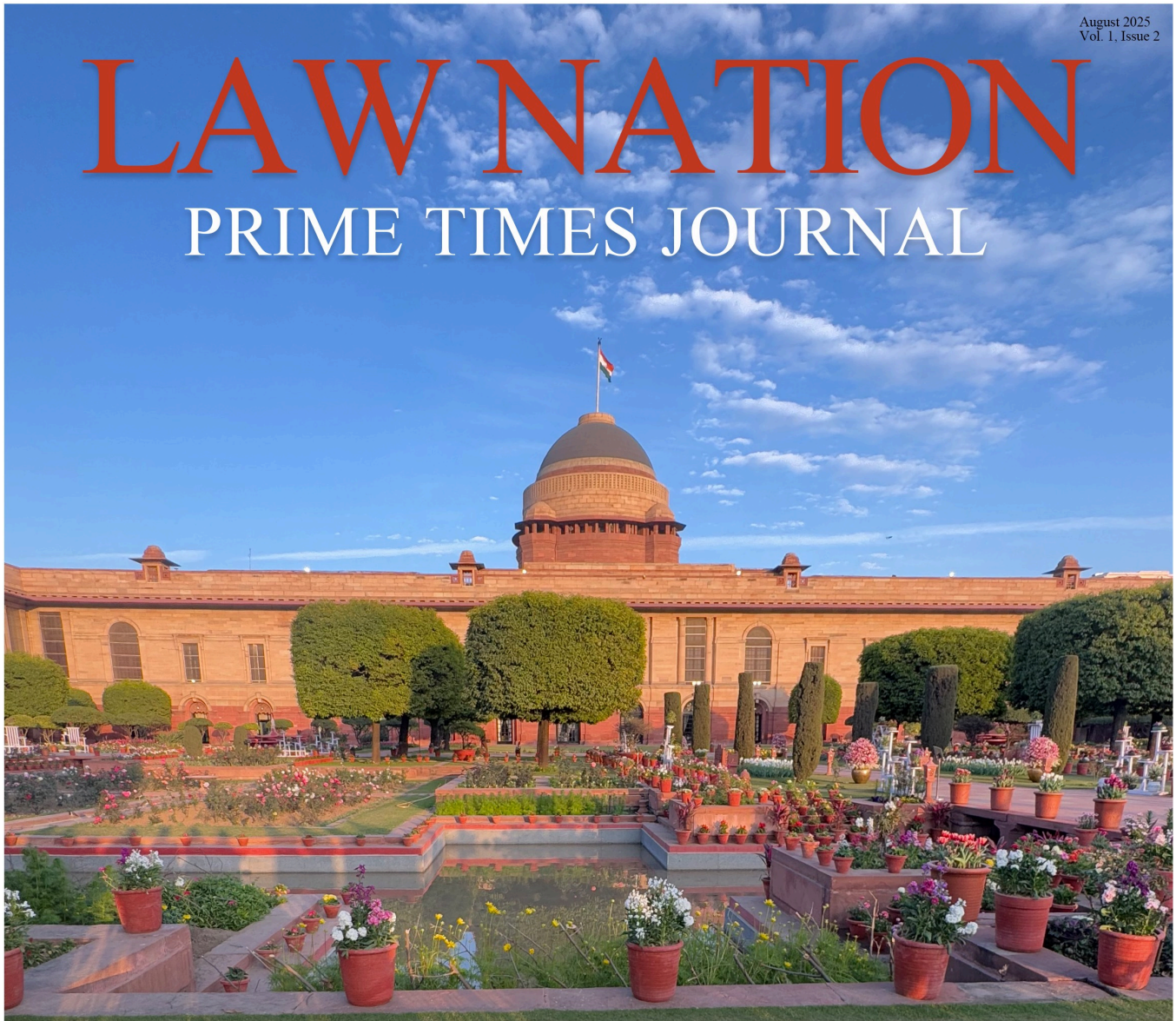
August 2025
Vol. 1, Issue 2

# LAW NATION

## PRIME TIMES JOURNAL



### THE CLUB HOUSE CONUNDRUM

Club ownership: Law vs. Loopholes

### GAMING SERVICE TAX

Games People Play

*Socialist Secular*

## SOVEREIGN ^ DEMOCRATIC REPUBLIC

The Forty Second Amendment to the Constitution of India has returned to the center of public and academic debate following recent remarks by senior leaders of the Rashtriya Swayamsevak Sangh (RSS) and various political commentators



*"A legal education initiative of Tvamev prime associates for lawyers advocates and law seekers."*

