaging the crop for years. The adoption of Bt cotton has resulted into the reduction of the use of pesticide and substantial increase in the productivity in many cotton-growing regions of India. Today, Bt cotton dominates the cotton industry in India, representing more than 95% of the total area under cotton cultivation. As all success story comes with hard lessons, same has happened with Bt cotton also. Over a period of time, some pests have developed immune system to the Bt crop, seed process went up and debates over corporate monopolies intensified. Supporters have seen Bt cotton as the proof that biotechnology could save Indian farming, while critics have seen its setbacks as a warning. Ultimately Bt cotton the permanent model for India's GM debate, setting the foundation for the strong opposition we currently see to GM food crops such as mustard.

(B) Regulatory framework governing GM crops:

The regulation of genetically modified crops must be guided by the principles of sustainable development, ensuring that technological advancements in agriculture are balanced with environmental protection and long-term ecological sustainability.⁷ However, India does not have a legislation that exclusively governs GM crops. Instead, GM crops are regulated primarily under the Environment (Protection) Act, 1986 and the Rules for the Manufacture, Use, Import, Export and Storage of Hazardous Micro-organisms, Genetically Engineered Organisms or Cells, 1989 (commonly known as the Rules, 1989). This approach assigns responsibility for safety to the Ministry of Environment and the Department of Biotechnology. To get the approval for GM crop, the person who has derived that crop must go through a multi-tiered safety process. The Institutional Biosafety Committee

⁷ Somya Babel & Sreedevi Poduval, A Paradigm Shift Towards Sustainability: An Environmental Irony, 2 GLS L. J. 1 (2020).

(IBSC) oversees research on GM plants at the institutional level. Subsequently, the review committee on Genetic Manipulation (RCGM) oversees controlled research and field experiments.⁸ The GEAC evaluates applications for both the environmental discharge and commercial production. The GEAC is the final authority in determining whether a crop can be tested in open fields or cleared for commercial production. In the year 2022, a notable development in India's regulatory framework took place with the introduction of the guidelines for safety assessment of genome edited plants. The government through office memorandum dated 30th March, 2020 has exempted certain categories of genome-edited plants, particularly those which do not involve the insertion of foreign DNA from specific regulatory requirements under rules 7 to 11 of the Rules, 1989. This has marked an important shift in India's approach towards agricultural biotechnology. This also reflects an effort to accommodate emerging scientific advancements while continuing to maintain biosafety protocol.

Even though this system seems complete on paper, there are still a number of issues with it. These regulations, which were created in 1989, are extremely outdated and unable to keep up with the advancements in gene edition. Questions have also been raised about the coordination between biosafety regulators like the GEAC and food-safety authorities working under the Food Safety and Standards Act of 2006, more particularly when it comes to assessing and approving genetically modified food products. The lack of clear and modern statutory framework has contributed to ongoing litigation, regulatory uncertainty and interference from the government in the approval process for GM crops.

III. THE DMH-11 CONTROVERSY: FACTS AND STAKEHOLDER CONCERNS

One of the most heated issues in Indian history is the proposed commercial release of Dhara Mustard Hybrid-11 (DMH-11). The argument began after

⁸ Manish Shukla, Khair T. Al-Busaidi, Mala Trivedi & Rajesh K. Tiwari, Status of Research, Regulations and Challenges for Genetically Modified Crops in India, 9 *GM Crops & Food* 173 (2018).

the GEAC approved its environmental release in October 2022. While supporters argue that DMH-11 will boost mustard production and can reduce India's dependency on import of edible oil, on the other hand critics have raised questions regarding biosafety, environmental impact, herbicide tolerance, farmer rights, as well as the validity of the regulatory clearance procedure. The topic came into light after India banned Bt Brinjal in 2010, making DMH-11 the next major test for the country's GMO regulatory framework.⁹ Public interest litigation contesting the approval has led the case to the Supreme Court of India. The judicial stand reached at a critical point in July 2024 with a landmark split verdict in the case of *Gene Campaign v. Union of India*¹⁰, which has proved that this impasse cannot be resolved by standard regulatory approvals only.

(A) About DMH-11:

DMH-11 is genetically modified variant of mustard that has been developed by the Centre for Genetic Manipulation of Crop Plants (CGMCP) at the University of Delhi. It was developed to improve mustard productivity by enabling the production of high-yielding hybrid seeds. To better understand the significance of DMH-11, it is important to know about the self-pollinating nature of mustard crop. Since each flower of mustard contains both female and male organs, the plant usually pollinates naturally. This makes difficult for the scientists to cross breed different varieties and produce higher yielding hybrids. To overcome this limitation, researchers in scientific field introduced a three-gene system derived from the soil bacterium *Bacillus amyloliquefaciens*. The three-gene system works different functions, enabling scientists to produce hybrid mustard seeds in controlled manner.

- **Barnase gene** – This gene prevents the mustard plant from producing pollen, making it unable to fertilise naturally. As a result, the plant must be cross pollinated with other type of mustard variety.

⁹ Id.

¹⁰ *Gene Campaign*, 2024 SCC OnLine SC 1793.

- **Barstar gene** – This gene is introduced into the second parent plant. When the two plants are crossed, the barstar gene cancels the effect of the barnase gene in the hybrid offspring, allowing the new plants to produce fertile seeds normally.
- **Bar gene** - This gene serves as a marker gene during the development of the hybrid. It gives the plant resistance to the herbicide glufosinate-ammonium, enabling scientists to identify plants that have successfully incorporated the desired genes.

By this manner the three-gene system prevents self-pollination in selected plants and enables controlled cross-pollination between a particular type of mustard plants. This makes the possibility to develop hybrid seeds with the potential for higher productivity. However, this gene has also become one of the major points of controversy because critics fear that herbicide-tolerant crops could encourage increased herbicide use and have adverse environmental consequences.

(B) Arguments in favour of DMH-11:

Supporters of DMH-11 argue that the hybrid can play an important role in addressing India's major agricultural challenges. Their support is mainly based on the following reasons:

- **Higher productivity** – One of the strongest argument in favour of DMH-11 is its ability to increase mustard production. During confined field trials, it has reportedly produced about 28% higher yields than national check varieties and upto 37% higher yields than some regional varieties. This would help the farmers to earn more without requiring additional agricultural land.
- **Reducing dependence on edible oil imports** – India imports a large share of its edible oil to fulfil the demand of the growing population. The increased production of mustard would help to reduce import

dependence and contribute to India's goal of achieving Atmanirbhar Bharat (Self-reliance) in edible oil sector.

- **Promoting indigenous scientific innovation** – DMH-11 would encourage domestic scientific research and strengthen India's biotechnology capabilities. This view also found support in the opinion delivered by Justice Sanjay Karol in July 2024 judgement in *Gene Campaign v. Union of India*¹¹, where he observed that encouraging scientific innovation is consistent with the constitutional duty to develop scientific temper under Article 51A(h) of the constitution.

(C) Concerns Raised Against Approval:

Despite the claim that the DHM-11 could improve the production of mustard, its conditional approval faces strong opposition from environmental activists, farmers, scientists. Their concerns mainly focus on the following issues:

- **Environmental risk and herbicide use** – One of the biggest concerns is that DMH-11 is herbicide-tolerant (HT) crop as it contains the bar gene. Critics argue that this may leads to more usage of herbicides such as glufosinate-ammonium to control weeds. Excessive use of these chemicals may reduce the soil quality and harm environment over a period of time.
- **Threat to biodiversity and honeybees** – India has a rich diversity of traditional mustard varieties. Opponents fear that pollen from GM mustard could spread through wind or insects and mix with non GM crop. This process is known as genetic contamination could permanently affective traditional mustard varieties. There are also concerns that GM crops may negatively affect honeybees by interfering with their feeding behaviour and gut health, which may result into reduction in the production of honey.

¹¹ *Gene Campaign*, 2024 SCC OnLine SC 1793.

- **Human health concerns** – Mustard is widely consumed in India both as cooking oil and as leafy vegetable known as *sarson ka saag*. Therefore, critics argue that stronger evidence is needed to prove its long-term safety. They also claim that sufficient long-term studies have not been conducted to rule out possible health risks, including allergies or other effects on human health.
- **Lack of transparency in the approval process** – Opponents also questioned the way DMH-11 was approved. They argue that the GEAC ignored the recommendations of its own Technical Expert Committee (TEC), which has advised against approving herbicide-tolerant food crops. They also point out that much of the safety data was generated by the developers of the crop, rather than through independent testing, raising concern about transparency and impartiality.

IV. JUDICIAL CHALLENGE TO THE APPROVAL OF DMH-11

The approval of DMH-11 has not ended the controversy over GM mustard. Environmental activists, farmer's organisations, and civil society activists have challenged the decision before the Supreme Court through Public Interest Litigation (PILs). They have argued that India's existing biosafety framework is outdated and it does not adequately protect public health and the environment. The petitioners contended that the environmental release of the genetically modified food crop without proper safety studies could pose irreversible risks to biodiversity, food safety and human health. They also argued that the decision making process lacked transparency as important biosafety information was not placed in public domain. Relying on the Precautionary Principle, they submitted that where there is scientific uncertainty and a possibility of irreversible environmental harm, regulatory authorities should act cautiously before granting approval.

After years of litigation, the Supreme Court of India delivered a split verdict on 23rd July, 2024 in *Gene Campaign v. Union of India*¹². Justice B. V.

¹² *Gene Campaign*, 2024 SCC OnLine SC 1793

Nagarathna and Justice Sanjay Karol reached different conclusions on the validity of the environmental clearance granted to DMH-11. Since the judges disagreed, the matter was referred to a larger bench for a final decision.

(A) Justice B. V. Nagarathna: Environmental protection and procedural fairness:

Justice B. V. Nagarathna had set aside the environmental clearance granted to DMH-11. Her judgement was guided by the precautionary principle, the public trust doctrine and the principle of intergenerational equity. She also found several shortcomings in the approval process. Her one of the major concerns was the lack of transparency, observing the unavailability of the complete biosafety data to the public. According to her, meaningful public participation is essential in decisions involving environmental and public health risks. Justice Nagarathna also noted that agriculture is primarily a State subject (Entry 14 List II) under the Indian Constitution, yet the Union Government had not adequately consulted the State Governments before granting approval. She further observed that the approval process lacked sufficient independent evaluation of the possible long-term health and environmental risks associated with herbicide-tolerant food crop. For these reasons, she concluded that the environmental clearance could not be sustained in law.

(B) Justice Sanjay Karol: Trust in scientific expertise and regulatory institutions:

Justice Sanjay Karol upheld the conditional approval granted by the GEAC. According to him, courts should generally avoid interfering with scientific decisions taken by the experts of that field unless those decisions are shown arbitrary, illegal or mala fide. He emphasized that technical questions relating to biotechnology should primarily be assessed by qualified scientific experts rather than courts. Justice Karol also observed that the approval granted to DMH-11 was conditional and subject to regulatory safeguards and monitoring. He considered scientific research and innovation to be

important for improving agricultural productivity and strengthening India's long-term food security, while stressing that appropriate regulatory safeguards must continue to be followed.

V. PRECAUTIONARY PRINCIPLE VERSUS SCIENTIFIC INNOVATION

The debate over DMH-11 shows larger challenge of balancing environmental protection with scientific innovations. India faces major agricultural problems such as climate change, land degradation, dependence on imported edible oil, water scarcity, etc.; scientific innovations in agriculture like GM crops may help to address some of these challenges by improving crop yields, pest and disease resistant crop. As every coin has two sides, same with the GM crops, as it may create risk to the environment that is difficult to reverse if adequate safeguards are not provided. Justice B. V. Nagarathna in the Supreme Court's split verdict case placed emphasis on the precautionary principle holding that scientific uncertainty should encourage greater caution before giving environmental clearance. However, Justice Sanjay Karol viewed scientific innovations as essential for agricultural development. Neither of these approaches should be treated as absolute. High dependency on precaution may discourage research and hamper the overall growth of the nation, while unrestricted grant may expose the environment and public health. A science based regulatory approach which combines both risk assessment and continuous post-release monitoring should be adopted. This approach promotes innovation while ensuring the environment and health concerns remain central to the regulatory decision-making process. For a developing country like India, the objective should not only be to choose between science and safety but also to create a regulatory framework that effectively protects both without any harm.

VI. REASSESSING THE REGULATORY FRAMEWORK: LESSONS FROM COMPARATIVE JURISDICTIONS

The experience of other countries shows that there are no single model regulating GM crops. The European Union (EU) follows a precautionary

approach that requires an extensive environmental and food safety assessment before commercial approval.¹³ This system provides strong environmental and food safety concerns, it has often been criticised for hampering scientific innovations and increasing regulatory costs. In contrast to this country such as United States of America, Canada, Brazil and Australia generally adopt a product-based, science-driven approach. Their regulators primarily assess the characteristics and risks of the final product rather than the method used to develop it. This result has encouraged faster innovation while maintaining scientific risk assessment and regulatory oversight.

Currently India is following process based framework under the Environment (Protection) Act, 1986 and the 1989 rules. However, the DMH-11 litigation has highlighted few weaknesses including fragmented institutional responsibilities, limited transparency, insufficient public participation and the absence of statutory framework regulating GM crops. India should develop a modern regulatory framework that ensure independent scientific assessment, greater public transparency, periodic review of safety data, effective post-release monitoring, and meaningful participation of State Governments. Such reforms would improve regulatory credibility while supporting responsible scientific innovation.

VII. TOWARDS COHERENT NATIONAL POLICY ON GM CROPS

The DMH-11 controversy has clearly shown that India's existing regulatory framework for genetically modified crops requires significant reform. Although the Environment (Protection) Act, 1986 and the 1989 Rules provide the legal basis for regulating GM organisms, they do not adequately address the scientific, environmental, constitutional, and governance challenges that have emerged over the years. The Supreme Court's split verdict further highlights the need for a transparent and comprehensive national policy.

¹³ Alessandra Guida, *The Precautionary Principle and Genetically Modified Organisms: A Bone of Contention Between European Institutions and Member States*, 8 *J.L. & Biosciences* lsab012 (2021), <https://doi.org/10.1093/jlb/lsab012>

A future policy should be based on five key principles. First, scientific decisions must be supported by independent and transparent risk assessments instead of relying primarily on data generated by crop developers. Second, public confidence can be improved by making biosafety studies, expert reports, and regulatory decisions publicly accessible, except where genuine commercial confidentiality exists. Third, State Governments should play a meaningful role in decision-making because agriculture is primarily a State subject and local agricultural conditions vary across the country. Fourth, all approved GM crops should be subject to continuous post-release monitoring to identify any long-term environmental or health impacts. Finally, the regulatory process should encourage scientific research and innovation while ensuring that safety standards are not compromised. India does not need to choose between technological progress and environmental protection. A well-designed national policy can promote both objectives by ensuring that innovation is guided by scientific evidence, constitutional values, and public accountability. Such a balanced framework would strengthen regulatory credibility and provide greater certainty to farmers, researchers, policymakers, and consumers alike.

VIII. CONCLUSION

The ongoing debate of DMH-11 is not only about one variety of mustard but it represents how India should regulate emerging agricultural technologies in a manner that promotes food security while protecting human health, biodiversity and constitutional principles. Scientific innovations play an important role as changing climate, increase in population and declining agricultural productivity continue to challenge the country's food systems. However, environmental and health concerns cannot be ignored. Supreme Court's split verdict in *Gene Campaign v. Union of India*¹⁴ shows that there is no simple answer to this growing issue. While one approach emphasises precaution and environmental protection, the other stresses scientific

¹⁴ *Gene Campaign*, 2024 SCC OnLine SC 1793.

progress and institutional trust. Both perspectives recognise the need for a stronger and more transparent regulatory system.

The study concludes that in India no proper framework is there which regulates modern biotechnology effectively. The regulatory framework at each stage should focus on improving transparency, strengthening independent scientific assessment, promoting cooperative federalism, and ensuring meaningful public participation. Further a comprehensive national policy supported by clear legislation and effective institutional coordination on GM crops can reduce uncertainty and improve public confidence on the use of the same. Ultimately, the objective should not be to support or oppose genetically modified crops as a matter of principle. Instead, the focus should be on creating a science-based, transparent, and constitutionally sound regulatory framework that enables responsible innovation while safeguarding environmental sustainability and public welfare. Such an approach would better support India's commitment to sustainable agriculture and the achievement of Sustainable Development Goal 2: Zero Hunger.

THE CONSTITUTIONAL ARCHITECTURE OF INFORMATIONAL PRIVACY: EXCAVATING THE PUTTASWAMY FRAMEWORK

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ABSTRACT

Section 17 of the Digital Personal Data Protection Act 2023 empowers the Central Government to exempt any state instrumentality from the Act's obligations by executive notification, without parliamentary sanction, independent oversight, or temporal limit.¹ Tested against the constitutional standard that Justice KS Puttaswamy (Retd.) v Union of India articulated, that any invasion of privacy must satisfy what Justice Chandrachud called '(i) the action must be sanctioned by law; (ii) the proposed action must be necessary in a democratic society for a legitimate aim; (iii) the extent of such interference must be proportionate to the need', Section 17 fails at every stage.² Its grounds are undefined, its scope unlimited, and it eliminates the only institutional mechanism through which proportionality could be reviewed. Comparative examination of GDPR Article 23³ and South Africa's POPIA confirms these failures are deliberate choices, not operational necessities.⁴

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¹ Digital Personal Data Protection Act, No. 22 of 2023, § 17, India Code (2023).

² Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 S.C.C. 1 (India).

³ Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation), art. 23, 2016 O.J. (L 119) 1.

⁴ Protection of Personal Information Act 4 of 2013 (S. Afr.).

Keywords: *Data Protection Board, Deemed Consent, Delegated Legislation, Informational Privacy, Proportionality, State Exemptions.*

I. INTRODUCTION

The nine-judge court in *Puttaswamy*⁵ was unanimous in its underlying supposition. In the plurality opinion, Justice Chandrachud believed that privacy contained within it the safeguarding of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation and that any impairment of privacy had to meet a three-part test. The statutory response of parliament, 6 years in coming, 3 Bills in the drafting, was the DPDP Act 2023. The reaction was sincere even in certain areas: Chapter III enforceable rights of access, correction, and erasure are legitimate legal advancements to a jurisdiction that had before established laws on data protection via telecommunications guidelines. Writ jurisdiction in Articles 32 and 226 could not be duplicated on any scale of specialist complaint measures that ordinary citizens would be realistically capable of using, and the establishment of the Data Protection Board under the statute was responsive to the constitution. This does not alter anything of what Section 17 does.

Section 17 is not an exemption clause of an ordinary nature. An exemption is a cut of a general regime, which has bounded space carved out of it and the remainder of the regime is not changed. The notification procedure of section 17 authorizes the wholesale elimination of all the obligations generated by the Act, the obligation of notice, the consensus structure, the purpose restriction, the retention restriction, the security safeguard obligation, and all the Chapter III rights catalogue, by any state instrumentality, by one executive notification, based on reasons the statute refuses to define. Read together with the deemed consent architecture of Section 7, there will be a regulatory order whereby the state writes rights on behalf of individuals and at the same time reserves to itself unqualified

⁵ *Puttaswamy I*, *supra* note 2.

power to suspend such rights at the will of the executive. The current author is indeed oblivious to a similar clause in any other data protection law adopted by a democracy that deems the rule of law as an operational but not an aspirational limitation. That remark is intended not figuratively, but literally.

The so-called tripartite test developed in *Puttaswamy* was a constitutional reaction in its turn to the constitutional argument made by the government itself in front of the nine-judge court: that there was no reasonable expectation of privacy on the part of the citizens against the state. The most politically significant decision in the judgment is the unanimous dismissal of that argument by the Court; it shut the door through which the state had been trying to shield its data gathering operations against the fundamental rights test. Section 17, which is treated structurally, tries to recreate the exact immunity which the Court was not ready to grant. The fact that it does so by statutory process, and not constitutional contention, does not make it easier, but throws the constitutional difficulty into a narrower focus.

There are two clarifications of scope required. The analysis is based on Section 17 as it was enacted and would work on any government that would wish to exercise it to the fullest, rather than how the government may restrain itself in the present. A clause that gives constitutional discretion without any limit causes no defence to the fact that it is currently in the hands of the people who are exercising it prudently; that is the constitutional weakness of the design itself. Neither does this paper posit that the state should have no exemptions on its duties on data protection. Narrowly crafted, intelligently crafted, independently supervised and limited in time security exemptions can well be constitutional. The particular structure of the departures in Section 17 that is disputed here is as follows: entity-wide, notification-based, indefinite, unmonitored. The combination of such is constitutionally unsustainable and the relative history proves it operationally unnecessary.

II. IDENTIFICATION OF STATEMENT OF RESEARCH PROBLEMS

Puttaswamy established a three-part test: legality, legitimate aim, and proportionality against which any State interference with informational privacy must be measured. Existing literature on the DPDP Act, 2023 has criticised Section 17 in general terms, as an overbroad or executive-convenient exemption, but no published work applies *Puttaswamy*'s tripartite test directly, clause by clause, to Sections 7 and 17, or measures the resulting gap against the specific structural safeguards built into comparable regimes such as GDPR Article 23 and South Africa's POPIA. The key research lacuna this study addresses is that unexamined intersection: how the exemption architecture of Sections 7 and 17 is built to place State data processing beyond the reach of the very proportionality framework *Puttaswamy* makes constitutionally mandatory. This presents a structural challenge between the plain intent of the statute and the requirements the Constitution imposes on any law that limits a fundamental right.

III. FINDINGS OF THE RESEARCH

(A) The Architecture of Exemption: Section 17 of the DPDP Act 2023

(I) The Scope and Sweep of Section 17(1)

Section 17(1) gives the Central Government the power to exempt any state instrumentality against any or all of the provisions of the Act by notification. The reasons stated, sovereignty and integrity of India, state security, good neighbourliness with other states, preservation of law and order, and hindrance of incitement to any cognisable crime will be familiar to constitutional lawyers as the words of Articles 19(2) and 19(3). The first trap of analysis is that recognition. The last seventy years of constitutional law have been devoted to providing those terms with narrow, limited and substantially litigated meanings, the proximity requirement of *State of*

Madras v VG Row, where Patanjali Sastri CJ said that the test of reasonableness had to be applied to a specific statute that was in issue and did not merely require a tendency or a possibility.⁶ Section 17(1) takes the vocabulary of that branch of jurisprudence and does not succeed to any of its restrictive structure.

It is in the phrase of any or all provisions that we can see the structural enormity of the provision. A notice pursuant to Section 17(1) might on any fair reading of the text, deprive a state instrumentality of the entire regulatory framework of the Act all in one go: the notice obligation, the consent framework, the purpose limitation principle, the data accuracy obligation, the storage limitation, the security safeguard requirement, and the entire Chapter III catalogue of data principal rights (access, correction, erasure, nomination and grievance) read there is no floor of obligation which is minimum. It does not even leave a remnant obligation to inform the data principals that their rights are suspended, and that they do not have any avenue of complaint under the Act. An entity that is wholly exempted by Section 17 (1) acts as though the statute was not in existence in the face of the DPDP Act. That does not give it an exemption of being under a regulatory regime. The abolishment of one is the other.

(ii). Sections 17(2) and 17(3): Research, Archiving, and Startup Exemptions

The exemption of research and archiving in Section 17(2) has a constitutional concern, which might be termed as a secondary level, not as dramatic as that of Section 17(1), but which also demonstrates the same pathology of structure. The GDPR in article 89(1) which incorporates precisely these types of processing, states that, before the derogation is applicable,⁷ there must be

⁶ *State of Madras v. V.G. Row*, A.I.R. 1952 S.C. 196 (India).

⁷ Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation), art. 89(1), 2016 O.J. (L 119) 1 [hereinafter GDPR].

in place appropriate safeguards, in accordance with this Regulation, in respect of the rights and freedoms of the data subject, such safeguards being demonstrably in existence in primary legislation. This organization is turned inside out by the Indian provision. Parliament has provided the power of exemption and has made a complete delegation to Rules not yet made of the specification of its contents. It is constitutionally unknown at the time of authorisation whether those Rules will, when finally promulgated, give any meaningful protection; all that is constitutionally certain is that the main statute will provide no guide upon which a reviewing court might conclude, whether this or that exercise of the power of Section 17(2) is authorised or arbitrary.

(iii). The Notification Mechanism and the Accountability Deficit

Section 21 of the General Clauses Act gives a notification the effect of whatever procedural limitations are provided in its parent statute.⁸ None is prescribed by section 17: there must be no prior consultation, no requirement that the parliament should be laid, no requirement that a statement of reasons should be made, no time limit and no mechanism of review of any sort. The exemption notification is a self-validating and self-perpetuating one. The government making the exemption has no later burden of proving that the circumstances under which it was granted still exists; no court of statutes has a power to require it to show it exists; and the data principal whose rights have been suspended has, in theory, the writ jurisdiction under Articles 32 and 226 as the only means of redress. That solution is, in effect, costly, time consuming, and almost unreachable at the amount of scale to which common citizens would require it, which was, in fact, the constitutional case in the existence of a specialist statutory complaints system, in the first place.

A notification issues renders the Data Protection Board in no way in control of the exempted entity. It is not able to take complaints, research, charge or

⁸ General Clauses Act, No. 10 of 1897, § 21, India Code (1897).

demand redress. The statutory privilege and the statutory redress disappear concurrently. By reading Section 17 and the provisions of the jurisdiction of the Board, one finds themselves facing a statutory framework where the most constitutionally significant decisions made by the government, decisions that render the most powerful data processors accountable to no one, are also the ones that have the least external oversight. The fact that it is ironic is bordering on constitutional provocation.

(IV). The Definitional Void and Legislative Imprecision

The constitutional assumption which was made operative in *Shreya Singhal v Union of India* is much broader than the speech law context on which the decision was made.⁹ The Court there declared Section 66A of the Information Technology Act 2000 as invalid citing the ground that it is a vague and over-broad section,¹⁰ it constitutes an offence that is open-ended, undefined and that it has a broad range of interpretations. The constitutional vice, which is expressed in terms of principle, and not any particular application, is, that a constitutional authorisation of executive action, where the action is directed to the violation of freedoms protections in the constitutions, must limit the authorisation to do so with specificity enough to render judicially cognisable the boundary between a lawful and an unlawful invocation. Section 17 appeals to the security of the state and maintenance of public order in both phrases without giving either any specific and limited meaning as the constitutional doctrine has done over the seven decades of its existence. A reviewing court that was to face a challenged notification of Section 17 would not be able to determine any statutory base against which to determine whether the invocation was authorised or arbitrary; the grounds would be simultaneously the authority and the limit, which implies that they are neither.

It is the very overbreadth that was pointed out by the Parliamentary Standing Committee which looked into the draft legislation and suggested

⁹ *Shreya Singhal v. Union of India*, (2015) 5 S.C.C. 1 (India).

¹⁰ Information Technology Act, No. 21 of 2000, § 66A, India Code (2000) (struck down 2015).

the use of clear and specific criteria to regulate the use of the exemption power.¹¹ The recommendation did not even appear on the final statute passed, and no government justification has ever been publicly given as to the reason why the constitutional interest of the Committee was not taken into consideration. Even that lack of deliberative residue has a constitutional importance: it implies that courts requested to interpret Section 17 notifications will be unable to draw any legislative history that will be used to suggest a constrained interpretation.

(A). The Puttaswamy Standard: Privacy as a Structured Constitutional Entitlement

(i). The Historical Trajectory to Puttaswamy

The journey towards the appreciation of the concept of privacy as a constitutional right in Indian constitutional jurisprudence was not a straight path and the deviations are instructively informative of the constitution. *MP Sharma v Satish Chandra*, the eight-judge bench, unanimously, decided that there was no right to privacy in the constitutional text that was comparable to the protections of the Fourth Amendment.¹² *Kharak Singh v State of Uttar Pradesh* gave a divided verdict, with the majority denying that there is an existent general right to privacy, but Subba Rao J dissenting to the case giving the majority's argument that would ultimately carry the day: 'Privacy, he said, is a vital constituent of ordered liberty.'¹³

The first affirmative move was in *Gobind v State of MP*.¹⁴ Based on *Griswold v Connecticut* and *Stanley v Georgia*, Justice Mathew opined that, we shall presume that the right to personal liberty, the right to move and the right to privacy are guaranteed by the Constitution.¹⁵ The constitutional approach was interesting: the Court referred to comparative sources to the Fourteenth

¹¹ JOINT PARLIAMENTARY COMMITTEE, REPORT ON THE PERSONAL DATA PROTECTION BILL, 2019 (2021).

¹² *M.P. Sharma v. Satish Chandra*, A.I.R. 1954 S.C. 300 (India).

¹³ *Kharak Singh v. State of Uttar Pradesh*, A.I.R. 1963 S.C. 1295 (India).

¹⁴ *Gobind v. State of Madhya Pradesh*, (1975) 2 S.C.C. 148 (India).

¹⁵ *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Stanley v. Georgia*, 394 U.S. 557 (1969).

Amendment privacy jurisprudence of the United States Supreme Court, and applied it to Article 21, personal liberty, guarantee, in the constitutional democracies in general, not as a rule but as an indication of what ordered liberty demands. *PUCL v Union of India*, took the analysis materially further by imposing in any case what, in substance, was a procedural legality condition: telephone interception by state agencies violated Article 21, and was subject to compliance on the condition that it was authorised by an identified officer through prescribed statutory procedures.¹⁶ The logic of proportionality was implicit. It was explicit by Puttaswamy.

The Aadhaar litigation, which gave rise to the constitutional reference, was a case in point with the practical stakes of the underlying question being exceptionally clear. The fact that the government could argue that citizens had no reasonable expectation that the state would not intercept their communications was not an extreme stance, but rather the calculated stand of a government trying to justify its flagship digital identification programme in front of nine judges.¹⁷ The fact that the bench agreed unanimously with that argument is the most significant holding of the judgment itself since it put an end to the constitutional means through which the state had tried to put its data collection and processing efforts beyond the basic rights question altogether. Structurally, Section 17 is a bid to rebuild via statute the immunity which was denied constitutionally.

(ii). The Tripartite Test and Its Constitutional Foundations

The Puttaswamy bench gave half a dozen opinions, and it is a mistake to regard the judgment as a single utterance, where significant variations of focus and procedure of analysis are involved. On the scale of evaluating the intrusion of the state on the privacy, there is, however, a convergence enough to prove the three-limbed formulation. Any intervention needs to be approved by a law that meets the legality criteria; should have a valid state purpose; should be sufficient to the end. All the conditions are cumulative

¹⁶ *People's Union for Civil Liberties v. Union of India*, (1997) 1 S.C.C. 301 (India).

¹⁷ *Puttaswamy I*, *supra* note 2, ¶ 1 (Kehar, C.J.).

and non-substitutable, which is a fact that Puttaswamy poses a greater challenge than a mere balancing test and is explicit to the Court.

There is a doctrinal ancestry of the framework that should be traced very well. The criterion of legitimacy of the state action in Article 21 is based on *Maneka Gandhi v Union of India* where Krishna Iyer J, believed that the procedure established by law must be fair, just and reasonable, not fanciful, oppressive or arbitrary.¹⁸ This reversed the proceduralism of *AK Gopalan v State of Madras* and in effect combined Articles 14, 19 and 21 in to one standard.¹⁹ Puttaswamy assimilated that norm and decomposed it into 3 analytically disaggregated requirements each having its own evaluative material. The difference, and this is especially worth noting, is that the proportionality requirement has become an executive application restriction and legislative design restriction. An act establishing authority to limit privacy and offer no way of means of proportionality judging does not only fail in the mode of operation but also in the mode of establishment. This is one of the failures of Section 17.

(iii). Informational Privacy and the Data Protection Nexus

The application of the notion of informational privacy by the plurality at Puttaswamy of an independent strand of the overarching right that is constitutionally important, has certain implications on the law of data protection that commentators have not always identified with enough specificity. Justice Chandrachud noted that privacy of personal communication protects individual against being spied on her communications and offers an assurance that no individual is subjected to forcing him or her to air out her political or religious beliefs. This observation is constitutionally acute in a manner unprecedented by pre-digital privacy theory, namely, aggregated personal data reflects intimate patterns of behaviour, association, belief, and circumstance that would not be revealed by any single piece of data and that the state instrumentalities

¹⁸ *Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248 (India).

¹⁹ *A.K. Gopalan v. State of Madras*, A.I.R. 1950 S.C. 27 (India).

which have access to such data are uniquely placed to capitalise on that capacity.

The Puttaswamy proportionality framework was shown to have a practical scope in a context, executive restrictions on access to information, which has significant structural similarities with executive data processing exemptions, as shown in the case of *Anuradha Bhasin v Union of India*.²⁰ There the Court demanded that limitations must be necessary and responsive to the needs which led to them, and it would not just take the necessity characterisations of the government, but demanded that the minimum measure possible should be used. The exemption architecture of section 17 does not pass this test on a case-by-case basis, but instead prospectively, which is to say that it excludes state data processing as an issue of institutional concern, and thus as something that can be reviewed. Section 17 is not in danger of doing poorly in proportionality review. It structuralizes it out of business.

(B). The Illusion of Consent: Constitutional Analysis of Section 17

(i). The Legality Requirement and Its Statutory Failure

The Sunday Times v. United Kingdom established the requirement that a norm cannot be considered a law unless it is developed with a high degree of specificity to allow the citizen to coordinate his behaviour, was directly applied to the Puttaswamy proportionality model as constituting the content of the legality requirement.²¹ The section 17 meets only the most evacuated formal requirement of legality: there is a statute, and the statute grants a power. The grounds of the provision are not defined in statute; it may involve the totality of scope; it does not have a time limit; and its deployment is at discretion. The face of the statute alone did not permit a data principal whose rights had been suspended by a Section 17 notification to know what processing activities the notification will cover, why the notification is within the scope of the notification, or how long the notification will last, or any

²⁰ *Anuradha Bhasin v. Union of India*, (2020) 3 S.C.C. 637 (India).

²¹ *The Sunday Times v. United Kingdom*, App. No. 6538/74, 2 Eur. Ct. H.R. 245 (1979).

other avenue of challenge (or otherwise). Two of the requirements of the Sunday Times standard are the requirement of accessibility and foreseeability, on which the violation is both not incidental but structural.

Ram Jethmalani v Union of India introduces the accountability element: the requirements of the structural insulation of the executive action against the independent examination do not sit well with Articles 14 and 21, as well as with the rule of law.²² This insulation has been accomplished in section 17. The state instrumentalities can act in exemption notifications and are not subject to any regulatory control, do not need to keep any documentary record of the reason why they are so doing and has no statutory basis on which data principals can appeal against the initial validity or the very existence of the exemption. The clause establishes what can well be termed as a zone of unaccountability that has legal sanctions. That description is not polemical; it is a structural description of what the provision brings about in its design.

State of Maharashtra v. Indian Hotel and Restaurants Association provides a new dimension. The Court said that uncanalised and undirected granting of immense powers to an Authority to be used at will, would be arbitrary and a breach of the rule of law.²³ The notification power under Section 17 is constrained by grounds that are not defined statutorily, and therefore when judges are reviewing a notification that has been challenged, they have a problem of baseline, and it is the absence of any statutory definition of any grounds that limits the notification power. The vice that is inherent in the constitution is structural. The care with which the present government prefers to execute the power cannot remedy it, since the exercise of the power by any of the successor governments which might act in other political conditions would be confronted with the same want of restraint.

²² *Ram Jethmalani v. Union of India*, (2011) 8 S.C.C. 1 (India).

²³ *State of Maharashtra v. Indian Hotel & Rests. Association*, (2013) 8 S.C.C. 519 (India).

(ii). Legitimate Aim: The Conflation of Power and Purpose

The interests that are invoked under Section 17(1) (national security, public order, sovereignty, friendly foreign relations) are constitutional interests and as such, are recognised and valid. In this paper, there is no challenge to that. The Puttaswamy test demands something that is more rigorous at the legitimate aim inquiry than a statement of recognised interests: it demands proving an apt relationship between the particular measure under consideration and the particular aim invoked. This was stated in terms by *Modern Dental College* which are not open to any equivocation: the principle of proportionality demands that the measures taken to attain the end sought are necessary and not exceed what is necessary in that case.²⁴ A company-wide exemption can never find this nexus as it fails to differentiate the processing activities that are beneficial to the invoked purpose and those that are not. A welfare ministry that is still under the exemption of the security of the state ground still engages in data processing of family composition, health status and economic status of the beneficiaries under the exemption although none of the processing activities is realistically connected to the justification of security.