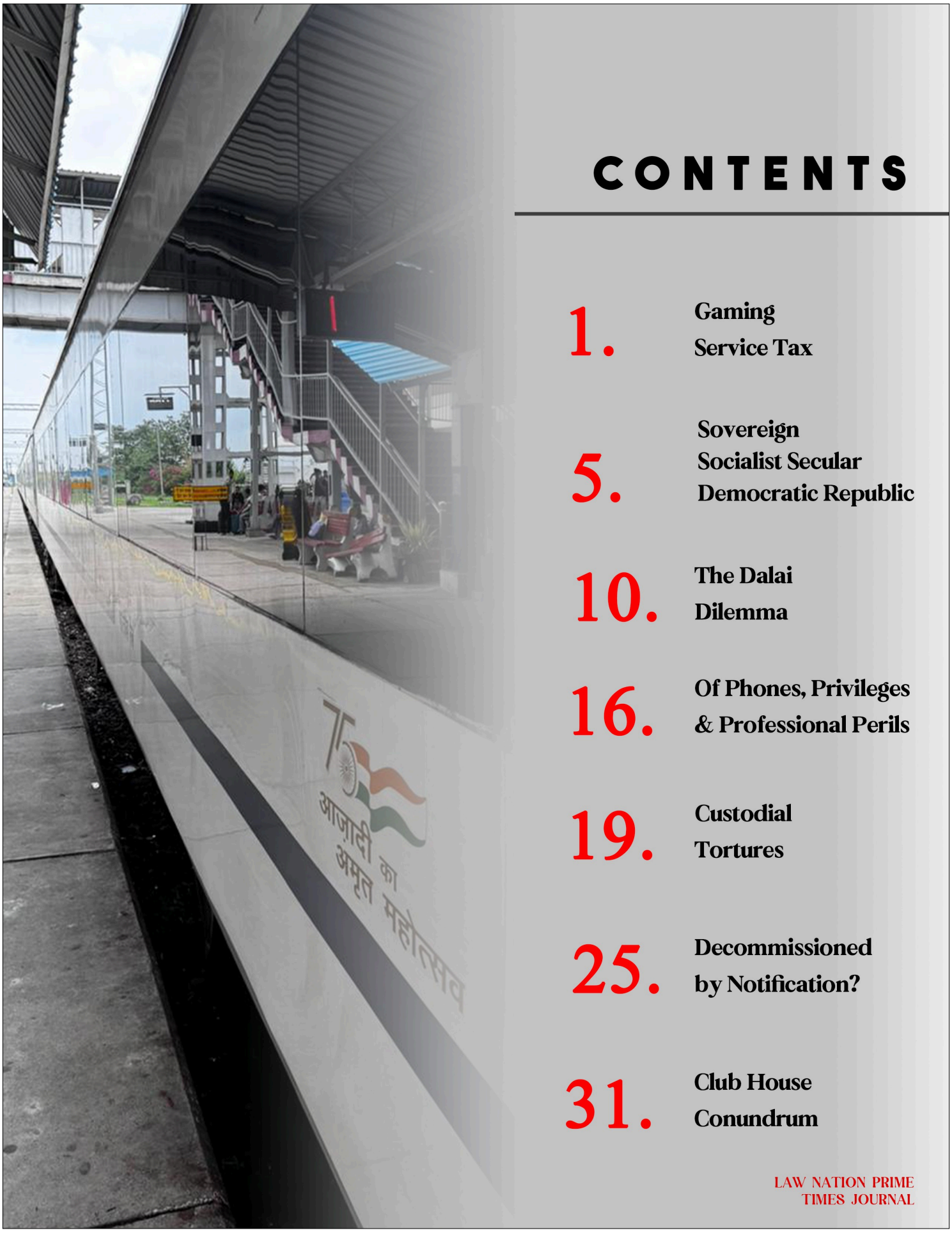
# FOREWORD

It is my privilege to present this edition of the Law Nation Prime Times Journal, an initiative devoted solely to the examination of legal issues for the purpose of education, awareness, and informed discourse among law seekers. This journal is not intended to provide specific legal advice; rather, it aims to explain, analyse, and contextualise developments in law so that its readers may better understand the legal environment.

The articles in this issue reflect the breadth and depth of contemporary legal challenges. From the evolving fiscal debates in Gaming Service Tax, to constitutional identity explored in Sovereign, Socialist, Secular, Democratic Republic, our focus remains on connecting legal theory to current affairs. We confront sensitive subjects like Custodial Tortures and policy questions in Decommissioning of Old Cars, while Club House Conundrum examines real-estate governance through a legal lens. Global and ethical intersections emerge in The Dalai Dilemma, and professional ethics are tested in Phones, Privilege & Professional Perils.

Each piece is researched and written to foster deeper understanding, spark discussion, and contribute to a culture of legal literacy. Law shapes society, and society, in turn, shapes law — and only through accessible, educational platforms can we ensure that dialogue remains open, informed, and inclusive.

Rajiv Kumar Virmani
Founder, Tvamev Prime Associates
Advocate-on-Record, Supreme Court of India

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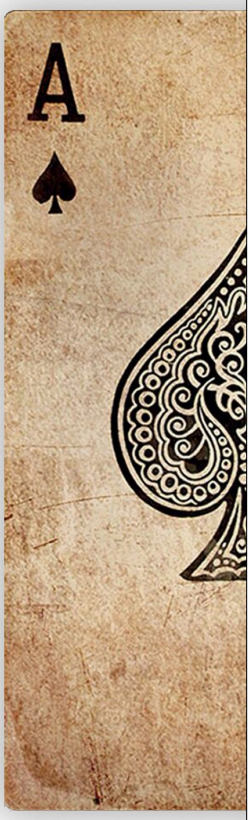
# GAMING SERVICE TAX

## Games People Play

**Shubham Pande & Surbhi Rashmi Advocates**



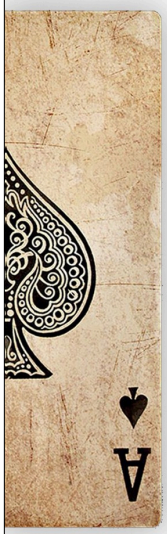
The global Real Money Gaming (RMG) market size was valued at USD 208.33 billion in 2024 The market is projected to grow from USD 225.28 billion in 2025 to USD 424.14 billion by 2032[1]. It is one of the most fastest growing industries in India's digital economy. Money gaming industry has generated approximately 425 million domestic gamers making India the second largest online gaming market in the world after China[2].

> "Real money gaming refers to games where the players land a sum of money for the purposes including but not limited to betting, gambling, online gaming, horse racing etc."

## Defining Online Gaming Under Goods And Services Tax Act

The term online gaming is defined under section 2 (80-A) and online money gaming under section 2 (80-B) of Goods and Services tax Act, 2017 as

> *"(80A) "online gaming" means offering of a game on the internet or an electronic network and includes online money gaming."*
>
> *(80B) "online money gaming" means online gaming in which players pay or deposit money or money's worth, including virtualdigital assets, in the expectation of winning money or money's worth, including virtual digital assets, in any event including game, scheme, competition or any other activity or process, whether or not its outcome or performance is based on skill, chance or both and whether the same is permissible or otherwise under any other law for the time being in force;*



Both the definition were introduced through the Central Goods and Services Tax (Amendment) Act, 2023 Act No. 30 of 2023.

## Classification of RMG

The online gaming industry in India is broadly comprises of following games:

**a. Games of skill**

A game of skill is one in which success depends principally upon the superior knowledge, training, attention, experience and adroitness of the players.


**b. Games of chance**

A game of chance is determined entirely or in part by lot or mere luck. The throw of the dice, the turning of the wheel, the shuffling of the cards, are all modes of chance. In these games the result is wholly uncertain and doubtful. No human mind knows or can know what it will be until the dice is thrown, the wheel stops its revolution or the dealer has dealt with the cards[3].


**c. Chance Skill combined**

Where Skill and chance play an equal role in deciding the outcome. In such games, neither chance nor skill is fully dominant, both are equally important to win the game.

# Taxation Regime Prior To The Central Goods And Services Tax (Amendment) ACT, 2023

## A. PRE-GST

Before the implementation of Goods and Service tax, online skill gaming was treated as an OIDAR (Online Information Database Access and Retrieval services) service different from gambling and was taxed on a Gross Gaming Revenue model ("GGR")[4].

**Gross Gaming Revenue model**

It is the total amount of money brings in through bets minus the amount that is paid to the winning player.

**Total Bets Place - Winning Paid Out** **GGR**

Games of skill were taxed under a GGR model and games of chance (or 'gambling') were taxed on the full-face value under a turnover model.

## B. After GST, Rule 31 A of Central Goods and Services Tax Rules, 2017

***[Rule 31A. Value of supply in case of lottery, betting, gambling and horse racing. -***

***(1)*** *Notwithstanding anything contained in the provisions of this Chapter, the value in respect of supplies specified below shall be determined in the manner provided hereinafter.*

**(2)** The value of supply of lottery shall be deemed to be 100/128 of the face value of ticket or of the price as notified in the Official Gazette by the Organising State, whichever is higher.

**Explanation** :- For the purposes of this sub-rule, the expression "Organising State" has the same meaning as assigned to it in clause (f) of sub-rule (1) of rule 2 of the Lotteries (Regulation) Rules, 2010.

**(3)** The value of supply of actionable claim in the form of chance to win in betting, gambling or horse racing in a race club shall be 100% of the face value of the bet or the amount paid into the totalisator.]

life-stuff.org

Under Rule 31A (3) of the CGST Rules, 2017, games of chance fell under a turnover model of taxation, while games of skill were taxed under a GGR model[5]. Games of chance were taxed based on 100% of the face value of the bets, i.e., the turnover model.

Apart from the differential taxable base on which the GST is levied, there were also different rates of taxation, with 28% tax on games of chance and 18% on games of skill. However, much to the industry's surprise, the recent amendments to the CGST Act and Rules have introduced extensive changes in three core components of the tax-the taxable event, value, and rate[6].

# The CGST (Amendment) ACT, 2023

The GST Council has changed the online gaming tax regime. The tax is now applied to the turnover instead of the company's revenue. This change is brought by the Central Goods and Services Tax (Amendment) Act, 2023 effective from October 1, 2023 which inter alia identifies electronic platforms as suppliers of actionable claim.