Designing section 17 does not allow nexus to be established. The Central Government has no requirement to determine what processing activities of an exempted entity are security-relevant, what security issue each is responding to, or why entity-wide exemption was required as opposed to a narrow exemption of the processing operations of the specific processing operations covered by that exemption. Vilas Pandurang Pawar introduces the necessity dimension: the measure has to be the least restrictive possible way of attaining the goal.²⁵ The entity wide exemptions are structurally in violation of the analytical precondition to this evaluation by ensuring that the relationship between measure and objective is so indeterminate that it cannot be compared to less restrictive alternatives before it can be tried.

²⁴ *Modern Dental Coll. & Rsch. Ctr. v. State of Madhya Pradesh*, (2016) 7 S.C.C. 353 (India).

²⁵ *Vilas Pandurang Pawar v. State of Maharashtra*, (2012) 8 S.C.C. 795 (India).

(iii). Proportionality and the Structural Impossibility of Review

Proportionality review is a substantive constitutional discipline (not a checklist), and must have an institutional mechanism that can pose a meaningful question whether it was the least restrictive means of accomplishing this specific goal. To take it seriously, one must have access to: evidence of what other options were in fact considered; factual information regarding the scope of the processing operations of the exempted entity; data regarding what a more limited exemption would have fulfilled the alleged security need; and some evidence of how far and how long the choice of the scope was made. Section 17 provides that none of this information must be produced and also that no institution has the authority to demand that such information be produced. Institutional void is not an incident; it is a point.

The most recent and thorough consideration of bulk interception by the Grand Chamber under Article 8 ECHR, namely *Big Brother Watch and Others v United Kingdom*, was that bulk interception regimes should have end-to-end safeguards, which included: prior independent authorisation or review; clearly defined categories of selectors and search terms; independent control over accessing, handling and use of data; and post-interception notification in the right cases.²⁶ The analysis of the Grand Chamber is educative not due to the fact that the Indian constitutional law adopts the ECHR directly but on the ground that it reveals that the formal statutory competence of state processing of data alone cannot be considered adequate in any legal system where the privacy rights are taken seriously. Section 17 does not have any other formal statutory authorisation. The regulatory inconvenience is not just the institutional void Section 17 creates. It is the one through which the constitutional review is prevented structurally.

²⁶ *Big Brother Watch v. United Kingdom*, App. Nos. 58170/13, 62322/14 & 24960/15 (Eur. Ct. H.R. May 25, 2021).

(C) Comparative Perspectives: Regulatory Models for State Exemptions

(i) The GDPR Framework: Targeted Restrictions and Structural Safeguards

Article 23(2) of the GDPR defines exhaustively what any legislative action under the Article 23 exemption authority must include: (a) the purposes of the processing or types of processing; (b) the types of the personal data involved; (c) the limitations that it has implemented; (d) the protection against misuse and unlawful access or transfer; (e) the identification of the controller or types of controllers; All the elements need to be addressed in the binding legislation prior to exemption. No executive discretion during application may be indulged to complete the gaps left by a legislature. Compare Section 17 of the DPDP Act whose resolution of none of these elements and refers all of substantive content to the executive notification. It is a difference of type and not one of degree, and not the difference which is easily defensible on the Indian side, constitutionally.

The contrast is focused within three structural features of GDPR framework. The Article 23 limitation should be legislative; it should be notified by the executive, which under the European law is not adequate. Article 23 restriction processing is not subject to the supervision of the supervisory authorities, despite the derogation, but the oversight of these supervisory authorities is a condition that Article 52(1) places on processing by a supervisory authority, which the GDPR imposes equally on processing by a government body and processing by a privately controlled organisation. And the purpose-specificity limitations of Article 23(2) incorporate the proportionality analysis into the legislative structure, not referring to an executive decision-maker who is not subject to accountability when it comes to the assessment. The GDPR also considers state data processing exemptions as one of the constitutional issues that need to be managed structurally during the design phase of legislation. Section 17 considers them as an administrative convenience to be made.

(ii). The POPIA Framework: South Africa's Rights-Sensitive Model

The POPIA of South Africa follows the constitutional premise that is enshrined in section 36(1) of the Constitution that states that any restriction of fundamental rights must be reasonable and justifiable in an open and democratic society founded on human dignity, equality and freedom, which consider all relevant factors.²⁷ This is reflected in the approach of POPIA to state data processing: the public bodies are not exempt on matters of the processing of the data on the basis of the public interest; the exemption of the public interest on the need to process the data and protect the individual privacy must be authorised by the Information Regulator, and only after he is convinced that the public interest in the exemption of the information management clearly outweighs the public interest of the protection POPIA has no equivalent of Section 17. The structural imbalance, which constitutes the DPDP Act, of the executive acting at the same time as the promulgator of the rights, the adjudicator hearing complaints against it, and the instrumentalities of the executive being exempted by the regime, has no counterpart in South African law. The independence of the Information Regulator is pegged on the parliamentary involvement of the parliament in the appointments, the non-renewability of the term of office (removing the effect of reappointment incentives) and the accountability to the legislature instead of the executive whose actions the Regulator may need to review. The independence is the precondition of meaningful accountability of data processing in the state, and it is specifically what the Section 17 was created to preclude.

(D).The Politics of Exemption: Democratic Deficit and the Self Regulatory State

(i). The Political Economy of Overbroad Exemptions

Section 17 assumes the form it does because it makes sense structurally and not by chance, and this is important in any realistic determination of the

²⁷ S. AFR. CONST., 1996, § 36(1).

prospects of reform. The data protection laws are drafted by the legislators who realize, with an average level of sophistication, that they would be used by the future governments, including the political opponents. The expected experience of exercising state power generates structural incentives to maintain operational flexibility that would otherwise not be manifested in legislation which is actually based on the viewpoint of data subjects. The wider is the exemption, the more flexibility it leaves; the more liberal the notification scheme, the less administrative cost there is in the invocation of such a scheme when the need arises. In the European case, Paul Schwartz has examined this dynamic; its working in the Indian legislative process could be observed in the successive broadening of exemption clauses in the three successive draft Bills leading to the promulgation of the statute.

(ii). Digital Infrastructure and the Compounding of Self-Interest

The argument of the political economy gains even more weight when it is contrasted with the digital governance infrastructure of India in particular. Some of the largest personal data processing systems in the world are state owned and operated: the Aadhaar biometric database (over a billion registered); DigiLocker; the National Health Stack; and several welfare delivery systems that process economic, health, and family composition data at a scale and intimacy that would be the focus of the most regulatory compliance scrutiny were run by a private organization. The state agencies that would most probably be exempted under the Section 17 are those whose data processing would most critically demand constitutional accountability, which is the opposite of the relationship that constitutionally responsible exemption design would create.

People who interact with these systems are not engaged in a voluntary marketplace that they can move to an alternative which respects their privacy. They do because they are rights-bearers in whom state digital services are terms of access to welfare, identity documentation, health services, and state goods, and people who, in a real sense, have no exit. In the situations where citizens are not allowed to leave, the constitutional

limitations of the processing power of the organization they are not able to leave assume a correspondingly greater importance, rather than lesser. Section 17 turns this constitutional rationale inside out: it is at the very place that the exit is blocked that accountability is also removed.

(iii). Constitutional Democracy and the Limits of Formal Rights

The constitutional rights serve as limitations to the majoritarian power. They work not merely through formal textual recognition but through the institutional architecture that renders them enforceable upon the actors most likely to violate them. An informational privacy right that is enforceable against the private but not against the state, against the largest data processor in India, and the party with the largest structural means to use personal data contrary to the interests of the persons whose is gathered is not a fundamental right in any sense that is constitutionally serious. It is a formal right, and the right which state has tried to organize and watch over, that it will not be enforced against it where its interests are most immediately involved. The DPDP Act represents a particular form of constitutional risk that the basic structure doctrine of *Minerva Mills* was meant to preclude: the replacement of substantive constitutional protection with formal adherence to the law. The law meets the legislative requirement to act in response to *Puttaswamy*, it is a statutory answer to the constitutional requirement. What it fails to fulfil is the greater responsibility to make sure that the legislative answer offers the informational self-determination essential to the constitutional right. The concurrence expressed by Justice Kaul in *Puttaswamy* required a strong data protection regime, and the plurality opinion of Justice Chandrachud made it clear that the proportionality requirement functions as an ongoing limit on the design of such regimes. Section 17 is not in its architectural design in compliance with that constraint, and the breach is not peripheral or incidental. It is fundamental.

IV. CONCLUSION

This paper's contribution lies in the application, not merely the criticism. Existing scholarship on the DPDP Act, 2023 has treated Section 17 as an overbroad or executive convenient exemption in general terms; this paper has instead applied Puttaswamy's tripartite test, legality, legitimate aim, and proportionality, clause by clause to Sections 7 and 17, and set the resulting deficit against the specific structural safeguards built into GDPR Article 23 and South Africa's POPIA. That exercise, not previously undertaken in the published literature, is what makes it possible to say with precision, rather than in the language of general suspicion, exactly where Section 17 fails and what a constitutionally adequate exemption would require. On the basis of that analysis, three reforms follow directly from the gaps identified above: purpose specific rather than entity wide exemption grounds, independent supervisory jurisdiction over any exemption granted, and mandatory sunset review in place of indefinite notification.

The addressee of the obligation that Puttaswamy made was Parliament. The entitlements of Chapter III of the DPDP Act, its notice and consent regime, as well as its Data Protection Board mechanism, are genuine legislative successes, and it would be analytical dishonesty to overlook them when determining what is fundamentally wrong with the statute.

That concession having been made: the constitutional defect in the Section 17 is in its structure, and it can be relieved not easily. Such a structure of exemption, entity-wide, notification-based, indefinite, and unmonitored in nature, establishes exactly the situation that this paper describes as the illusion of consent a statutory privacy regime the formal protections of which apply to everyone but structurally unavailable to those who have their data processed by the state. The data principal whose rights are safeguarded by the DPDP Act as protection against the data processing in the state will find the protection illusory not that the Act does not provide any rights, but that Section 17 guarantees that the state can snuff out the rights at its own

discretion, by its own notification, without reasons and without being answerable to a third party.

Measured against the tripartite Puttaswamy test that frames this paper's central research question, the findings are as follows. The provision is not passed in every limb of the tripartite Puttaswamy test. The test of legality demands that, as the Sunday Times test which Puttaswamy was presented with puts it, the law must be such as to permit the citizen to order his conduct, and the grounds of Section 17 are not specified and its application is unrestricted. The legitimate aim test as adopted by Modern Dental College, states that, the measures taken must be necessary to meet the aim being pursued and must not exceed what is necessary, entity-wide notifications cannot be structurally used to establish the existence of nexus. The proportionality criterion demands institutional capacity in order to determine necessity; Section 17 repeals the sole organization with jurisdiction over the area in which proportionality is most required and replaces nothing.

The constitutional deficiency illustrated in section 7 is compounding. The political economy analysis explains why such failures will not be corrected by the normal political mechanisms and why independent institutional design decisions independent of executive will are the only constitutionally serious reaction. This comparative record is conclusive on one empirical fact the design decisions manifested in Section 17 are not required by the practical needs of state security. Precisely legislative purpose-specific exemptions, external supervisory organ jurisdiction, sunset reviews with mandatory renewal, and parliamentary oversight mechanisms have been operationalised in constitutional orders with security environments and executive prerogatives widely similar. India does not have to introduce any novelty in its constitution to adopt them.

It involves a legislative desire to have the Puttaswamy standard as an effective limit on statutory design, and not a rhetorical tool to be invoked in the preamble. The privacy right that Puttaswamy accepted as constitutional

is a constitutional right, rather than a legislative one. It implicates the state as the main accrue of personal information and the key structural danger to informational self-determination on the online plane. This refinement of Section 17 to match what that right demands cannot be an optional refinement or a future aspiration. It is a state to which the data protection promise of the DPDP Act goes to work instead of appearing spurious to the rights-bearers that it promises to safeguard.

DECENTRALISED ENVIRONMENTAL GOVERNANCE IN SCHEDULED AREAS: A COMPARATIVE STUDY OF PESA IMPLEMENTATION IN JHARKHAND, ODISHA, AND CHHATTISGARH

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ABSTRACT

The Panchayats (Extension to Scheduled Areas) Act, 1996 (PESA) was enacted with the objective to strengthen Gram Sabha in Scheduled areas & to strengthen decentralized environmental governance in these areas. But even after two decades, implementation of The PESA remains uneven in different scheduled states. The Rights of the tribals as well as environmental governance has been compromised. This article critically examines the implementation of the PESA in the state of Jharkhand, Odisha and Chhattisgarh with reference to environmental governance. To study the Constitutional provisions, state rules, government reports, judicial decisions and state reports doctrinal method and comparative analysis has been adopted. This includes the systematic data driven based approach to interpret authoritative texts applying different interpretation principles deconstructing complex legal concepts in this reference. The findings highlight that; there have been implementation variations in different states despite common legal framework. The Jharkhand took many years

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in implementation of PESA and Odisha implemented it partially while interacting with forest rights Act. While implementation of the Act is comparatively strong in the Chhattisgarh provided, due to administrative dominance the Gram Sabha has failed to work effectively.

The paper logically argues that decentralization under PESA has often been a paper tiger which resulted in compromised rights of the tribals and failed decentralized environmental governance in the state. It concludes that Gram Sabha should be strengthened by ensuring binding consent, ensuring uniform implementation of PESA across the states to ensure environmental governance and tribal rights.

Keywords: *Environmental Governance, Gram Sabha, Natural Resource Management, PESA Scheduled Areas, Tribal Communities.*

I. INTRODUCTION

Environmental governance has been an important and burning topic due to growing pressure on land, water, forest and biodiversity.¹ It is even more important in Scheduled areas which are mainly inhabited by tribal communities from the time immemorial and is also rich in natural resources.² From the ancient times Adivasi communities has been depended on forest and other natural resources not only for their livelihood but for their cultural, social and spiritual life.³ However, mining activities, and several developmental projects which need resource extraction has forced these communities to leave their places and it also led to environmental degradation.⁴ Therefore, environmental governance in scheduled Area raises serious discussion about participation, justice and sustainability.⁵

¹ U.N. Conference on Environment & Development, Rio Declaration on Environment and Development principle. 2, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 12, 1992).

² INDIA CONST. sched. V.

³ The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, No. 2 of 2007, INDIA CODE (2006).

⁴ *Samatha v. State of Andhra Pradesh*, (1997) 8 S.C.C. 191 (India); Walter Fernandes, *Mining, Displacement and Rehabilitation in India*, 39 ECON. & POL. WKLY. 1191 (2004).

⁵ *United Nations Declaration on the Rights of Indigenous Peoples*, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

The Constitution makes believed that decentralisation is the best way to improve environmental governance in India.⁶ The idea behind decentralization is that local peoples especially Adivasi communities can better manage and protect natural resources because of their close relationship with nature, environment and traditional knowledge system.⁷ With this objective they introduced 73rd Constitutional Amendment Act, 1992, which strengthened Panchayati Raj Institutions and promoted democratic participation at the grassroot level. In Scheduled areas, decentralization was further strengthened through the Panchayat (Extension to Scheduled Areas) Act, 1996 (PESA), which granted important role to the gram Sabha in taking decision related to natural resources like land, forest, water and other developmental activities.⁸

The main objective behind the enactment of PESA was to correct the historical injustice faced by the tribal communities by giving them right to self-governance and control over natural resources.⁹ It gives power to gram Sabha to take decision related to natural resources and save them from exploitation,¹⁰ also they can approve or disapprove any developmental plan, grant permission before land acquisition.¹¹ On paper this act represents a progressive legal framework which is best for natural resource governance and tribal development and also aligns with the larger goals of sustainable development and environmental justice.¹²

⁶ INDIA CONST. arts. 40, 243–243O; INDIA CONST. sched. XI.

⁷ The Provisions of the Panchayats (Extension to Scheduled Areas) Act, No. 40 of 1996, INDIA CODE (1996); *United Nations Declaration on the Rights of Indigenous Peoples* arts. 3, 26, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

⁸ The Constitution (Seventy-Third Amendment) Act, No. 20 of 1992, INDIA CODE (1992).

⁹ The Provisions of the Panchayats (Extension to Scheduled Areas) Act, No. 40 of 1996, pmb., INDIA CODE (1996); INDIA CONST. sched. V.

¹⁰ Id. § 4(d), (i), (k).

¹¹ Id. § 4(e), (i); *Samatha v. State of Andhra Pradesh*, (1997) 8 S.C.C. 191 (India).

¹² *U.N. Declaration on the Rights of Indigenous Peoples* arts. 3, 26, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007); *Rio Declaration on Environment and Development* princ. 10, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 12, 1992).

In spite of these legal and constitutional provisions, the actual implementation of PESA has remained different in different states.¹³ Most of the states took prolonged years in framing and implementation of PESA rule. The states who implemented this failed to implement it in proper manner¹⁴, further they give huge power to administrative authorities to dominate the gram Sabha in their decision-making power.¹⁵ As a result, decentralised governance has always remained symbolic rather than effective.¹⁶ In tribal areas which are rich in natural resources, consent of gram Sabha is rarely effective or it is often treated as formality rather than effective.¹⁷ This gap between law and its implementation has weakened tribal participation and undermined real objective of PESA.¹⁸

This article examines how decentralised environmental governance under PESA is implemented in different states. This article is a comparative study of three tribal dominated states i.e. Jharkhand, Orissa and Chhattisgarh which is similar in Constitutional status but had difference in its implementation.

II. IDENTIFICATION OF STATEMENT OF RESEARCH PROBLEMS

(a) Statement of Research Problem

The Panchayats (Extension to Scheduled Areas) Act, 1996 (PESA) was ratified to strengthen tribal self-governance by recognising the Gram Sabha

¹³ The Provisions of the Panchayats (Extension to Scheduled Areas) Act, No. 40 of 1996, INDIA CODE (1996); Ministry of Tribal Affairs, Government of India, *Report on the Implementation of PESA* (2024).

¹⁴ Nat'l Inst. of Rural Dev. & Panchayati Raj, *Study on State-Level Implementation of PESA in Scheduled Areas* (2023); Ministry of Tribal Affairs, Government of India, *PESA Mahotsav Report* (2025).

¹⁵ Chhattisgarh Panchayats (Extension to Scheduled Areas) Rules, 2022; *see also Assessing the Compliance of the Local Self-Governance Act for PESA in Jharkhand*, 43 J. RURAL DEV. 215 (2024).

¹⁶ Dipti Paridhi Kindo, *Twenty-eight Years of the PESA Act in India: Development or Deprivation? Perspectives of Elected Tribal Leaders*, *Dev. Prac.* (published online July 7, 2025) (on file with author).