> *"(102A) "specified actionable claim" means the actionable claim involved in or by way of— (i) betting; (ii) casinos; (iii) gambling; (iv) horse racing; (v) lottery; or (vi) online money gaming;[7]"*

The Central Goods and Services Tax (Third Amendment) Rules, 2023, introduces Rule 31B making the value of supply of online gaming the total amount deposited with the gaming operator. The taxable base for online gaming has changed by inserting to Rule 31B and 31C through notification No. 51/2023 dated 29-09-2023 issued by Central Board of Indirect Taxes and Customs[8].

> *"**31B**. Value of supply in case of online gaming including online money gaming– Notwithstanding anything contained in this chapter, the value of supply of online gaming, including supply of actionable claims involved in online money gaming, shall be the total amount paid or payable to or deposited with the supplier by way of money or money's worth, including virtual digital assets, by or on behalf of the player:*
>
> *Provided that any amount returned or refunded by the supplier to the player for any reasons whatsoever, including player not using the amount paid or deposited with the supplier for participating in any event, shall not be deductible from the value of supply of online money gaming.*

It means that the value for online gaming tax is the total amount a player pays or deposits. Any money that is later returned or refunded to the player cannot be deducted from this initial amount for tax purposes.

> ***31C.** Value of supply of actionable claims in case of casino.– Notwithstanding anything contained in this chapter, the value of supply of actionable claims in casino shall be the total amount paid or payable by or on behalf of the player for – (i) purchase of the tokens, chips, coins or tickets, by whatever name called, for use in casino; or (ii) participating in any event, including game, scheme, competition or any other activity or process, in the casino, in cases where the token, chips, coins or tickets, by whatever name called, are not required: Provided that any amount returned or refunded by the casino to the player on return of token, coins, chips, or tickets, as the case may be, or otherwise, shall not be deductible from the value of the supply of actionable claims in casino.*

It means that in value of supply of actionable claims in case of casino, the taxable value is the total amount a player pays for purchase of chips, tokens, coins to participate in a game.

The total value cannot be deducted by any amount the casino later refunds to the player for unused chips or tokens.

## Value of Taxable Supply

**Section 15(1)**

> ***"The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply."***

Section 15(1) states that the transaction value of supply as the price actually paid or payable for the supply of goods or services.

While Section 15(1) states that the value of supply shall be the transaction value (the price actually paid for the supply), Section 15(4) states that *"where the value of the supply of goods or services or both cannot be determined under sub-section (1), the same shall be determined in such manner as may be prescribed."*

This empowers the Government to frame rules for value of supply in accordance with the procedures laid down in Section 15 (1) of the CGST Act. However, Section 15(5) say that

> **"Notwithstanding anything contained in sub-section (1) or sub-section (4), the value of such supplies as may be notified by the Government on the recommendations of the Council shall be determined in such manner as may be prescribed."**

Section 15(4) delegates power that is guided by the principle established in Section 15(1), whereas the same power is delegated in Section 15(5) without any such guidance a single but significant difference. Further, the value of taxable supply in the CGST Act is only addressed in Section 15, meaning that no other part of the Act prescribes any guidance on how the value is to be determined. This allows the Government to exercise uncontrolled power and discretion[9].

## Critical Analysis

**Can deposits be considered as Income?**

- One of the arguments of platform owners can be that they should be taxed only on the revenue and not on the money it temporarily holds on behalf of others.

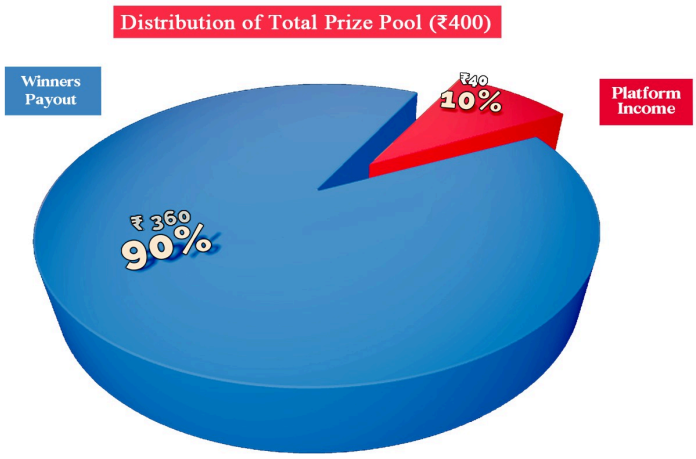
- The money deposited by the players with the platform owner cannot be assed as a revenue. The platform owner holds money for a period of time, till one of player becomes the winner. The platform holds the money in the capacity of trustee. This money is a liability to the platform owner, as it must eventually be paid out to the winner(s).

- The platform's actual income is the charges or fee it charges for facilitating the game.

- Therefore, the tax should only be levied on the fee as it is the value of supply.

**Illustration:** Four Players (A, B, C, and D) each deposit Rs.100, a total of Rs. 400. The platform owner charges 10% as a platform fee on the total amount.

10% of 400= Rs. 40
Therefore, the actual income of Platform owner is Rs. 40
The remaining amount Rs. 360 is transfer from losing player to winning player.




As the graph clearly shows, the platform owner's actual income is only the ₹40 platform fee, which represents 10% of the total amount. The remaining ₹360, which is 90% of the total amount, is the prize money transferred from the losing players to the winning player.

On the contrary it can be a view of Revenue Authorities Department is very clear that taxable value is determined under Rule 31A (3) as 100% of the face value of the bet or the amount paid to the totalizator. The rate of tax shall be 28%.

## The Matter is Pending Before The Hon'ble Supreme Court

The matter pertaining to taxation on online gaming is sub-judice before the Hon'ble Supreme Court for adjudication on following issues (but not limited to):-

- Validity of Rule 31A (3) of the CGST Rules as the said Rule is ultra vires Section 2(31), Section 7, Section 9 and Section 15 of the CGST Act;

- Validity of Section 15(5) of the CGST Act as the said provision is ultra- vires Article 246A, Article 366(12A) of the Constitution of India, 1950 and Section 15(1) of the CGST Act;

- Invocation of Section 74 of the CGST Act does not meet the jurisdictional requirements.

**END NOTES**


1. *Fortune Business Insights, Online Gaming Market Size, Share & Growth Forecast [2023], Fortune Business Insights, available at : https://www.fortunebusinessinsights.com/online-gaming-market-112179 (last visited Aug. 13, 2025)*

2. *India's Gaming Industry: Time for age & Content Ratings? By All India Game Developers Forum, August 2024.*

3. *K.R. Lakshmanan (Dr) v. State of T.N., (1996) 2 SCC 226 Para 3*

4. *Goods and Service Tax on Online Skill Gaming: A Constitutional Perspective, Volume 19 | Issue 2 Eeshan Sonak and Saranya Ravindran*

5. *Central Goods and Services Tax (CGST) Rules, 2017, §31A(3), inserted vide Notification no. 03/2018 (w.e.f. January 23, 2018).*

6. *Goods and Service Tax on Online Skill Gaming: A Constitutional Perspective, Volume 19 | Issue 2 Eeshan Sonak and Saranya Ravindran*

7. *The Central Goods and Services Tax (Amendment) Act, 2023, Act no. 30 of 2023*

8. *Central Goods and Services Tax (Third Amendment) Rules, 2023, inserted by Notification No. 51/2023-Central Tax dated 29-09-2023*

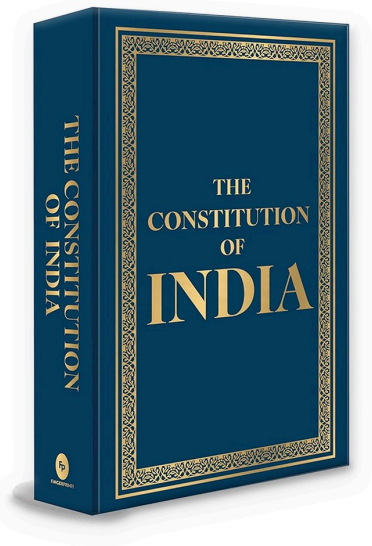
9. *Sonak, Eeshan and Ravindran, Saranya (2024) "Goods and Service Tax on Online Skill Gaming: A Constitutional Perspective," Indian Journal of Law and Technology: Vol. 19: Iss. 2, Article 2. DOI: 10.55496/JXQC4948*

*Socialist Secular*

# Sovereign ∧ Democratic Republic

## A Challenge to 42ND Amendment in 48TH Year

**Rajiv K. Virmani, Advocate on Record &**
**Jayeeta Deb Sarkar, Advocate**




The Forty Second Amendment to the Constitution of India has returned to the center of public and academic debate following recent remarks by senior leaders of the Rashtriya Swayamsevak Sangh (RSS) and various political commentators. In June 2025, the RSS General Secretary, Dattatreya Hosabale, reignited controversy by questioning the constitutional legitimacy of the words "socialist" and "secular" in the Preamble, which were inserted during the emergency in 1976. Speaking at an event marking fifty years since the emergency, he called for a national discussion on whether these terms genuinely reflect India's civilisational ethos or whether they were political insertions made without sufficient democratic mandate[1].

The issue of whether the insertion of the words 'socialist' and 'secular' in the Preamble to the Constitution during the emergency period by the Constitution (Forty-second Amendment) Act, 1976 is constitutionally valid, was discussed by the Hon'ble Supreme Court of India recently in 2024.

## The 42ND Amendment

The 42nd Amendment to the Constitution of India was enacted in 1976 i.e. during the period of Emergency that lasted from June 1975 to March 1977[2]. It was introduced by the Indira Gandhi-led government at a time when constitutional machinery and democratic institutions were under significant strain.
The constitutional authority for amending the Constitution lies in Article 368 of The Constitution of India, 1950 (COI), which allows Parliament to amend the provisions of the Constitution by introducing a bill that must be passed by each House by a majority of the total membership and by a two-thirds majority of the members present and voting. The Forty Second Amendment was passed in conformity with the procedure prescribed in Article 368 of COI.