¹⁷ *Samatha v. State of Andhra Pradesh*, (1997) 8 S.C.C. 191 (India); *A Study of Gram Sabhas in Scheduled Areas of Odisha* (2025).

¹⁸ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, arts. 18, 26, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

as the main organization for decision-making in Scheduled Areas. It aims to empower tribal societies in matters relating to Natural resources like land, water, minor forest produces and all other local development. But despite the effective constitutional and legislative framework, the implementation of PESA has remained uneven across the different Scheduled States.

While Many States delayed the framing of PESA Rules, others have diluted the powers of the Gram Sabha by allowing administrative authorities to hold control over decision-making processes. As a result, decentralised environmental governance has remained largely symbolic rather than effective. In most tribal areas rich in forests and mineral resources, the consent of the Gram Sabha is frequently treated as a procedural requirement instead of a meaningful exercise of community participation. This gap between the legal framework and its practical implementation has weakened tribal participation and undermined the objectives of environmental governance and tribal self-governance. Although Jharkhand, Odisha and Chhattisgarh are all Scheduled Area States governed by the same constitutional provisions and the PESA Act, their approaches towards implementation differ considerably. These variations have resulted in different levels of empowerment of Gram Sabhas and varying degrees of community participation in environmental decision-making.

(b). Research Gap

The present literature has broadly discussed the constitutional framework of PESA, tribal self-governance and environmental protection. Several studies have also examined the implementation of PESA in individual States or analysed specific aspects such as forest rights, land acquisition or tribal participation. However, there is limited comparative research examining how different Scheduled States have implemented the same central legislation and how these differences influence decentralised environmental governance. In particular, there is insufficient comparative analysis of Jharkhand, Odisha and Chhattisgarh despite their common constitutional status under the Fifth Schedule and their significant tribal populations. The

existing literature also pays comparatively less attention to the role played by political commitment, administrative practices and institutional capacity in determining the effectiveness of Gram Sabhas under PESA. Consequently, the relationship between legal recognition and actual implementation remains insufficiently explored.

This study attempts to fill these gaps by undertaking a comparative analysis of the implementation of PESA in Jharkhand, Odisha and Chhattisgarh from the perspective of decentralised environmental governance.

(c). Research Questions

This study seeks to answer the following research questions:

- 1) Why does the implementation of PESA differ among Scheduled States despite the existence of a common constitutional and legal framework?
- 2) How do State laws, administrative practices and institutional mechanisms affect the functioning and effectiveness of Gram Sabhas in environmental decision-making?
- 3) What do these differences reveal about the effectiveness of decentralised environmental governance in Scheduled Areas of India?

(d). Objectives of the Study

The main objective of the study is to:

- 1) To Examine the constitutional and legal framework governing decentralised environmental governance;
- 2) To Analyse the implementation of PESA in Jharkhand, Odisha and Chhattisgarh;
- 3) To Compare the functioning of Gram Sabhas in these three States;
- 4) To identify the legal and administrative factors responsible for uneven implementation; and
- 5) To suggest reforms for strengthening decentralised environmental governance and tribal self-governance.

III. RESEARCH METHODS AND RESEARCH DESIGN

This study adopts a doctrinal and comparative research methodology to examine the implementation of the Panchayats (Extension to Scheduled Areas) Act, 1996 (PESA) in the States of Jharkhand, Odisha and Chhattisgarh from the perspective of decentralised environmental governance. The doctrinal method has been used to analyse constitutional provisions, legislative principles, judicial decisions, government reports, policy documents and scholarly literature relating to tribal self-governance, environmental governance and the functioning of Gram Sabhas in Scheduled Areas. In this paper special emphasis has been given on the constitutional framework under the Fifth Schedule, the Panchayats (Extension to Scheduled Areas) Act, 1996 (PESA), the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA), and other relevant legal instruments governing natural resource management.

The study also adopts a comparative research method to examine similarities and differences in the implementation of PESA across the states of Jharkhand, Odisha and Chhattisgarh. The comparative analysis enables to assess how variations in State legislation, administrative practices and institutional mechanisms influence the functioning of Gram Sabhas and affect decentralised environmental governance in Scheduled Areas. The research is entirely based on secondary sources & includes constitutional provisions, parliamentary enactments, State legislation, judicial pronouncements, government reports, reports of the Ministry of Tribal Affairs, National Institute of Rural Development and Panchayati Raj (NIRDPR) books, peer-reviewed journal articles, documents related to policy and other relevant literature. The comparative analysis is undertaken to identify the factors responsible for the uneven implementation of PESA despite the existence of a common constitutional and statutory framework and to evaluate their impact on environmental governance and tribal self-governance.

IV. DISCUSSION, ANALYSIS AND FINDINGS

• Constitutional and Legal Framework for Decentralised Environmental Governance

The Constitutional base of decentralised governance in India rests on the understanding that democratic decision-making must extend to the grassroot level, in addition to respective institutions¹⁹. In Scheduled Areas, where tribal communities have traditionally controlled their natural resources through customs and group decision-making, this vision is especially important²⁰. Therefore, constitutional provisions that safeguard tribal sovereignty, land rights, and participatory government are directly related to environmental governance in these areas²¹.

• The Fifth Schedule and Tribal Self-Governance

A unique administrative structure for Scheduled Areas is provided by the Fifth Schedule of the Indian Constitution, which acknowledges the unique social, cultural, and economic circumstances of tribal populations.²² It grants the governor the authority to enact laws that promote harmony and a sound government, particularly in areas such as resource management, lending, and property transfers.²³ Protecting indigenous communities against exploitation and maintaining their connection to land and natural resources are the fundamental goals of the Fifth Schedule²⁴. However, there is room for future legislative involvement because the Schedule itself does not explicitly outline institutional procedures for local participation.²⁵

¹⁹ INDIA CONST. art. 40; INDIA CONST. arts. 243–243O; Constitution (Seventy-Third Amendment) Act, 1992, INDIA CODE (1992).

²⁰ INDIA CONST. sched. V; The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, No. 2 of 2007, pmbl., INDIA CODE (2006); U.N. Declaration on the Rights of Indigenous Peoples arts. 5, 26, G.A. Res. 61/295, U.N. Doc. A/RES/61/295.

²¹ The Provisions of the Panchayats (Extension to Scheduled Areas) Act, No. 40 of 1996, INDIA CODE (1996); *Samatha v. State of Andhra Pradesh*, (1997) 8 S.C.C. 191 (India).

²² INDIA CONST. sched. V.

²³ *Id.* para. 5(1)–(2).

²⁴ *Samatha v. State of Andhra Pradesh*, (1997) 8 S.C.C. 191, 214–16 (India).

²⁵ The Provisions of the Panchayats (Extension to Scheduled Areas) Act, No. 40 of 1996, INDIA CODE (1996).

• **The 73rd Constitutional Amendment and Environmental Decentralisation**

By formally recognizing Panchayati Raj Institutions (PRIs), the 73rd Constitutional Amendment Act, 1992, signalled a dramatic turn towards decentralized governance.²⁶ It sought to facilitate community involvement in development and resource management, encourage local planning, and bolster democratic participation.²⁷ By acknowledging local self-government as a constitutional concept, the Amendment established the foundation for environmental decentralization, albeit officially excluding Scheduled Areas.²⁸ The Eleventh Schedule includes topics pertaining to land, water, minor forest products, and local resources, indicating the possible involvement of local organizations in environmental governance.²⁹

• **The Panchayats (Extension to Scheduled Areas) Act, 1996 (PESA)**

In order to respect tribal customs and apply the 73rd Amendment's principles to Scheduled Areas, the Panchayats (Extension to Scheduled Areas) Act, 1996 (PESA) was passed.³⁰ Because it placed the Gram Sabha at the centre of government in Scheduled Areas, PESA is a significant piece of law.³¹ It acknowledges the Gram Sabha as a body composed of all village adults and gives it authority over decisions pertaining to land, local development planning, and the management of natural resources.³² The State Panchayat laws are required to adhere to the thirteen fundamental provisions of PESA³³. These clauses provide the Gram Sabha the authority to

²⁶ Constitution (Seventy-Third Amendment) Act, 1992, INDIA CODE (1992); INDIA CONST. arts. 243–243O.

²⁷ INDIA CONST. art. 243G; INDIA CONST. sched. XI.

²⁸ INDIA CONST. art. 243M(4)(b) (excluding Scheduled Areas from Part IX unless Parliament provides otherwise); The Provisions of the Panchayats (Extension to Scheduled Areas) Act, No. 40 of 1996, INDIA CODE (1996).

²⁹ INDIA CONST. sched. XI, entries 2, 3, 6, 12, & 23.

³⁰ The Provisions of the Panchayats (Extension to Scheduled Areas) Act, No. 40 of 1996, pmb., INDIA CODE (1996); INDIA CONST. art. 243M(4)(b).

³¹ *The Provisions of the Panchayats (Extension to Scheduled Areas) Act*, No. 40 of 1996, § 4, INDIA CODE (1996).

³² Id. § 4(b), (d), (i), (k).

³³ Id. § 4 (opening clause: "Notwithstanding anything contained under Part IX...")

manage small water bodies, regulate small forest products, approve development plans, protect communal resources, and consult before acquiring land or resettling people.³⁴ Crucially, by mandating that decisions pertaining to land and resources require the Gram Sabha's approval or consultation, PESA connects environmental governance with democratic engagement.³⁵ PESA aims to rectify past injustices by giving indigenous communities back decision-making authority, according to official documents released by the Ministries of Home Affairs and indigenous Affairs.³⁶ The PESA does not, however, function on its own.³⁷ Because state laws must give the Act's general principles specific form, the efficacy of the Act is dependent on how states formulate their Panchayat Acts and PESA Rules.³⁸

• State Responsibility and Environmental Governance

State-level implementation significantly shapes environmental governance in Scheduled Areas, even though PESA offers a central legislative framework.³⁹ States are in charge of creating PESA regulations, ensuring that administrative procedures respect Gram Sabha power, and coordinating current Panchayat legislation with PESA's provisions.⁴⁰ Numerous States have either delayed the drafting of regulations or diminished the authority of the Gram Sabha by shifting important decision-making to bureaucratic entities, according to studies conducted by organizations like the National Institute of Rural Development and Panchayati Raj (NIRDPR).⁴¹

³⁴ Id. § 4(d), (e), (i), (j), (k).

³⁵ *Samatha v. State of Andhra Pradesh*, (1997) 8 S.C.C. 191 (India); U.N. Declaration on the Rights of Indigenous Peoples arts. 18, 26, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

³⁶ MINISTRY OF TRIBAL AFFAIRS, GOV'T OF INDIA, *Report on the Implementation of the Panchayats (Extension to Scheduled Areas) Act, 1996* (2024); MINISTRY OF HOME AFFAIRS, GOV'T OF INDIA, *Guidelines on Implementation of PESA* (1996).

³⁷ *The Provisions of the Panchayats (Extension to Scheduled Areas) Act*, No. 40 of 1996, § 4, INDIA CODE (1996).

³⁸ Id. § 4 (requiring State legislation to be in conformity with PESA); INDIA CONST. art. 243M(4)(b).

³⁹ *The Provisions of the Panchayats (Extension to Scheduled Areas) Act*, No. 40 of 1996, § 4, INDIA CODE (1996); INDIA CONST. art. 243M(4)(b).

⁴⁰ Constitution (Seventy-Third Amendment) Act, 1992, INDIA CODE (1992).

⁴¹ Nat'l Inst. of Rural Dev. & Panchayati Raj (NIRDPR), *Study on the Status of PESA Implementation in Scheduled Areas* (2023); Ministry of Tribal Affairs, Gov't of India, *PESA Mahotsav Report* (2025).

Environmental decentralization has been undermined by this discrepancy between administrative practice and constitutional purpose.⁴² Gram Sabha approval has frequently been lowered from a legally binding ruling to a formality.⁴³ A centralized strategy that goes against the essence of PESA is seen in the district administrations, forest departments, and mining authorities' ongoing domination.⁴⁴ In this regard, decentralized environmental administration under PESA needs to be viewed as a contested area between administrative power and constitutional commitments rather than just a legal framework.⁴⁵ The following section analyses Jharkhand, Odisha, and Chhattisgarh at the state level to see how this conflict manifests itself in real life.⁴⁶

(A). State-Level Implementation of PESA in Scheduled Areas

(I) Jharkhand

• Delayed Rules, Weak Gram Sabha Authority, and Resource Conflicts

Jharkhand presents a unique case of examining decentralised environmental governance under PESA because it is one of the most mineral rich as well as tribal dominated state in India.⁴⁷ Despite having large population of tribal community and natural resources state has historically shown weak

⁴² INDIA CONST. arts. 243G, 243M(4)(b); The Provisions of the Panchayats (Extension to Scheduled Areas) Act, No. 40 of 1996, § 4, INDIA CODE (1996).

⁴³ PESA Act § 4(e), (i); see also Ministry of Tribal Affairs, Government of India, *Report on the Implementation of PESA* (2024).

⁴⁴ *Samatha v. State of Andhra Pradesh*, (1997) 8 S.C.C. 191 (India); Nat'l Inst. of Rural Dev. & Panchayati Raj (NIRDPR), *Status of PESA Implementation in Scheduled Areas* (2023).

⁴⁵ U.N. Declaration on the Rights of Indigenous Peoples arts. 18, 26, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007); Rio Declaration on Environment and Development princ. 10, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 12, 1992).

⁴⁶ See Chhattisgarh Panchayats (Extension to Scheduled Areas) Rules, 2022; Jharkhand Panchayats (Extension to Scheduled Areas) Rules, 2026 (Gazette Notification); *Study of Gram Sabhas in Scheduled Areas of Odisha* (2025).

⁴⁷ Census of India 2011, Office of the Registrar Gen. & Census Comm'r, Ministry of Home Affairs, Government of India (showing significant Scheduled Tribe population in Jharkhand); Ministry of Mines, Government of India, *Annual Report 2023–24* (identifying Jharkhand as a mineral-rich State).

implementation of PESA.⁴⁸ From many years, absence of implementation of PESA according to state created a major between the legal promises made about decentralized form of governance and governance which is practiced in practical form.⁴⁹

One of the major problems in Jharkhand was the delay in framing and implementation of PESA rules.⁵⁰ Although PESA was enacted in 1996, Jharkhand failed to implement it in three decades.⁵¹ During these period Gram Sabha was formally existed but it lacked powers and procedures.⁵² Studies shows that most effective and important thirteen provision of PESA was either partially implemented or ignored.⁵³ Decision relating to natural resources and land, minerals and mines remain with district administration.⁵⁴

Because of this, Jharkhand's Gram Sabhas frequently served as consultative bodies with little actual authority over the regulation of natural resources.⁵⁵ Their involvement in forest diversion, mining approvals, and land acquisition was usually limited to attending meetings after decisions had been made or issuing non-binding resolutions.⁵⁶ This weakened the idea of

⁴⁸ National Inst. of Rural Dev. & Panchayati Raj (NIRDPR), *Study on the Status of PESA Implementation in Scheduled Areas (2023)*; *Assessing the Compliance of the Local Self-Governance Act for PESA in Jharkhand*, 43 J. RURAL DEV. 215 (2024).

⁴⁹ Jharkhand Panchayats (Extension to Scheduled Areas) Rules, 2026 (Gazette Notification); Ministry of Tribal Affairs, Government of India, *Report on PESA Implementation (2024)*.

⁵⁰ National Inst. of Rural Dev. & Panchayati Raj (NIRDPR), *Status of PESA Implementation in Scheduled Areas (2023)*.

⁵¹ The Provisions of the Panchayats (Extension to Scheduled Areas) Act, No. 40 of 1996, INDIA CODE (1996); Jharkhand Panchayats (Extension to Scheduled Areas) Rules, 2026 (Gazette Notification).

⁵² *Assessing the Compliance of the Local Self-Governance Act for PESA in Jharkhand*, 43 J. RURAL DEV. 215 (2024).

⁵³ Id.

⁵⁴ Ministry of Tribal Affairs, Government of India, *Report on the Implementation of PESA (2024)*; see also *Samatha v. State of Andhra Pradesh*, (1997) 8 S.C.C. 191 (India).

⁵⁵ National Inst. of Rural Dev. & Panchayati Raj (NIRDPR), *Status of PESA Implementation in Scheduled Areas (2023)*; *Assessing the Compliance of the Local Self-Governance Act for PESA in Jharkhand*, 43 J. RURAL DEV. 215 (2024).

⁵⁶ The Provisions of the Panchayats (Extension to Scheduled Areas) Act, No. 40 of 1996, § 4(e), (i), INDIA CODE (1996); Ministry of Tribal Affairs, Government of India, *Report on PESA Implementation (2024)*.

prior consultation and consent, which lies at the heart of PESA.⁵⁷ Conflicts between local people and the State grew more intense in mining-affected districts like West Singhbhum and portions of Hazaribagh because there was no meaningful participation in decisions pertaining to resources.⁵⁸

One significant factor in drawing attention to these shortcomings has been judicial action⁵⁹. The necessary character of Gram Sabha consultation in cases involving sand mining, forest use, and land allotment in Scheduled Areas has been emphasized by the Jharkhand High Court in recent years.⁶⁰ The legal significance of PESA principles has been emphasized by the Court's repeated stays of administrative procedures in which Gram Sabha permission was not secured.⁶¹ Despite uneven enforcement, these rulings show that judges are beginning to recognize decentralized governance.⁶² The announcement of Jharkhand's PESA Rules in 2026 was a significant milestone⁶³. In addition to outlining processes for consent, planning, and community resource management, the Rules formally recognize the Gram Sabha's authority over sixteen Scheduled Area districts.⁶⁴

Even while this is a significant advancement, preliminary evaluations indicate that there may still be implementation issues.⁶⁵ The efficient use of Gram Sabha power is nevertheless hampered by administrative domination,

⁵⁷ PESA Act § 4; U.N. Declaration on the Rights of Indigenous Peoples arts. 18, 19, 26, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

⁵⁸ Ministry of Mines, Government of India, *Annual Report 2023–2024* (2024); see also *Gram Sabha v. State of Jharkhand*, Cont. Case (C) No. 1531 of 2025 (Jharkhand H.C. May 8, 2026).

⁵⁹ *Samatha v. State of Andhra Pradesh*, (1997) 8 S.C.C. 191 (India) (recognising protection of tribal land in Scheduled Areas).

⁶⁰ *The Provisions of the Panchayats (Extension to Scheduled Areas) Act*, No. 40 of 1996, § 4(e), INDIA CODE (1996).

⁶¹ *Id.*; see also Ministry of Tribal Affairs, Government of India, *Report on the Implementation of PESA* (2024).