At the time of its enactment, Parliament was functioning with a supermajority held by the ruling Indian National Congress, which had declared the Emergency in 1975 citing internal disturbance. The political environment during this period was characterized by censorship of the press, suspension of civil liberties, arrest of opposition leaders, and concentration of executive power[3]. The legislative process for constitutional amendments, though procedurally valid, occurred in a context where opposition voices had been effectively silenced and the normal democratic checks and balances were not operational.

This amendment bill was based on the recommendations of the Sardar Swaran Singh Committee, constituted by the Congress Party to review the Constitution and suggest amendments that would, in the government's view, reflect the realities of governance and align the document more closely with the goals of economic and social justice. While the committee submitted its report in 1976, not all of its recommendations were accepted in full. Nonetheless, the bill that was eventually passed incorporated a wide array of changes touching almost every aspect of constitutional governance.

The 42nd Amendment made changes to the Preamble, Fundamental Rights, Directive Principles of State Policy, distribution of powers between the Union and the States, judicial review mechanisms, and Emergency provisions. It also introduced Fundamental Duties under a new Part IV-A of the Constitution. The scope of the amendment was so broad that it altered 40 Articles, modified the Seventh Schedule, and inserted 14 new Articles[4].

It is noteworthy that the amending process was completed during the continuance of the Sixth Lok Sabha, whose normal tenure had already expired on 18th March 1976 but had been extended by one year under Article 83 due to the Proclamation of Emergency[5]. Later, concerns were raised about the legitimacy of constitutional amendments enacted by a Parliament whose mandate had been extended through exceptional provisions.

Additionally, the retrospective effect of the amendment was also questioned. It was argued in subsequent legal challenges that modifying the Preamble, which was adopted by the Constituent Assembly on 26th November 1949, and applying such a change retrospectively, created a constitutional inconsistency. Among the amendments done, The Preamble was also amended to insert the words “Socialist” and “Secular”. These insertions marked a symbolic shift in the ideological orientation of the state, embedding into the constitutional text terms that had political and philosophical implications beyond their plain meaning.

The sweeping changes, introduced in a single constitutional amendment, fundamentally altered the distribution of power among the organs of the state and affected the balance between citizens' rights and state obligations. The term “Mini-Constitution” was thus attributed not merely due to the volume of changes but also because it sought to rewrite the Constitution by amending a large number of provisions of the Constitution. The 42nd Constitutional Amendment in India is well known for its controversial changes and inclusions. The changes were undertaken in consonance with the suggestions made by the Swaran Singh Committee constituted for the same purpose by the then Prime Minister of India, Mrs. Indira Gandhi and introduced by Shri H.R. Gokhale, the then Law Minister in Congress regime [6].

Although several provisions were later reversed by the Forty-Third, Forty-Fourth Amendments and by the Supreme court, through Minerva Mills v. Union of India[7] , a substantial number of changes introduced by the Forty-Second Amendment such as the insertion of Fundamental Duties, creation of tribunals, and inclusion of new Directive Principles continue to remain in force.

## Political Scenario during the Amendment

The political climate during the enactment of the Forty-Second Amendment was marked by intense centralisation of power, a breakdown of democratic norms, and the unprecedented use of constitutional machinery to silence dissent. The amendment was passed during the period of the National Emergency, declared on 25th June 1975 by then Prime Minister Indira Gandhi under Article 352 of the Constitution, citing internal disturbance. This Emergency lasted until 21 March 1977, marking a 21-month suspension of many civil liberties and fundamental rights[8].

The Indian National Congress, led by Indira Gandhi, held an overwhelming majority in Parliament, especially in the Sixth Lok Sabha. Most opposition leaders had been detained under the Maintenance of Internal Security Act (MISA), and civil society was subdued by a strict regime of censorship and surveillance. This lack of institutional and public resistance allowed the government to initiate sweeping legislative changes without facing effective parliamentary or public opposition.

It was in this environment that the Sardar Swaran Singh Committee was constituted by the Congress Party to recommend constitutional reforms. Headed by the then External Affairs Minister, Sardar Swaran Singh, the committee submitted a report that advocated significant expansions of state power and limitations on judicial review. Although many of the suggestions were modified or selectively adopted, the report formed the basis of the Forty Second Amendment Bill introduced in Parliament in 1976[9].

## Judicial Reforms

In Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225, the Hon'ble Supreme Court ruled secularism and socialism as part of the basic structure, which cannot be removed or amended even by Parliament. By virtue of this case, which has since been said to have become "the bedrock of constitutional interpretation in India", a majority of seven out of a record thirteen-judge-bench held that a constitutional amendment could not alter the basic structure of the constitution. Thus, the 'basic structure doctrine' was laid down in a historical verdict. The thirteen judges gave a total of eleven opinions; and even the majority were not uniform as to their views on what the basic structure of the Constitution entailed. This judgement becomes a matter of interest owing to two of the judgements forming a part of the majority: (i) the then Chief Justice Sikri and (ii) Justice Shelat and Justice Grover. Justice Sikri, in his judgement, stated that the "Secular character of the Constitution" was one of the features that formed part of the basic structure of the Constitution of India (Kesavananda Bharati at para. 292). [10] Justice Shelat and Justice Grover, in their judgements, not only stated that the "Secular and federal character of the Constitution" formed part of the basic structure of the Constitution but also reiterated the following position.