⁶² INDIA CONST. arts. 21, 243G; United Nations Declaration on the Rights of Indigenous Peoples arts. 18, 19, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

⁶³ Jharkhand Panchayats (Extension to Scheduled Areas) Rules, 2026 (Jharkhand).

⁶⁴ *Id.* rr. 4–8; *The Provisions of the Panchayats (Extension to Scheduled Areas) Act*, No. 40 of 1996, § 4, INDIA CODE (1996).

⁶⁵ National Inst. of Rural Dev. & Panchayati Raj (NIRDPR), *Status of PESA Implementation in Scheduled Areas* (2023); Ministry of Tribal Affairs, Government of India, *PESA Mahotsav Report* (2025).

a lack of understanding at the village level, and a lack of institutional ability.⁶⁶ All things considered, Jharkhand's example shows how inadequate administrative commitment and postponed rulemaking might jeopardize decentralized environmental control.⁶⁷ The shift from symbolic recognition to actual empowerment of Gram Sabhas is still a problem, notwithstanding recent legislative and judicial developments that give promise.

(ii). Odisha

• Partial Recognition of Gram Sabha Authority and Interaction with the Forest Rights Act

A different approach to PESA implementation is provided by Odisha, which lacks comprehensive State-level PESA Rules and only partially recognizes Gram Sabha authority.⁶⁸ Odisha has not legally announced the complete PESA Rules, despite having a sizable Scheduled Area and a sizable tribal population.⁶⁹ The State has instead depended on sectoral guidelines, executive orders, and the selective integration of PESA concepts into the frameworks for forest governance and Panchayats that are currently in place.

In reality, Gram Sabhas in Odisha have been given a restricted role in the regulation of natural resources, especially when it comes to issues involving land and forests.⁷⁰ The Forest Rights Act, 2006 (FRA), which established a legal framework for community involvement through Community Forest Resource (CFR) rights, is closely related to this restricted recognition.⁷¹

⁶⁶ Assessing the Compliance of the Local Self-Governance Act for PESA in Jharkhand, 43 J. RURAL DEV. 215 (2024).

⁶⁷ INDIA CONST. arts. 243G, 243M(4)(b); *The Provisions of the Panchayats (Extension to Scheduled Areas) Act*, No. 40 of 1996, § 4, INDIA CODE (1996).

⁶⁸ *United Nations Declaration on the Rights of Indigenous Peoples* arts. 18, 26, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

⁶⁹ Odisha Panchayat Raj Act, 1994 (as amended); Ministry of Tribal Affairs, Government of India, *Status of PESA Implementation Report* (2024) (noting the absence of comprehensive PESA Rules in Odisha).

⁷⁰ National Inst. of Rural Dev. & Panchayati Raj (NIRDPR), *Study on PESA Implementation in Scheduled Areas* (2023).

⁷¹ *Id.*

Through FRA-based processes, Gram Sabhas have exerted responsibility over biodiversity conservation, minor forest produce, and forest protection in a number of Scheduled Area villages.⁷² This has somewhat made up for the lack of official PESA regulations.⁷³

Prominent case studies from Odisha demonstrate this approach's advantages and disadvantages.⁷⁴ The impact of persistent Gram Sabha resistance and legal mobilization is seen by the restoration of land in Lohandiguda, where land obtained for a major industrial project was returned to local residents.⁷⁵ In a similar vein, villages like Gudiyapadar have effectively asserted their rights to Community Forest Resources, empowering local populations to jointly manage forests and means of subsistence.⁷⁶ These instances demonstrate how decentralized environmental governance can result in favourable consequences where community mobilization and legal recognition meet.⁷⁷

These achievements are still erratic and brittle, though⁷⁸ the Gram Sabha approval is frequently requested selectively or only after important decisions have been made.⁷⁹ Decision-making in the areas of infrastructure, land acquisition, and mining is still dominated by administrative agencies.⁸⁰ Gram Sabha resolutions can now be overridden by bureaucratic discretion due to

⁷² *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act*, No. 2 of 2007, §§ 3(1)(i), 5, INDIA CODE (2007); Ministry of Tribal Affairs, Government of India, *Annual Report 2023–2024*.

⁷³ National Inst. of Rural Dev. & Panchayati Raj (NIRDPR), *supra* note 2.

⁷⁴ A Study of Gram Sabhas in Scheduled Areas of Odisha (2025).

⁷⁵ *Orissa Mining Corp. v. Ministry of Env't & Forests*, (2013) 6 S.C.C. 476 (India).

⁷⁶ *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act*, No. 2 of 2007, § 3(1)(i), INDIA CODE (2007); Ministry of Tribal Affairs, Government of India, *Community Forest Resource Guidelines* (2015).

⁷⁷ *United Nations Declaration on the Rights of Indigenous Peoples* arts. 18, 26, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007); *Rio Declaration on Environment and Development* princ. 10, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 12, 1992).

⁷⁸ National Inst. of Rural Dev. & Panchayati Raj (NIRDPR), *Study on the Status of PESA Implementation in Scheduled Areas* (2023).

⁷⁹ Id.; Ministry of Tribal Affairs, Government of India, *Status of PESA Implementation Report* (2024).

⁸⁰ *Odisha Grama Panchayats Act*, 1964 (as amended); Ministry of Mines, Government of India, *Annual Report 2023–2024* (2024).

the lack of legally mandated PESA Rules, making participation merely a formality.⁸¹

In general, Odisha exhibits a mixed style of decentralized governance, with inadequate PESA implementation coexisting with limited empowerment through the FRA.⁸² Although certain local accomplishments have been made possible by this, significant environmental decentralization in Scheduled Areas is still hampered by the absence of a comprehensive and binding PESA framework.⁸³

(iii). Chhattisgarh

• Stronger Formal Rules and Persistent Administrative Control

One of the states with comparatively more robust formal PESA implementation is Chhattisgarh.⁸⁴ Chhattisgarh, in contrast to Jharkhand and Odisha, announced its PESA Rules in 2022, offering a more transparent legal framework for Gram Sabha involvement in Scheduled Areas.⁸⁵ The Gram Sabha is legally acknowledged by the Rules as having control over village-level planning, small forest produce management, and consultation on issues pertaining to land and resources.⁸⁶ This structure seems to be more in line with PESA's goals on paper.⁸⁷ However, in reality, the persistence of administrative domination has hampered the efficacy of these Rules.⁸⁸ Although Gram Sabhas is technically consulted, higher-level authorities frequently have to approve their decisions.⁸⁹

⁸¹ *The Provisions of the Panchayats (Extension to Scheduled Areas) Act*, No. 40 of 1996, § 4, INDIA CODE (1996); INDIA CONST. art. 243M(4)(b).

⁸² *he Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act*, No. 2 of 2007, §§ 3(1)(i), 5, INDIA CODE (2007).

⁸³ *United Nations Declaration on the Rights of Indigenous Peoples* arts. 18, 26, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007); *Rio Declaration on Environment and Development* princ. 10, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 12, 1992).

⁸⁴ National Inst. of Rural Dev. & Panchayati Raj (NIRDPR), *Study on the Status of PESA Implementation in Scheduled Areas* (2023).

⁸⁵ *The Chhattisgarh Panchayat (Extension to Scheduled Areas) Rules*, 2022 (India).

⁸⁶ *Id.*

⁸⁷ *The Provisions of the Panchayats (Extension to Scheduled Areas) Act*, No. 40 of 1996, § 4, INDIA CODE (1996).

⁸⁸ National Inst. of Rural Dev. & Panchayati Raj (NIRDPR), *supra* note 1.

⁸⁹ *Id.*

The autonomy of local entities is nonetheless limited by bureaucratic processes, technical specifications, and the overlapping jurisdiction of departments like tax, mining, and forestry⁹⁰. Consequently, top-down administrative control continues to limit Chhattisgarh's decentralized environmental governance.⁹¹ However, there are also noteworthy local-level projects that show the Gram Sabha-led governance's potential.⁹² Gram Sabhas has established committees to oversee forests, fisheries, and small forest products in villages like Khamdhogi in Kanker district.⁹³ Local lives have improved and community control over resources has been reinforced as a result of these activities.⁹⁴ Such instances, however, rely more on administrative tolerance and local leadership than they do on the methodical use of Gram Sabha authority.⁹⁵

The weakening of Gram Sabha powers through appeals and administrative overrides is another problem in Chhattisgarh.⁹⁶ In the interests of progress and the general welfare, Gram Sabha resolutions that forbid mining or land diversion are frequently contested or disregarded.⁹⁷ This illustrates a larger conflict between extractive development strategies, which put resource exploitation ahead of community consent, and decentralization.⁹⁸ The experience of Chhattisgarh shows that genuine decentralized environmental governance cannot be achieved solely through formal rulemaking.⁹⁹ Although the PESA Rules offer legal clarity, their transformational potential is constrained by the administrative authorities' ongoing dominance.¹⁰⁰

⁹⁰ Ministry of Tribal Affairs, Government of India, Status Report on PESA Implementation (2024).

⁹¹ Id.

⁹² *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act*, No. 2 of 2007, §§ 3(1)(i), 5, INDIA CODE (2007).

⁹³ Chhattisgarh State Minor Forest Produce Federation, *Annual Report* (2023).

⁹⁴ Id.

⁹⁵ National Inst. of Rural Dev. & Panchayati Raj (NIRDPR), *supra* note 1.

⁹⁶ Id.

⁹⁷ See *Samatha v. State of Andhra Pradesh*, (1997) 8 S.C.C. 191 (India); *Orissa Mining Corp. v. Ministry of Env't & Forests*, (2013) 6 S.C.C. 476 (India).

⁹⁸ INDIA CONST. arts. 243M(4)(b), 244; *United Nations Declaration on the Rights of Indigenous Peoples* arts. 18, 26, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

⁹⁹ National Inst. of Rural Dev. & Panchayati Raj (NIRDPR), *supra* note 1.

¹⁰⁰ Id.

Therefore, the State is an example of a situation where legal recognition is present but Gram Sabhas' substantive empowerment is still lacking.¹⁰¹

(B) Comparative Analysis of PESA Implementation in Scheduled Areas

The comparative analysis of Jharkhand, Odisha and Chhattisgarh highlighted that decentralized environmental governance under PESA is more influenced by political will of state, their administrative practices and their institutional practices, and less by constitutional guidelines and statutes.¹⁰² Although all the three state operates under same union legislation¹⁰³, they work differently in gram Sabha empowerment¹⁰⁴ and environmental decision making.¹⁰⁵

(I). Uneven Implementation under a Common Legal Framework

The PESA was with the objective to create a uniform law for self-governance in Scheduled Area by recognizing the Gram Sabha as main authority over natural resources.¹⁰⁶ However, study on three states showed that lack of state level statutes has allowed executive discretion to dominate governance.¹⁰⁷ In Jharkhand long delay in framing and implementation of PESA rules resulted in weak authority of Gram Sabha¹⁰⁸, On the other hand, Odisha's selective and uneven recognition of community participation has resulted from its failure to notify comprehensive rules.¹⁰⁹ Chhattisgarh, on the other hand,

¹⁰¹ *The Provisions of the Panchayats (Extension to Scheduled Areas) Act*, No. 40 of 1996, § 4, INDIA CODE (1996).

¹⁰² National Inst. of Rural Dev. & Panchayati Raj (NIRDPR), *Study on the Status of PESA Implementation in Scheduled Areas* (2023).

¹⁰³ *The Provisions of the Panchayats (Extension to Scheduled Areas) Act*, No. 40 of 1996, § 4, INDIA CODE (1996).

¹⁰⁴ Ministry of Tribal Affairs, Government of India, *Status Report on PESA Implementation* (2024).

¹⁰⁵ INDIA CONST. arts. 243M(4)(b), 244; see also B.D. Sharma, *Tribal Self-Rule: PESA and the Fifth Schedule*.

¹⁰⁶ *The Provisions of the Panchayats (Extension to Scheduled Areas) Act*, No. 40 of 1996, § 4, INDIA CODE (1996); INDIA CONST. arts. 243M(4)(b), 244.

¹⁰⁷ National Inst. of Rural Dev. & Panchayati Raj (NIRDPR), *Study on the Status of PESA Implementation in Scheduled Areas* (2023).

¹⁰⁸ Jharkhand Panchayati Raj (Extension to Scheduled Areas) Rules, 2026 (India); see also NIRDPR, *supra* note 2.

¹⁰⁹ Ministry of Tribal Affairs, Government of India, *Status Report on PESA Implementation* (2024).

formally adopted the PESA Rules earlier, but administrative procedures still limit the Gram Sabhas' autonomy.¹¹⁰

These changes in implementation of PESA in different state shows structural weakness in implementation of PESA.¹¹¹ Though the act lays down guidelines for its implementation yet it leaves on states will as how they want to implement it.¹¹² As a result, implementation of decentralised governance always depends on states will rather than national laws.¹¹³ The lack of uniform laws has created fragmented governance and its outcome in scheduled areas.¹¹⁴

(ii). Role of Political Will and State Priorities

Political will plays an unparallel role in shaping how PESA operates in that area.¹¹⁵ The state which are rich in natural resources their bureaucrats focus on resources extraction, like mining, industrialization and other development projects than decentralized governance of PESA.¹¹⁶ Both in Jharkhand and Chhattisgarh which are mineral rich state worked under the influence of mining industries and ignored the Gram Sabha's decisions.¹¹⁷ Even in the situations where there is need for consent of the Gram Sabha, it is usually obtained under pressure.¹¹⁸

¹¹⁰ The Chhattisgarh Panchayat (Extension to Scheduled Areas) Rules, 2022 (India); National Inst. of Rural Dev. & Panchayati Raj (NIRDPR), *supra* note 2.

¹¹¹ National Inst. of Rural Dev. & Panchayati Raj (NIRDPR), *Study on the Status of PESA Implementation in Scheduled Areas* (2023).

¹¹² *The Provisions of the Panchayats (Extension to Scheduled Areas) Act*, No. 40 of 1996, § 4, INDIA CODE (1996); INDIA CONST. arts. 243M(4)(b), 244.

¹¹³ Ministry of Tribal Affairs, Government of India, *Status Report on PESA Implementation* (2024).

¹¹⁴ B.D. Sharma, *Tribal Self-Rule: PESA and the Fifth Schedule* (Concept Publ'g Co.); *United Nations Declaration on the Rights of Indigenous Peoples* arts. 18, 26, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

¹¹⁵ National Inst. of Rural Dev. & Panchayati Raj (NIRDPR), *Study on the Status of PESA Implementation in Scheduled Areas* (2023).

¹¹⁶ Ministry of Mines, Government of India, *Annual Report 2023–2024* (2024); INDIA CONST. art. 244.

¹¹⁷ National Inst. of Rural Dev. & Panchayati Raj (NIRDPR), *supra* note 1; *The Chhattisgarh Panchayat (Extension to Scheduled Areas) Rules, 2022*; *Jharkhand Panchayats (Extension to Scheduled Areas) Rules, 2026*.

¹¹⁸ *The Provisions of the Panchayats (Extension to Scheduled Areas) Act*, No. 40 of 1996, § 4(i), INDIA CODE (1996); *United Nations Declaration on the Rights of Indigenous Peoples* art. 19, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

In these situations, Odisha presents a different scenario there because of political will and Gram Sabha implementation different industrial projects were forced to changed or delayed.¹¹⁹ The Lohandiguda case explained how Legal pressure and persistent community mobilization can affect state action.¹²⁰ Such results, however, are still the exception rather than the rule and rely largely on local political factors rather than structural backing for decentralization.¹²¹

(iii). Bureaucratic Resistance and Administrative Control

In all the three states bureaucratic struggle emerged as a common barrier to effective decentralised environmental governance. Bureaucrats often consider gram Sabha as mere consultative bodies rather than decision-making institution. This attitude is highlighted in the technical practices that limits the scope of participation of gram Sabha, like very short notice period, technical documentation which are unapproachable for the villagers, and the use of powerful committees to bypass local residents.

In Chhattisgarh, despite the presence of all the laws, there clause like administrative appeal and departmental approval continue to weaken the power and authority of Gram Sabha. In Jharkhand also even after the notification of PESA rules, their implementation heavily dependent on officials of district levels. Likewise in Odisha also instead of relying on Gram Sabha rule they rely on instructions provided by executives which strengthen bureaucratic setup. These pattern shows that enactment and implementation of PESA have not made necessary changes in administrative culture.

(iv). Institutional Capacity and Awareness at the Grassroots Levels

Another major factor which influences the implementation of PESA is the working capacity of Gram Sabha.¹²² Limited legal awareness, Lack of

¹¹⁹ Ministry of Tribal Affairs, Government of India, *Status Report on PESA Implementation* (2024).
¹²⁰ Id.

¹²¹ *Orissa Mining Corp. v. Ministry of Env't & Forests*, (2013) 6 S.C.C. 476 (India).

¹²² *The Provisions of the Panchayats (Extension to Scheduled Areas) Act*, No. 40 of 1996, § 4, INDIA CODE (1996).

technical support, and insufficient financial support hinder effective participation.¹²³ In many villages Gram Sabha members are unaware of their powers under PESA¹²⁴ and because of this lack of knowledge they are unable to take complex decisions related to environmental and developmental projects.¹²⁵

(v). Implications for Environmental Governance and Justice

Decentralized environmental governance in Scheduled Areas is still primarily procedural rather than substantive, according to the comparative analysis.¹²⁶ Despite their official recognition, Gram Sabhas frequently has little influence over environmental outcomes.¹²⁷ Tribal populations continue to bear the ecological and social consequences of development without having any real control over resources, which has significant ramifications for environmental justice.¹²⁸

The results indicate that decentralization requires strong political support, less bureaucratic intervention, and improved institutional capacity at the local level in order to realize PESA's revolutionary potential.¹²⁹ Decentralized governance runs the risk of turning into a symbolic exercise rather than a tool for equitable and sustainable environmental management in the absence of these prerequisites.¹³⁰

¹²³ *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act*, No. 2 of 2007, §§ 3, 5, INDIA CODE (2007).

¹²⁴ Ministry of Tribal Affairs, Government of India, *Status Report on PESA Implementation* (2024).

¹²⁵ *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act*, No. 2 of 2007.

¹²⁶ National Inst. of Rural Dev. & Panchayati Raj (NIRDPR), *Study on the Status of PESA Implementation in Scheduled Areas* (2023).

¹²⁷ *The Provisions of the Panchayats (Extension to Scheduled Areas) Act*, No. 40 of 1996, § 4, INDIA CODE (1996).

¹²⁸ *United Nations Declaration on the Rights of Indigenous Peoples* arts. 18, 26, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007); *Rio Declaration on Environment and Development* principle. 10, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 12, 1992).

¹²⁹ Ministry of Tribal Affairs, Government of India, *Status Report on PESA Implementation* (2024).

¹³⁰ NDIA CONST. arts. 243M(4)(b), 244; see also B.D. Sharma, *Tribal Self-Rule: PESA and the Fifth Schedule*.

(C). Challenges to Decentralised Environmental Governance in Scheduled Areas

Decentralized environmental governance in Scheduled Areas still faces a number of practical and structural obstacles, even with legislative support through PESA and constitutional recognition. These obstacles erode the objective of environmental justice for tribal communities and restrict Gram Sabhas' actual control over land, forests, and natural resources.

(i). Tokenism of Participation

The tokenistic aspect of Gram Sabha participation is one of the biggest obstacles.¹³¹ Consultation with Gram Sabhas is frequently viewed as a formality rather than a process for making meaningful decisions.¹³² Meetings are frequently held after important project decisions have been made, which leaves little room for in-depth debate or disagreement.¹³³ Resolutions and attendance records are occasionally created only to fulfil legal requirements, without guaranteeing informed consent or true community support.¹³⁴

All three States exhibit this tokenism.¹³⁵ The Gramme Sabha resolutions against land acquisition or mining have often been disregarded or overruled by district authorities in Jharkhand.¹³⁶ The Administrative agencies in Odisha are able to selectively recognize Gram Sabha decisions due to the lack of legally binding PESA Rules.¹³⁷ Gram Sabha consent is frequently open to administrative review and appeal, even in Chhattisgarh, where formal regulations are in place.¹³⁸ The Gram Sabhas is reduced to symbolic

¹³¹ National Inst. of Rural Dev. & Panchayati Raj (NIRDPR), *Study on the Status of PESA Implementation in Scheduled Areas* (2023).

¹³² *The Provisions of the Panchayats (Extension to Scheduled Areas) Act*, No. 40 of 1996, § 4(i), INDIA CODE (1996).

¹³³ Ministry of Tribal Affairs, Government of India, *Status Report on PESA Implementation* (2024).

¹³⁴ *Orissa Mining Corp. v. Ministry of Env't & Forests*, (2013) 6 S.C.C. 476 (India).

¹³⁵ National Inst. of Rural Dev. & Panchayati Raj (NIRDPR), *Study on the Status of PESA Implementation in Scheduled Areas* (2023).

¹³⁶ *Jharkhand Panchayats (Extension to Scheduled Areas) Rules*, 2026; see also Ministry of Tribal Affairs, Government of India, *Status Report on PESA Implementation* (2024).

¹³⁷ *The Provisions of the Panchayats (Extension to Scheduled Areas) Act*, No. 40 of 1996, § 4, INDIA CODE (1996); National Inst. of Rural Dev. & Panchayati Raj (NIRDPR), *supra* note 1.

¹³⁸ *The Chhattisgarh Panchayat (Extension to Scheduled Areas) Rules*, 2022.

institutions by such actions, which also erode the democratic spirit of decentralization.¹³⁹

(ii). Conflict between Decentralisation and Extractive Development

Second major challenges are the conflict between development models and decentralized governance.¹⁴⁰ Most of the Scheduled area are rich in natural resources like different minerals, forests and water resources making them important to Indian industries and infrastructural development¹⁴¹. Construction of large dams, Mining projects and several industrial projects are prioritized in the name of economic development and nation interest.¹⁴² During such circumstances decentralized governance structures are perceived as obstacles rather than partners.¹⁴³

These development projects are excessively seen in Jharkhand and Chhattisgarh which are rich in minerals and mining activities are on its peak and they exercise strong influence over government decision.¹⁴⁴ Decision of gram Sabha is labelled as anti-development and anti-national activities and community consent is also ignored.¹⁴⁵ This situation reflects a deeper policy conflict between community-based resource management and centralized economic planning.¹⁴⁶

¹³⁹ NDIA CONST. arts. 243M(4)(b), 244; *Orissa Mining Corp. v. Ministry of Env't & Forests*, (2013) 6 S.C.C. 476 (India).

¹⁴⁰ *The Provisions of the Panchayats (Extension to Scheduled Areas) Act*, No. 40 of 1996, INDIA CODE (1996).

¹⁴¹ Ministry of Mines, Government of India, *Annual Report 2023–24*.

¹⁴² National Inst. of Rural Dev. & Panchayati Raj (NIRDPR), *Study on the Status of PESA Implementation in Scheduled Areas* (2023).

¹⁴³ Ministry of Mines, Government of India, *supra* note 20; Government of Chhattisgarh, *Economic Survey 2023–2024*; Government of Jharkhand, *Economic Survey 2023–2024*.

¹⁴⁴ National Inst. of Rural Dev. & Panchayati Raj (NIRDPR), *supra* note 4.

¹⁴⁵ *Samatha v. State of Andhra Pradesh*, (1997) 8 S.C.C. 191 (India).

¹⁴⁶ *United Nations Declaration on the Rights of Indigenous Peoples* arts. 18, 19, 26, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

(iii). Weak Enforcement and Legal Ambiguity

Another important challenge is the lack of effective enforcement mechanism for Gram Sabha decision.¹⁴⁷ The PESA though recognises the authority of the Gram Sabha but does not clearly stipulate the legal consequences of non-compliance by State authority.¹⁴⁸ As a result, organizational agencies often face minimal consequences for ignoring Gram Sabha decisions.¹⁴⁹

Judicial intervention has provided some relief by reaffirming the importance of Gram Sabha consent in Scheduled Area.¹⁵⁰ However, litigation is always time consuming, costly, and unapproachable for many tribal communities.¹⁵¹ Apart from it court decision often represent individual cases rather than whole governance failure.¹⁵² The lack of proper penalties or other remedial mechanism within PESA framework weakens its enforcement and limits its impact.¹⁵³

(iv). Limited Awareness and Capacity at the Grassroot Level

Finally inadequate awareness and official capacity at village level continue to restrict effective decentralised governance.¹⁵⁴ Many gram Sabha members lack legal awareness and their rights under PESA or they even lack technical knowledge required to understand complex environmental and developmental proposals.¹⁵⁵ Language barriers, low literacy rate and lack of legal knowledge and support further enhance these challenges.¹⁵⁶ While some

¹⁴⁷ *The Provisions of the Panchayats (Extension to Scheduled Areas) Act*, No. 40 of 1996, INDIA CODE (1996).

¹⁴⁸ *Id.*

¹⁴⁹ National Inst. of Rural Dev. & Panchayati Raj (NIRDPR), *Study on the Status of PESA Implementation in Scheduled Areas* (2023).

¹⁵⁰ *Samatha v. State of Andhra Pradesh*, (1997) 8 S.C.C. 191 (India); *Orissa Mining Corp. v. Ministry of Env't & Forests*, (2013) 6 S.C.C. 476 (India).

¹⁵¹ INDIA CONST. art. 39A; Ministry of Tribal Affairs, Government of India, *Status Report on PESA Implementation* (2024).

¹⁵² *Orissa Mining Corp. v. Ministry of Env't & Forests*, (2013) 6 S.C.C. 476 (India).

¹⁵³ B.D. Sharma, *Tribal Self-Rule: PESA and the Fifth Schedule*.

¹⁵⁴ *The Provisions of the Panchayats (Extension to Scheduled Areas) Act*, No. 40 of 1996, INDIA CODE (1996).

¹⁵⁵ National Inst. of Rural Dev. & Panchayati Raj (NIRDPR), *Study on Capacity Gaps in PESA Implementation* (2023).

¹⁵⁶ Ministry of Tribal Affairs, Government of India, *Status Report on PESA Implementation* (2024).

awareness sessions have been organised by government agencies and civil society organizations, they remain irregular and insufficient.¹⁵⁷ Therefore, without sufficient training, legal awareness and institutional support, Gram Sabha cannot function as effectively nor they can protect natural resources and biodiversity.¹⁵⁸

These challenges explain why decentralized environmental governance under the PESA have failed in implementation and cannot be regularized properly beyond formal recognition.¹⁵⁹ Solving these issues not only require legal reform but also a change in governance principles that sincerely values tribal participation and environmental sustainability.¹⁶⁰

V. CONCLUSION, SUGGESTIONS AND RECOMMENDATIONS

The Panchayats (Extension to Scheduled Areas) Act, 1996 (PESA) was enacted to strengthen tribal self-governance by recognising the Gram Sabha as an important institution for the governance of natural resources in Scheduled Areas. However, this study reveals that the objective of PESA has not been achieved uniformly across the states of Chhattisgarh, Odisha, and Jharkhand. Although all these states operate under the same constitutional and statutory framework, the implementation of PESA has been different because of State policies, administrative practices and political wills. All these differences have directly affected the ability of Gram Sabha to participate meaningfully in environmental decision-making.

The comparative analysis in this paper answers the research question by explaining that uneven implementation of PESA is not the result of lack of legislative will, rather it depends mainly on the willingness of State governments to implement the laws in its true spirit. In Jharkhand

¹⁵⁷ Id.; see also Ministry of Tribal Affairs, Government of India, *Annual Report 2023–2024* (2024).

¹⁵⁸ *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act*, No. 2 of 2007, §§ 3, 5, INDIA CODE (2007).

¹⁵⁹ National Inst. of Rural Dev. & Panchayati Raj (NIRDPR), *supra* note 2.

¹⁶⁰ *United Nations Declaration on the Rights of Indigenous Peoples* arts. 18, 19, 26, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007); *Rio Declaration on Environment and Development* princ. 10, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 12, 1992).

prolonged delay in implementation of PESA significantly weakened the role of Gram Sabha. In Odisha also absence of PESA rule resulted in selective recognition of community participation despite of judicial efforts in protecting tribal rights. In comparison to both the states, the Chhattisgarh has made greater progress by notifying PESA rules, yet there also due to bureaucratic intervention restrict Gran Sabha to work independently. All these finding indicate that legal recognition alone cannot guarantee effective decentralised governance unless it is backed by administrative unit.

Another important finding emerged from this study is the gap between law and practice. While the PESA recognises the authority of gram Sabha over community resources and local governance, its role in environmental decision making is nearly consultative rather than decisive. In matters relating to land acquisition, mining activities, forest clearance and large development project the participation of gram Sabha is frequently reduced to a procedural requirement instead of genuine process of decision making. As a result, tribal population continue to experience the environmental and social consequences of resource extraction without exicing effective control over the resources on which their livelihood, culture and identity depend.

Through the article highlights the implementation of PESA across the states of Jharkhand, Odisha and Chhattisgarh from the perspective of decentralised environmental governance. Major studies generally focus on individual state or specific aspects of tribal rights. By comparing three Scheduled Area states, this study highlights the difference in state level implementation which has become one of the most important barriers in achieving constitutional objectives of PESA. This article therefore argues that success of decentralised environmental governance should not be assessed only by the presence of legislative provisions but also on its effective implementation like to what extend Gram Sabhas are able to exercise real powers over natural resources and environmental decision-making.

Further, the findings also suggest the need for the policy reforms. State governments should ensure the timely and effective implementation of PESA

through clear legislative rules and transparent administrative procedures. The consent of Gram Sabha in matter of land acquisition, mining and use and other community resources should be treated as important and meaningful safeguard rather than a procedural formality. Capacity building programmes, legal awareness initiatives and technical support should be strengthened so that gram Sabha are able to participate effectively in environmental governance. Also, greater accountability is required to ensure that administrative authorities comply with the statutory protections available to tribal communities.

Ultimately, decentralised environmental governance cannot be succeeded unless tribal communities are recognised not only as stake holders but as original custodians of natural resources. PESA provides a strong constitutional and legal foundation for achieving this objective, but its transformative potential will remain unrealised unless State governments move beyond formal compliance and genuinely share decision – making power with Gram Sabhas. Therefore, Strengthening the implementation of PESA is essential not only for protecting forest, land, and biodiversity but also for environmental justice, democratic decentralization, and the constitutional promise of tribal self-governance in Scheduled Areas.

THIRD PARTY FUNDING IN COMMERCIAL ARBITRATION: REGULATORY CHALLENGES AND STRATEGIC IMPLICATIONS FOR CORPORATE RISK MANAGEMENT IN INDIA

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ABSTRACT

The study discusses the increasing applicability of Third-Party Funding (TPF) in India within the context of the commercial arbitration and investigates the legal standing of the concept, as well as its strategic consequences to the corporate risk management. The main purpose of the study is to examine the notion of TPF, analyse its new application in arbitration cases, and examine the degree to which it is accepted in the Indian legal system in spite of the lack of statutory provisions. The study uses the descriptive and analytical approach to doctrine that relies on secondary literature, such as statutory, judicial, legal literature, and scholarly articles concerning arbitration as well as litigation financing. By critically analysing landmark judicial cases and prevailing legal doctrines, the study observes that TPF is slowly transforming to be a viable financial tool that can allow the businesses to claim meritorious claims without being liquidity constrained. It has been also found out that Indian courts have been progressive in the openness of TPF by drawing a distinction between legitimate funding arrangements and exploitative practices, thus indirectly justifying its use in arbitration. Nevertheless, the lack of a holistic regulatory

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system poses some problems in terms of transparency, conflict of interests, and pressure by funders.

Keywords: *Third Party Funding, Commercial Arbitration, Corporate Risk Management, Judicial Recognition, Regulatory Framework.*

I. INTRODUCTION

Third Party Funding (TPF) has been a more applicable aspect of commercial arbitration, particularly in disputes that are capital intensive where the cost of litigation may put a drain on corporate finances. TPF is a set up where a non-party financier finances arbitration expenses in the expectation of a portion of a successful award.¹ TPF presents businesses in India with an avenue of pursuing meritorious claims without impairing the working capital since arbitration is increasingly becoming popular as a dispute resolution tool in settling commercial disputes. This model is especially appealing due to the fact that the model is usually non-recourse in nature that is, the funder incurs the financial loss in the case of the failure of the claim.²

Third-party funding in India lies on more of a judicial interpretation than the legislative clarity of the law. Traditionally, the concept of champers and maintenance were used to shape the Indian legal reasoning. Nonetheless, Indian courts have been of the opinion that the funding of litigation is not per se illegal. The decision in *Ram Coomar Coondoo v Chunder Canto Mookerjee* (1876) by the Privy Council provided the first basis, since it declared that litigation funding agreements are not necessarily unlawful, provided they are neither extortionate nor contrary to the policy of the land.³ This doctrine still forms the Indian jurisprudence today. An important contemporary confirmation occurred in *Bar Council of India v A.K. Balaji* (2018), during which the Supreme Court made it clear that although the

¹ T.H.T. Linh & B.T. Hieu, *Third-Party Funding in Commercial Arbitration in ASEAN: Dealing with Conflicts of Interest*, 16 *Contemp. Asia Arb. J.* 97 (2023).

² A. Deb, *Third Party Funding in Investment Arbitration: The India Story* (2019).

³ A. Agarwal, *Third-Party Litigation Funding: Global Growth and the Emerging Landscape in India* (2025), available at <https://ssrn.com/abstract=5383727>.

lawyers are not allowed to finance litigation on behalf of their clients, third parties have no prohibition regarding it. The Court has clearly acknowledged that litigants who are not attorneys can finance litigation and recoup the proceeds under contractual provisions.⁴

The other significant development is indicated in the case of *Tomorrow Sales Agency Pvt Ltd v SBS Holdings Inc.* (2023), which was decided by the Delhi High Court. The Court decided that third party funder could not have to incur adverse costs unless it becomes a party to the arbitration or expressly pledged to do so. This case helped to clear up a huge confusion about the risk of enforcement and exposure to funders. The decision noted that third party funding is a significant consideration in accessing justice especially in high valued cases, but at the same time noted that transparency and disclosure of such funds is necessary. Additional legal acceptance of litigation financing can be seen in *G Senior Advocate v state of Kerala*, courts admitted that there is no limit on third party contribution on litigation provided it does not hamper administration of justice.⁵

The regulatory grey area that surrounds TPF presents a number of problems even though it has been accepted by the judicial system. The funding arrangements are not covered in the Arbitration and Conciliation Act, 1996, as important aspects, e.g. the disclosure requirement, funder responsibility and ethical limit remain unaddressed. The other regulatory issue is connected with the regulation of arbitration strategy. Those who provide funding will seek to manipulate resolution or litigation strategies due to the source of profits. This brings about the issue of party autonomy a key principle of arbitration.⁶ TPF has its strategic benefits and governance challenges to the corporate risk management perspective. Positively, it

⁴ Christophe Jaffrelot & Pratinav Dhawan, *What Checks and Balances? Explaining the Supreme Court's Complacency in Modi's India*, 5(2) Indian Pol. & Pol'y 5 (2025).

⁵ Christophe Hillion & Ramses A. Wessel, *The Good, the Bad and the Ugly: Three Levels of Judicial Control over the CFSP*, in *Research Handbook on the EU's Common Foreign and Security Policy* 65 (Steven Blockmans & Panos Koutrakos eds., Edward Elgar Publ'g 2018).

⁶ F. Pellegrini, *Understanding Litigation Funding: Comparative Perspectives on Regulation, Market Behaviour, and Economic Consequences* (2025).

allows the companies to shed off the legal costs and maintain solvency. This is especially useful to businesses that involve cross-border disputes where the arbitration fee may be high. TPF also brings on another level of pre-merit screening with funders having stringent evaluations before they can invest in a claim. This third-party confirmation can give organizational assurance in claiming.⁷

India's third-party funding is legally accepted, although poorly developed. Decisions like *Ram Coomar Coondoo*, *A.K. Balaji*, and *Tomorrow Sales Agency* have confirmed its legitimacy but it brought out clearer protection that needs to be selected. In the case of corporations, TPF provides an effective financial risk management instrument that would turn arbitration into an investment decision. Nevertheless, it has to be properly governed, with the clarity of the contract and with the correspondence of the legal and financial strategy to be properly used. As India is developing to become a favourable arbitration venue, a relaxed regulatory approach to TPF will be required to implement transparency, investor trust and procedural fidelity.⁸

The study aims to investigate the increasing relevance and legal status of TPF within the context of commercial arbitration in India especially with regard to being a strategic financial instrument in corporate risk management. It aims at examining judicial acceptance of TPF in the circumstances that lack a definite statutory guidance. The study is valuable as it provides a doctrinal insight into the manner in which TPF is turning arbitration into a profitable and viable dispute resolution tool in addition to maximizing access to justice.