> *India is a secular State in which there is no State religion. Special provisions have been made in the Constitution guaranteeing the freedom of conscience and free profession, practice and propagation of religion and the freedom to manage religious affairs as also the protection of interests of minorities. According to K.M. Pannikar, "it may well be claimed that the Constitution is a solemn promise to the people of India that the legislature will do everything possible to renovate and reconstitute the society on new principles" (Kesavananda Bharati at para. 487).*

In S. R. Bommai v. Union of India (1994) 3 SCC 1, SC reaffirmed secularism as a basic feature of Indian democracy. In this case, the Hon'ble Court has deliberated painstakingly on the Indian model of secularism, sought to locate it within the constitutional schema and given a decision that has granted it significant legal importance. The most significant contribution of the judgement was holding in no uncertain terms that secularism is a part of the basic structure of the Constitution (S. R. Bommai at paras. 29, 153, 186).[11] The judgement goes on to hold that not only is the encroachment of religion in secular activities of the State prohibited but also that:

> *…religious tolerance and equal treatment of all religious groups and protection of their life and property and of the places of their worship are an essential part of secularism enshrined in our Constitution. We have accepted the said goal not only because it is our historical legacy and a need of our national unity and integrity but also as a creed of universal brotherhood and humanism. It is our cardinal faith. Any profession and action which go counter to the aforesaid creed are a prima facie proof of the conduct in defiance of the provisions of our Constitution (S. R. Bommai at para. 151).*

In Minerva Mills v. Union of India (1980), the Hon'ble SC held that the socialist objectives in the DPSPs are fundamental to the Constitution, and in certain cases, Articles 39(b) and 39(c) can override Articles 14 and 19 to uphold socialism and economic justice. In this case, the Court struck down parts of the 42nd Amendment that gave Directive Principles a higher status than Fundamental Rights.

But when it came to the words 'socialist' and 'secular', the Court took a different view. It didn't see them as new ideas. Instead, it was held that these terms were already part of the Constitution's broader values; the amendment just made them more visible. The then Chief Justice of India YV Chandrachud, writing for the majority, made it clear that Indian socialism wasn't about rigid ideology. It was about creating a fairer social order, something the Directive Principles had always aimed to achieve.

> *"We resolved to constitute ourselves into a Socialist State which carried with it the obligation to secure to our people justice-social, economic and political. We, therefore, put part IV into our Constitution containing directive principles of State policy which specify the socialistic goal to be achieved.[12]"*

In Balram Singh V. Union Of India 2024 INSC 893, writ petition under Article 32 of COI was filed challenging the insertion of the words 'socialist' and 'secular' by the 42nd Amendment Act, 1976 in the Preamble of COI which was tagged along with petitions filed for the similar issues. The petitioners raised the grounds that the insertion of the word 'secular' was deliberately abstained by the Constituent Assembly and the word 'socialist' restricts the economic policy choice vesting in the elected government. The petitioners also argued that the

insertion was faulty because it was 'passed' during the Emergency when there was no will of the people to sanction the amendments as the normal tenure of the Lok Sabha had ended on 18 March 1976.

A Division Bench comprising of the then Chief Justice Sanjiv Khanna along with Justice Sanjay Kumar dismissed the writ petitions by holding that the constitutional position regarding the secular and socialist nature of the Constitution remains unambiguous due to earlier interpretations of these words by the Hon'ble Supreme Court. The Hon'ble Supreme Court held that the challenge to the amendment has been made forty-four years after its enactment, and it lacks merit because the terms 'socialist' and 'secular' have been widely accepted and understood by the people of India. These additions have not restricted legislations or policies pursued by elected governments. Therefore, the Court refused to undertake a detailed examination of the challenge[13].

The Hon'ble Supreme Court further affirmed the Parliament's power to amend the Constitution, including its Preamble under Article 368 of COI. It was held that the power is not limited by the date of the Constitution's adoption and the retrospective nature of the amendment would not curtail the power so conferred[14].

The Hon'ble Supreme Court also acknowledged that the concept of secularism has evolved. It reasoned that while the Constituent Assembly did not explicitly include the term 'secular,' the Constitution's provisions, such as Articles 14 (right to equality), 15 (right against discrimination), 16 (equality of opportunity), 25 (right to religious freedom), 26 (freedom to manage religious affairs), 29 (protection of interests of minorities), and 30 (right of minorities to establish and administer educational institutions), reflect secular ethos.

The Hon'ble Supreme Court referred to ***R C Poudyal v. Union of India***[15] (1993 INSC 51) where it was held that secularism essentially represents the nation's commitment to treat persons of all faiths equally and without discrimination[16]. The Court further reiterated that secularism is a basic feature of the Constitution[17] as was expounded in ***Kesavananda Bharati v. State of Kerala***[18] ***and S R Bommai v. Union of India***[19].