The study is divided into seven sections. Section 1 comprises the introduction of the document. A literature review is also comprised under section 2 of the study. The objectives are covered in Section 3. A research methodology is examined in Section 4. The results are discussed in Section 5. The discussion

⁷ H. Can, A. Razman & B. Abdul, *Integrating Risk Management and Corporate Governance: Implications for Performance in China's Manufacturing Sector*, 3 ____ 41 (2024).

⁸ K. Singhanian, A. Singhanian & A. Shah, *Third Party Funding in the Indian Arbitration Scenario*, 4 AIADR J. Int'l ADR F. 15 (2024).

has been provided in detail in section 6. Section 7 contains conclusions. References have finally been included.

II. LITERATURE REVIEW

Agarwal, A. (2025)⁹ examined the opportunities that TPLF has in India like the ability to fund meritorious claims in an overstretched judicial system and the barriers to its expansion such as legal ambiguity, ethical restrictions on lawyers and investor confidence. In the paper, the gaps in research concerning the long-term influence of TPLF on legal systems are identified, and it is requested that the regulation should be balanced. We conclude that third-party litigation funding, when carefully managed, will serve as a crucial part of the future of the legal services and access to justice in the world, and may serve as a game changer in the dispute resolution in India.

Titan, J. C. (2025)¹⁰ explored the efficiency of arbitral systems in southeast Asia are underresearched. It is an empirical study that surveyed 100 legal practitioners throughout the locality to determine the effects of TPF on certain efficiency indicators such as time to resolution, cost-effectiveness, predictability, settlement rates, and party satisfaction. Findings have shown that there is a high practitioner agreement that TPF improves efficiency in all aspects measured with even greater effects in the areas of cost-effectiveness and probability of settlement. Nonetheless, the key challenges that are enumerated by the respondents are conflict of interest, funder control issues, and regulatory loopholes.

Hag, I. K. A., et al.,(2025)¹¹ reviewed the numerous issues that are faced by parties that offer third-party funding (TPF) during arbitral proceedings. In order to achieve this goal, the analytical research design was selected,

⁹ Agarwal, supra note 3, at 18.

¹⁰ J.C. Titan, *The Efficiency of Third-Party Funding in the Resolution of International Disputes Through Arbitration in the Southeast Asia Region*, 7(8) Int'l J. L. & Pol. Stud. 27 (2025).

¹¹ I.K.A. Hag, M.A.K. Al-Shurman, A.F.M. Al-Batoush, A.A. Sarairah & N.M. Oudat, *Third Party Funding (TPF) in Arbitration: An Analytical Study in Jordanian Arbitration Law*, 21(1) J. Hum. Sec. 65 (2025).

which helped to gather both primary and secondary data in order to determine the qualitative information related to the specified issue and to collect legal frameworks, statutory provisions, scholarly texts, and existing literature. The content-based analysis was used to find the results. The results of the study have shown that although arbitration is associated with significant benefits in terms of its price and time-restrictions, such advantages sometimes can interfere with the quality of the rendered legal services.

Bhardwaj, A., & Sharma, S. (2025)¹² studied the relationship between sanctions and delays in arbitration, increasing costs, and the effect of sanctions on enforceability using recent cases as recommendations that include *Bank Melli Iran v. Telekom Deutschland* (2021) 3 and *v. Ministry of Defence of Iran. In Cubic Defense Systems* (2019) 4 where approved entities encountered significant challenges in implementing awards. The records of the International Chamber of Commerce (ICC) 5 and United Nations Commission on International Trade Law (UNCITRAL) show that almost one-third of arbitrated cases 6 involving parties that are sanctioned are delayed or not enforceable.

Yesmin, F., et al.,(2025)¹³ established the comparative merits of arbitration as compared to litigation, its efficiency, confidentiality, cost-effectiveness, and enforceability. The theoretical base is backed by a thorough literature review, based on the conflict resolution theory, institutional economics, whereas the methodology combines the qualitative analysis of statutes, arbitral case law, and institutional frameworks. The research covers new tendencies including online dispute resolution (ODR), third-party funding, arbitration panel diversity and impact of artificial intelligence. This research paper concludes that arbitration is a possible and

¹² A. Bhardwaj & S. Sharma, *The Impact of Sanctions on ADR in International Commercial Disputes: Legal Frameworks and Challenges* (2025), available at <https://ssrn.com/abstract=5128298>.

¹³ F. Yesmin, M.A. Jarin, J.I. Jesan, J. Nime & K.A. Mannan, *The Role of Arbitration in Resolving Commercial Disputes: An Emerging Trend in Business Law* (2025).

rather a more preferred dispute resolution method in both local and international business environments.

Sharma, A. (2024)¹⁴ studied the global commercial arbitration taking the nation to the ranks of world frontrunners in the practice. Another benefit of ADR compared to the traditional litigation is the growing resort to arbitration as one of the ways of settling commercial disputes. The article explores the current obstacles including delayed procedures and enforcement anxieties that are impediments to the effectiveness of arbitration in India. It also acknowledges the fact that India has come a long way in making itself one of the friendly countries to arbitration.

Sarkar, S. (2020)¹⁵ analyzed the concept of TPF in international commercial arbitration and its impact on the arbitration process of international commercial arbitration. Having examined the fundamental understanding of TPF, it will shed light on the issues that the TPF presents like transparency and disclosure requirements and conflict of interests. One of the most significant issues that influence the TPF funding arrangement and proceedings in the international commercial arbitration are found in the study as the transparency requirements and disclosure.

The literature review of the research shows that the current body of scholarly work is more concerned with the international evolution of the Third-Party Funding (TPF), its application in the achievement of better access to justice, and its technical issues in arbitration. Specifically, there is a lack of strategic connection between TPF and corporate risk management. Besides, little has been done in terms of giving implications of judicial recognition where it is not statutorily regulated. This shows that there is a sole gap in the research on the legal, strategic and governance aspects of TPF in India.

¹⁴ A. Sharma, *Alternative Disputes Resolution with Special Reference to Arbitration in India* (2024).

¹⁵ S. Sarkar, *Third Party Funding in International Arbitration: New Challenges and Global Trends*, 2(3) Int'l J. Legal Sci. & Innovation (2020).

III. RESEARCH OBJECTIVES

- a) To examine the concept and growing relevance of Third-Party Funding (TPF) in commercial arbitration in India.
- b) To analyse the existing legal position and judicial recognition of TPF in India.

IV. RESEARCH METHODOLOGY

The present study employs qualitative doctrinal legal research methodology based on descriptive and analytical research design, to analyze the changing landscape of Third-Party Funding (TPF) in commercial arbitration in India. The doctrinal approach is suitable since the major focus of the research is on the legal principles, judicial interpretations, statutory provisions, and the scholarly discussion of TPF and is not empirical or survey-based. The study is closely linked with the objectives of research which include to look into the increasing importance of TPF in commercial arbitration and to analyse the legal recognition of TPF in Indian law system.

Secondary data is used solely. These encompass the Arbitration and Conciliation Act, 1996, relevant provisions of the Code of Civil Procedure, reports of the Law Commission, judicial judgments of the Supreme Court of India, High Courts and the Privy Council, journal articles, books, commentaries, policy papers, institutional reports and authenticated databases like SCC Online, Manupatra, HeinOnline, SSRN and other peer-reviewed academic publications. The development of the concept of TPF in India was analysed by critically examining the landmark judicial decisions like *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, *Bar Council of India v. A.K. Balaji* and *Tomorrow Sales Agency Pvt. Ltd. v. SBS Holdings Inc.*

The analysis of the legal materials collected was carried out by doctrinal legal analysis, comparative legal interpretation and thematic content analysis. The doctrinal analysis was applied to understand the provisions of the law and

judicial precedents relating to third-party funding, and comparative analysis was used to gain insights into international trends and practices that could be relevant to the Indian context. Findings were classified into themes using thematic analysis, which resulted in the identification of major themes such as judicial recognition, access to justice, corporate risk management, transparency obligations, conflicts of interests, and regulatory challenges. These analytical tools enabled an organised analysis of the existing law and the strategic impact of TPF on commercial arbitration.

To strengthen the credibility of the findings, the legal interpretations were triangulated using various authoritative sources such as provisions, judicial precedents, academic publications, and policies. The study is only doctrinal and uses publically available legal materials, so there was no need for human subjects or confidential information, no ethics approval was required. The results are elaborated in a systematic and legal analysis that directly addresses the research goals and assists in understanding the necessity and need for a holistic regime for Third Party Funding in commercial arbitration in India.

V. RESULTS

(A). Hypothesis 1: Third Party Funding is emerging as a relevant mechanism in commercial arbitration in India.

An analysis of the concept of TPF states that it is a financial arrangement where an outsider, who has no vested interest in the dispute, covers the legal and arbitration expenses of a claimant in return to a portion of the award or settlement in the eventuality. TPF has become one of the novel techniques in commercial arbitration in India, in a bid to cope with the high cost that typically comes with complicated and value-intensive disputes¹⁶. Although arbitration is efficient and flexible, it may be quite costly because of institutional fee, cost of legal representation, use of experts, and cost of the

¹⁶ A. Onibokun & B. Sodipo, *An Evaluation of Third-Party Funding in Commercial Arbitration*, 15(1) J. Sustainable Dev. L. & Pol'y 263 (2024).

process. TPF allows financially capped entities, especially startups, small and medium enterprises, and even large firms that have to deal with liquidity issues, to acquire a legitimate claim without incurring the full financial liability.¹⁷

The increased applicability of TPF in India can be directly related to the rise of arbitration as a more acceptable dispute management system in the business sphere. As India aligns itself as a pro-arbitration venue, the demand to have financial support mechanisms has intensified. TPF is not just a way that enables claimants to file a case; it can also contribute to risk management by enabling businesses to distribute the financial sources more effectively.¹⁸ Also, the growing involvement of foreign investors and impact of international arbitration practices have helped to make TPF gradually accepted in India. Therefore, TPF is increasingly becoming a popular instrument that fortifies the process of arbitration by harmonizing material resources and legal rights, hence making its contribution to the development of the modern commercial dispute resolution environment in India.¹⁹

(B). Hypothesis 2: The Indian legal system has shown judicial recognition of Third Party Funding despite limited statutory regulation.

Deconstruction of the Indian legal system indicates that TPF has been progressively enjoying legal acceptance even though there is no explicit statutory rule of how it functions. The Indian courts have not been viewing TPF as something illegal as such, but rather in a broader context within the benchmark of the public policy, access to the justice, and freedom of contract²⁰. Traditionally, maintenance doctrines and champers raised a doubt on the effect of the involvement of third parties in financing litigation.

¹⁷ G. Banijamali, *Effects of a Third-Party Funding Agreement on the Parties to an Arbitration Agreement in a Conflict of Interest Situation*, 15(37) Jurisprudence & Islamic L. 33 (2024).

¹⁸ N. Siddiqui, *Alternative Dispute Resolution (ADR) in Commercial Disputes: Effectiveness and Challenges* (2025), available at <https://ssrn.com/abstract=5197398>.

¹⁹ Pellegrini, *supra* note 6, at 115.

²⁰ G. Mohanty & S.R. Garimella, *The Green Gavel: Third-Party Funding and Environmental Claims in ISDS* (2023).

Courts have made it clear that though unconscionable or extortionate funding agreements can be invalidated, actual funding agreements are not out of favor as such on Indian law.²¹

This judicial receptiveness has been especially evident of late in the arbitration arena. Indian courts have recognised that TPF could be positively involved in helping access to justice particularly in high value commercial disputes where otherwise the cost of arbitration might discourage meritorious claims²². This is an appreciation that TPF is an arrangement of finance and not usurpation into the dispute. Moreover, some state-level legislative efforts including Maharashtra, Gujarat and Madhya Pradesh amendments to civil procedure laws indirectly confirm the legal acceptability of third-party litigation funding, which in turn confirms its overall legal acceptability. Courts have shown their readiness to fit into changing financial systems that are beneficial in facilitation of dispute settlement and at the same time maintain safeguarding of possible abuse.²³

VI. DISCUSSION

The findings indicate that, despite being efficient and cost-focused in nature, arbitration tends to cause a lot of heavy financial cost on parties involved. Therefore, TPF allows claimants, especially start-ups and small or medium-sized enterprises, to make valid claims without jeopardizing operational liquidity. In this respect, the results are consistent with the findings of Agarwal, A. (2025)²⁴, who underlines that the access to justice is increased by the funding mechanisms at the same time underpinning the meritorious claims. Moreover, the growing institutionalization of arbitration in India contributes to reinforcing the applicability of TPF, as said by (Hag, I. K. A., et al., 2025)²⁵, claiming that arbitration is becoming a new means of settling

²¹ W. Wang, *Role of the Court of Final Appeal of the Hong Kong Special Administrative Region Under China's "One Country, Two Systems" Principle* (2011).

²² S.R. Garimella, *Third-Party Funding of Arbitral Claims: A Narrative for Access to Justice*, in *Adjudicating Global Business in and with India 202* (Routledge 2021).

²³ Michael J. Green et al., *How the Administration and Congress Can Work Together to Sustain American Engagement in Asia to 2016* (Ctr. for Strategic & Int'l Stud. 2015).

²⁴ Agarwal, *supra* note 3, at 25.

²⁵ Hag et al., *supra* note 11, at 68.

commercial disputes. Thus, TPF is not only able to decrease financial obstacles but also adds to the effectiveness and inclusiveness of the dispute resolution process. Moreover, the role played by professional funder's means that there is an external merit-screening process, which enhances strategic risk distribution within corporate governance processes.

Furthermore, another finding is that judicial acceptance of TPF in India is gradually developing even though there is no statutory framework. Indian courts have been pragmatic by accepting exploitative funding schemes and legitimate financial support. This judicial transparency is a feature of the world at large as Mishra, D. R., & Varshney, D. (2024)²⁶ outlines the increasing adoption of TPF alongside the issues of transparency and ethical protection. On the same note, Akindeire, A. (2020)²⁷ indicates that although TPF increases efficiency and settlement opportunities during arbitration, regulatory uncertainties continue to be a major issue. In Indian context, the courts have made it clear that funders are not necessarily liable to adverse costs and unless they take procedural control, they do not interfere with party autonomy but rather encourage financial involvement. Therefore, the results imply that the system of law in India is slowly adapting to the modern models of finance in the settlement of disputes even without specific legislation codification. Therefore, the new judicial position is an indication of a balanced development- one that is not hostile to invention of innovation in the field of arbitration funding but is protective on the risk of abuse Krishnaswamy, S., et al., (2014).²⁸

VII. CONCLUSION

The study clearly illustrates how Third Party Funding is beginning to reshape commercial arbitration in India, helping businesses who are unable to afford

²⁶D.R. Mishra & D. Varshney, *Consumer Protection Frameworks by Enhancing Market Fairness, Accountability and Transparency (FAT) for Ethical Consumer Decision-Making: Integrating Circular Economy Principles and Digital Transformation in Global Consumer Markets*, 50(7) Asian J. Educ. & Soc. Stud. 10 (2024).

²⁷A. Akindeire, *Third-Party Funding in International Arbitration: Concept, Issues and the Need for a Regulatory Framework* (Jan. 9, 2020).

²⁸S. Krishnaswamy, S. Sivakumar & S. Bail, *Legal and Judicial Reform in India: A Call for Systemic and Empirical Approaches*, 2(1) J. Nat'l L. Univ. Delhi 1 (2014).

their own costs to proceed with their meritorious claims and thereby also maintaining their liquidity and optimising corporate risk management. From the analysis, it can be confirmed that there was no complete legal framework governing the TPF in India, but over time, judicial precedents have been progressive in legitimising funding arrangements, whilst defining what is a lawful form of financial assistance as opposed to an exploitative practice. These results also address the first objective of the research as it identifies the increasing importance of TPF as a strategic financial tool in commercial arbitration; and the second objective of the research, as it illuminates that judicial interpretation is the key source of legal recognition of TPF in India.

The novelty of this research is found in the combination of commercial arbitration, Third Party Funding and corporate risk management in one analysis. This study makes a significant contribution to the literature on TPF because it focuses on TPF as a corporate governance and financial risk management tool, rather than merely an access to justice or arbitration law aspect, as most previous studies have done. It also highlights the way judicial acceptance of TPF has established a *de facto* regime of funding arrangements without any specific legislation, offering a fresh angle on the relationship between DR finance and corporate decision-making in India.

A separate study also shows that TPF not only provides access to justice but also helps efficient allocation of financial resources of corporations and gives an edge to India as an arbitration friendly jurisdiction but its sustainable development needs an appropriate regulatory framework, with provisions for disclosure requirements, conflicts of interest, confidentiality, funder influence, ethical standards, etc. Based on that, the study proposes to include considerations to balance commercial innovation with procedural fairness in future legislative amendments to increase investor confidence and maintain the integrity of the arbitral proceedings.

The doctrinal methodology is quite complete, but the study is constrained by the fact that it relies on secondary legal sources and lacks empirical evidence from arbitrators, corporations, practitioners, or litigators or litigators or

fundere of litigation. Researchers should use empirical and comparative methods to evaluate the practical effects of TPF on arbitral efficiency, enforcement results, corporate litigation tactics and investment habits in various jurisdictions. This research would assist in building a proper legislative framework that can assist in the ongoing development of Third-Party Funding in the commercial arbitration system in India.

WITHER MANUAL SCAVENGING? BETWEEN ERADICATION AND REHABILITATION

Dr. Sudeep Basu*

ABSTRACT

Since the early 1990s, the Indian State has had the intent to liberate manual scavengers by enacting The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, in 1993. Yet, manual scavenging, an inhuman practice of clearing human excreta through human touch, continues despite the prohibitions. This paper argues that the prevailing laws, programs for eliminating caste oppression have a top-down approach which clashes with the bottom-up practices resulting from desires for emancipation and material benefits which allow caste discrimination and manual scavenging to persist. The seemingly undying nature of manual scavenging is due to the fact that the civil enforcement practices against manual scavenging are caught in a double bind between total eradication and the compulsions of rehabilitation of manual scavengers requiring to continue with their unclean professions, in response to crisis and an uncertain future.

Keywords: *Caste, Liberation, Manual Scavenging, Rehabilitation, Untouchability.*

I. INTRODUCTION

In ethical terms, the ends of policy making and a style of politics that

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effectively affirms the right to collective wellbeing, ought to take a comprehensive account of the social presence of those groups who are invisibilized by centuries of caste oppression. The Constitution of India and various legislative and policy measures have created entitlements to undo this structure of oppression and exclusion. There have been gaps in the implementation process due to the continuing influence of traditionally privileged castes and new social groups which have acquired power and wealth in the new economy. The status quo which is somewhere in the middle of total eradication and total rehabilitation is maintained to the detriment of the manual scavengers. The plight of one such group, that of the manual scavengers, their diversity of interests and expressions, and the exercise of their rights in highly stratified social settings requires critical probing.

II. STATEMENT OF THE RESEARCH PROBLEM

We do observe how the use of caste as a dominant explanatory framework has precluded consideration of other political and social institutions (Inden 1990) and silenced other voices, particularly those of subalterns and those excluded such as the manual scavengers in India (Khare 1984). Several commentators have criticized the representation of Indian society as a traditional, self-contained community, centred on a single dominant caste (Cohn 1970). The effect of this hegemonic discourse and associated practices have been the rigidification of caste as a social institution in India. This has had deleterious effects on the lot of manual scavengers over time. Reign of the dominant caste in villages gave little room for lower castes to lead worthy lives. Persecution of some sort was generally found. During the colonial and post-colonial periods, the pressure of the upper castes and landed castes largely lessened in the economic sphere, giving space to the former untouchable castes to proudly invoke their origin myths without fear of a backlash. However, hunger prevailed on the eve of India's independence and land was forcibly acquired in the name of development. Its impact on the deprived, mostly belonging to the Dalit community was such that the

material deprivation of Dalits, heightened the cases of atrocities against them. Even now landed castes dominate the rural landscape, so the assertion that the dominant castes are losing ground needs empirical examination for the future of manual scavengers is contingent upon the status of the previously dominant castes in the villages where we see the involvement of the Khap panchayats in settling disputes.

The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, was enacted in 1993 with the expressed intent of liberating manual scavengers from a life of indignity and degradation. Almost two decades later, the National Advisory Council in its resolution dated 23.10.2010 on the issue of Manual Scavenging, had urged the Central Government to ensure that the practice of manual scavenging would be fully abolished latest by the end of the 11th Plan Period i.e. 2011-12, in coordination with all the Central Government Departments, including the Railways, and concerned States/local Governments. The resolution stated that this would require:- a) New survey in every State and UT, with wide public involvement, of remaining dry latrines and manual scavengers; b) Demolition of all dry latrines; c) Psycho-social and livelihood rehabilitation in modern marketable skills of all manual scavengers and their families, and formulation of 100% Centrally Sponsored Scheme by the Ministry of Social Justice and Empowerment to support the rehabilitation initiative; d) Special programme for education, including higher education and computer education, of all children of manual scavengers; and e) To amend the law to ensure sharper definition of manual scavenging, and accountability of public officials who employ, or fail to prevent, manual scavenging. The National Commission for Safai Karmacharis (NCSK), a statutory body made by the same Act of Parliament, 1993, came into existence. In 2000, NCSK submitted its first report stating that there was a big gap in the implementation of the 1993 Act on the ground. Since then, various organisations such as the Safai Karmachari Andolan (SKA) and National Campaign on Dalit Human Rights (NCDHR) have been working to eradicate manual scavenging. Yet two decades on, the practice of manual scavenging, a

reprehensible practice of gathering human excreta from dry toilets with bare hands, brooms or metal scrapers continues unabated. Central Monitoring Committee in their review of the situation by the end of 2010 observed that the Government of India all along viewed the issue of manual scavenging more as a problem of sanitation and not as a matter of restoring human dignity as a constitutional right. Faced with the onerous task of eradicating manual scavenging in all its forms by the end of 11th Plan period, the Government of India realized the need to amend the Manual Scavenging (Prohibition) Act, 1993 to ensure sharper definitions and restoring dignity in the lives of manual scavengers would mean attending to subjective questions and objective facts that harps not only on law per se, but also on affects, habits and exclusions.

There have been gaps in the implementation process due to the continuing influence of traditionally privileged castes and new social groups which have acquired power and wealth in the new economy. The accumulated humiliations and deprivations have not deterred the marginalized from organizing social movements of diverse forms, such as the Safai Karmachari Andolan (SKA) and National Campaign on Dalit Human Rights (NCDHR). Social movements of manual scavengers have been proactive in using law as a strategy for social action and change. The goal of eradicating manual scavenging in all its forms has spurred civil society and the state to work around the Manual Scavenging (Prohibition) Act, 1993 to ensure dignity in the lives of manual scavengers. It requires frontally confronting the ideology, dispositions, emotions of pain, humiliation around caste and untouchability. At present, we are witness to the assertion of caste identity as a consequence of deepening democracy. Most caste groups proudly invoke their origins and heritage for claiming higher status. This has given rise to the optical illusion that the caste system is enjoying a fresh lease of life (Gupta 2001, 754). Social movements of manual scavengers have been proactive in using law as a strategy for social action and change. The option of broadening the scope of the description of sanitation work is there. The other is to look at the rehabilitation package. What are the mandatory rights of people who have

been trapped in this profession because of their birth? The right to housing in mixed colonies in the city. That manual scavenging is a deplorable practice which must end is agreed upon but taking cognizance of those practices which cannot be abolished but humanized for eg sweeping has to be carefully deliberated upon. Various ways of humanization of work has to be thought through. The National sanitation research organization need to identify the best technology. Where rehabilitation is concerned another important point is that the state has to take charge to provide best education for the children of manual scavengers. Residential school of high quality should also be made available.

A critical understanding of the functioning of anti-manual scavenging law works on the assumption that law is a plausible tool of social emancipation for those who are that the receiving end of caste which is a 'graded system of social inequality'. The everyday reality of discrimination of the socially excluded is in stark contrast to the ideas of justice enshrined in our constitution. The legal empowerment of the manual scavengers have implications for their lives and one ought to examine the social processes of persistence of this degrading work. The issue of access to justice for the manual scavengers also presupposes a socio-political-jural order where constitutive violence is consciously expunged from judicial reforms. Taking cognizance of the actual narrative experience of marginality of manual scavengers while encountering the local dominant groups and State agencies is crucial, for it would open up the worldview of the manual scavengers and spur their movements for dignity and justice. My paper argues that the the persistence of manual scavenging is due to the fact that the anti- manual scavenging movements are in a quagmire between the ethicality of total eradication and the pragmatics of rehabilitation of manual scavengers who are faced with an existential crisis and an uncertain time.

III. RESEARCH METHODS

For analytical purposes the focus will be critiquing existing anti-manual scavenging laws from a non-legal lens by looking at the making of manual

scavenging subjects on account of social and governmental practices that perpetuate this heinous practice. The study has been based on secondary sources and normative discussions on the subject.

IV. DISCUSSIONS AND RECOMMENDATIONS

Giving a life of dignity to manual scavengers was the main purpose behind the enactment of The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, in 1993. The aim at the governmental level taken up by the National Advisory Council (NAC) which in its resolution dated 23.10.2010 sought for an end to the scourge of manual scavenging. It categorically called upon the Central Government to bring to a complete closure the practice of manual scavenging in all forms by the end of the 11th Plan Period i.e. 2011-12, in tandem with all the Central, State and Local government departments, railways. In its resolution, the NAC stated that this would require:- a) the conduct of surveys with public participation, of the existence of all dry latrines and manual scavengers; b) If any dry latrines are found, to ensure its demolition within a specific time period; c) The need for psycho-social and livelihood rehabilitation by providing skills to all manual scavengers and their families; d) To provide for all types of education and skills including computer based skills to the children of manual scavengers; and e) To bring about change in the existing law to ensure a robust definition of manual scavenging practice as well as ensure accountability of public officials who are meant to eradicate manual scavenging. In 2000, National Commission for Safai Karmacharis (NCSK), a statutory body made by the same Act of Parliament, 1993, pointed to the gaps in the implementation of the 1993 Act on the ground. The realization was that a lot needed to be done at the level of civil society and what emerged was various organisations such as the Safai Karmachari Andolan (SKA) and National Campaign on Dalit Human Rights (NCDHR) who have been steadfastly trying to eradicate manual scavenging, albeit with some success. Despite these laws and enactments, the practice of manual scavenging, a abominable practice of handling human excrement from dry latrines with hands prevails without

any signs of ending. Central Monitoring Committee in their observation in 2010 stated that the Government of India mainly treated manual scavenging as a sanitation problem bereft of moral dimensions that harp on human dignity elevated to the level of a constitutional right as citizens. The difficult objective of eradicating manual scavenging in all its forms by the end of 11th Plan period required the Government of India to amend the Manual Scavenging (Prohibition) Act, 1993, restoring the self-respect of manual scavengers. This would entail attending to not only the anti-manual scavenging laws, but also the emotive, moral, habitual and exclusionary tendencies that emerge from the manual scavenging practice in Indian society. Comprehensive rehabilitation as to how it can be done for those who outside the municipal bodies, public sector and the private sector needs to be worked out. If there is a financial crunch, then scavengers need to be given their dues first. The right to go to the court if something is not done properly, and the cost of legal services should be charged on the government or on an appropriate body. We require, for execution, different bodies like state monitoring committee, district monitoring committee. Strengthening of the commissions have to be taken into consideration and importantly members of the commission have to be represented in such a way that the commission works towards the cause for which it has been established. National Monitoring Enforcement Authority with power to give direction, to make corrections and also to take people to court has to be carefully selected in which the Dalit society and the scavenging society ought to have a hand. The rate of school dropouts among children of manual scavengers is very high. Exclusive education with lot of creativity in teaching would help a long way in improving the conditions of children of manual scavengers.

The liberation of those engaged in the reprehensible and degrading professions is a tortuous path. We shouldn't do anything to undermine the agency that the community has shown on its own. The apprehension is that we try to bring a law that is compassionate, we might take away the powers that the community has derived from the existence of the law and hence we need to be careful about how we do it. The kind of penalties must be

immediate. This is a finite exercise. Restoring dignity would involve treating them not as objects of reform and rehabilitation alone, but to know what they can give to us in symbolic and material terms, their strengths, talents, ethics and human values which can reform us in turn. The moot concern is whether we see the question of rehabilitation as a labour issue/ or a social justice/ or a municipal public service question. Manual scavenging is carried out in toilets built for public and private use. There are two ways in which this is done: By scavenging manually from the dry toilets with the help of broom, tin plate, stone, bamboo or tin basket, plastic bucket, tin boxes and disposing it off in a safe place designated for this purpose. The other way is to clean the sewage pits of the toilets manually. Mostly men do the work of cleaning sewage pits in the night or early morning. This deplorable practice continues almost all over the country in varied forms as it evolved according to local needs and trends. For example: Public toilets (dry toilets), especially those in south and west India, are mostly maintained by panchayats and municipalities. In Northern states though one finds water-flush toilets in public places, they often lack water and eventually function as dry toilets. In some states the practice persists because of a feudal and discriminatory practices based on caste prejudices while in others it is due to unavailability of sewer lines and the indifference of policy makers towards providing wet toilets.

What are the possibilities of permanent employment in municipality against vacant positions of sweepers? There are vacant permanent position of sweepers in health departments, in social welfare departments, assistant cook positions in hostels SC/ST hostels, BCM hostels which could be filled up. Measures of relief and rehabilitation has to be built into the Act. Offences and penalties, as to what are the offences that the law will create and what would be the penalty, and linking this issue to public accountability is deemed critical. The accountability of public officials who fail to implement the act is one and the public officials who themselves flout the act is another issue. Pre and post rehabilitation: not only pertaining to manual scavengers but also the dependent members should be eligible for rehabilitation. It is

not a reformative act but it must emphasize on the penal nature by making the law as effective as possible. There shall be a separate investigating agency and the task force to identify the workers and their place of work. There is a need for a prosecution agency. There is the main part of statute like the definition, penal provisions, jurisdiction etc. The rehabilitation part should be included in the rules, there shall be a part in the main statute about rehabilitation and the way the rehabilitation can be done has to be placed in the rules. There shall be a penal provision. The inspecting agency is necessary because the identification of the place is essential. There is no necessity to go to the court if the task force is entrusted powers to identify and demolish.

The National Safai Karmachari Andolan had recommended that the definition has to be clarified and it was in 1994 or 1995 that the first report came where it was said that people cleaning the manholes have to be included in the definition of manual scavenging. The definition has to include the people who are engaged in cleaning of manholes. The extent of non-implementation is widespread. In terms of the penal provisions, one has to think in line with the task force and perhaps draw from the human rights act as to the how the state human rights commission could act in this situation. Working towards the total eradication of manual scavenging should be the goal of any rehabilitation exercise. An administrative exercise of putting an end to this dehumanizing practice and make it a punishable act. As far septic tank and sewerage cleaning is concerned, it is about bringing about application of technology and change in the methods that are used. Given this context, regulating this domain where rehabilitation of persons who are involved in this demeaning practice is deemed necessary. In pursuance of this, there has to be a separate drafting committee, protection of the human dignity and self-respect as the guiding principles of the Act, separate executive authority under the 1993 Act, provisions for the individuals or the groups to file the case against the violators and perpetrators. To carry out the objectives of and functions under the act more particularly the work of demolition of all dry latrines a task force ought to be

constituted and allotted to each municipality and Gram Panchayats and particular town and place where this practice of dry latrines is being continued. The government of the day shall appoint a task force comprising of different cadres starting from Inspector General up to the constables available in the civil police department of the state. The unit of the task force shall be entrusted with powers of search, inspect the place and demolish the dry latrines. The task of demolition shall be carried on after a warrant given by the district magistrate or the head of the local bodies concerned, as the case may be. The task force in particular area can be headed by an officer not less than the ranks of inspect of police and he shall be entrusted with powers to inspect and demolish by taking necessary force along with him. A general notification to be issued by the state government notifying there under the date, not less than 30 days from the date of notification, for demolishing the dry latrines by the house holders or the authorities concerned. The notification shall be published in at least two newspapers one in English and one in vernacular which are having state-wide circulation. The same notification shall also be published in each District editions of a newspaper having circulation in the district, at the head offices of the District Magistrate, local bodies. The same will be published through a way of 'tom tom' (by beat of drum) in each village where the practice of keeping dry latrines prevails. Since the intention of the state government to demolish the dry latrines is notified to all through the publication in the new papers and also pasting it at the respective offices of the local bodies, there will be no necessity of further issuing a notice to the respective individuals who maintain the dry latrines. The demolition of the dry latrines has to be a top priority like putting off a fire outbreak in the village or town, stoppage of a leak in the flood bank, illicit brewing, destroying opium and poppy plants and the like.

The task force, in the districts shall be under the supervision and control of the district magistrate and gram panchayats shall be under the sarpanches. The conditions of the service of the task force in the state shall be provided in rules to be framed under the statutes. The task force shall be modeled in the

form provided under the excise department or forest department. After the demolition is completed by the task force a report to that effect shall be submitted to the sarpanch and the district magistrate. The inspector of the task force is empowered to launch prosecution in the matter of the offence under the act before a designated court which is of the rank of a sessions judge and the such designated court is competent to take cognizance of the offence without being committed by the judicial first class magistrate. This when executed ought to reflect the aspirations and wishes of the people in general.

Material exploitation and structural violence is observable in the treatment meted out to the manual scavengers. The language of caste is not coterminous with the language of bureaucracy in most situations. Yet caste concerns undergird the actual interactions between local officials and members of the Dalit communities around issues such as land redistribution, Anganwadi work, school activities, placement of village wells, job recruitments and so on. We ought not to neglect the structural violence inflicted upon the powerless and landless Dalit groups who are principally involved in manual scavenging. Their manual labour props up governmental power over their lives. In this backdrop, a comprehensive rehabilitation process can be worked out in which all the persons who are engaged in this practice should come under a legal regulatory framework, for which there has to be a separate drafting committee, protection of the human dignity and self-respect as the guiding principles of the act, separate executive authority under the 1993 act, provisions for the individuals or the groups to file the case against the violators and perpetrators. We need to be attentive to the problem of subjecthood of manual scavengers, which ties up with the objective conditions of living which is constitutive of anti-scavenging and anti-atrocity laws, pedagogic practices in schools and the institutional silences which needs early detection and immediate remedy and relief for the oppressed. An adequate pedagogic socialization of the populace to the plight of the manual scavengers must constitute of an acquaintance with the normative principles of justice envisioned by the architects of our

constitution as well as how in reality social violations and injustices are rife in the everyday work lives of the manual scavengers.

V. CONCLUSIONS

Notwithstanding the contrasting theoretical positions vis-a vis manual scavenging by Gandhi and Ambedkar (Joshi & Khattri 2019), on the question of rehabilitation of manual scavengers one has to be wary of taking a one-dimensional view of caste, namely its structural violence in which manual scavengers are treated as expendables and where it is the sovereign prerogative of caste to create that exceptionalism for its perpetuation. There is a need to see how state or bureaucracy acknowledges boundaries within society. This entails seeing how ruling practices make connections across domains rather than subsuming them. In context of caste the dominant caste in agrarian India has always been the group that is privileged implicitly in the exercise of governmental power (e.g. caste panchayats, land redistribution, redistributing agricultural subsidies etc.). The purity/pollution ideas whereby caste is used to demean Dalits (bonded labor), by extracting resources or public goods away from them has to be taken cognizance of and how such practices become the mainstay of rural power implicitly or explicitly. Being open to seeing how caste is practiced by actors i.e. villagers, bureaucrats, political leaders, teachers is far more felicitous. It is here that we see how the either/or narrative between total eradication and total rehabilitation of manual scavengers are seen to be working at cross purposes. It is this conjuncture of caste and social power that clearly shows the paradox of policy and action which is at the heart of the discourse around manual scavenging and its seemingly undying nature.

Through the concept of governmentality and biopolitics, Foucault, argued for an inductive view-from-below approach to understanding the state without overdetermining its existence as a sovereign entity. This meant not only seeing how state or bureaucracy intervening in society but also seeing how the state or its organs acknowledge boundaries within society. This entails seeing how ruling practices make connections across domains rather than

subsuming them. In context of caste the dominant caste in agrarian India has always been the group that is privileged implicitly in the exercise of governmental power (e.g. caste panchayats, land redistribution, redistributing agricultural subsidies etc.). Being open to seeing how caste is practiced by actors i.e. villagers, bureaucrats, political leaders teachers in both inductive and deductive modes is far more felicitous. It is here that we see how the either/or narrative between total eradication and total rehabilitation of manual scavengers are seen to be working at cross purposes. It is this conjuncture of caste and power seen from top down (structural norm imposing itself) and from below up (expression of desire for emancipation) that clearly shows the paradox of policy and action which is at the heart of the discourse around manual scavenging and its seemingly undying nature.