The Hon'ble Supreme Court also ruled that the term 'socialist' in the Indian context does not mandate a specific economic model. It signifies the State's commitment to social and economic justice, ensuring that no citizen is disadvantaged due to economic or social circumstances. The Court observed that the term does not preclude the existence of a mixed economy or private enterprise. The Court ruled that the word 'socialism' reflects the goal of economic and social upliftment and does not restrict private entrepreneurship and the right to business and trade which is a fundamental right under Article 19(1)(g) of the Constitution[20].

The Hon'ble Supreme Court held that the majority judgment in the nine-judges Constitution bench in Property Owners Association v. State of Maharashtra[21] removed the ambiguity regarding the model of governance by ruling that the Constitution as framed in broad terms allows the elected government to adopt a structure for economic governance which would subserve the policies for which it is accountable to the electorate[22].

At present, the law is settled that the insertion of the words 'socialist' and 'secular' in the Preamble to the Constitution of India by the Forty-Second Amendment Act, 1976 is constitutionally valid, having been enacted through the procedure prescribed under Article 368, and that these terms merely gave express recognition to foundational values already inherent in the Constitution, as affirmed by the Hon'ble Supreme Court in **Kesavananda Bharati v. State of Kerala, Minerva Mills v. Union of India, S. R. Bommai v. Union of India,** and most recently in **Dr. Balram Singh v. Union of India,** wherein the Court held that secularism and socialism form part of the basic structure of the Constitution and that their inclusion does not restrict democratic governance, economic policymaking, or legislative competence of elected governments.

Any change in the present position can only be made if Hon'ble Supreme Court decides to refer the matter to larger bench or if the legislature decides to move a constitutional amendment for modification/deletion of the words 'socialist' and 'secular' from the preamble of the Constitution of India.

**END NOTES**

*1. The Hindu, June 27, 2025, 'Secularism' and 'socialism' not part of Preamble drafted by Ambedkar, must be reviewed: RSS available at https://www.thehindu.com/news/national/secularism-and-socialism-not-part-of-preamble-drafted-by-ambedkar-must-be-reviewed-rss/article69741441.ece (last visited on 01.08.2025)*

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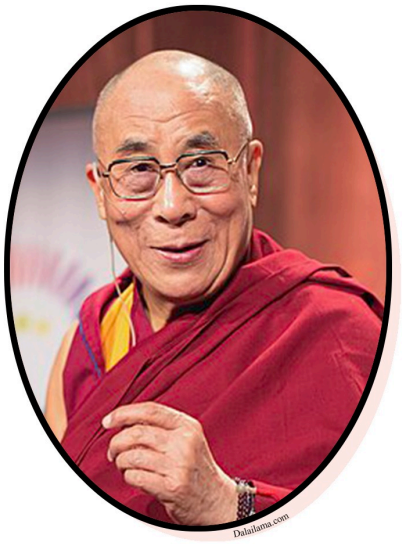


# THE DALAI DILEMMA

**Shreya Bansal, B.A. LL.B Amity University, Nanki Moudgil & Shreya Rattan B.A. LL.B, O.P. Jindal University.**

As Tenzin Gyatso, the 14th Dalai Lama, gets closer to his 90th birthday, the question of who will succeed him has become a difficult legal and political issue that combines international law, state sovereignty, and spiritual freedom.

Tibetan Buddhism's tulku system is in charge of the process of reincarnation. The PRC (People's Republic of China), on the other hand, uses historical tools like the 1793 Golden Urn and legal norms like Order No. 5 (2007), which go against Articles 18 and 27 of the ICCPR (International Covenant on Civil and Political Rights), UDHR (The Universal Declaration of Human Rights), and UNDRIP (The Declaration on the Rights of Indigenous Peoples).

India may accommodate both the Tibetan government-in-exile and the Dalai Lama. It does this by using a mix of moral support and diplomatic tactics. In the meantime, the US and other democratic countries have claimed they support the Tibetan cause and often bring it up when talking about China's record on human rights.

This issue highlights how hard it is to balance governmental sovereignty with the right to religious freedom. It will have a huge impact on the future of Tibetan Buddhism.

## Founding Spiritual Legacy:

The word "Dalai" comes from the Mongolian word for "ocean," and the word "Lama" comes from the Tibetan word for "guru" or "teacher." Gedun Drupa (1391–1474) was the first person to hold the title, but it was given to him after the 3rd Dalai Lama, Sonam Gyatso, received recognition from the Mongolian king Altan Khan. The 5th Dalai Lama turned the institution into both a spiritual and political one by making the Potala Palace the seat of administration. This strengthened the office's spiritual and worldly influence.

## A Framework of Historical and Religious Context:

The 14th Dalai Lama was recognized between 1937 and 1940 by traditional tulku methods like visions, identification tests, and monastic exams. This led to his official enthronement.

The Dalai Lama has been a symbol of both spiritual and political power in Tibetan Buddhism since the 14th century. He is thought to be the reincarnation of Avalokiteshvara. The tulku system requires a strict process to confirm each rebirth, which includes visions, oracles, personal identification, and extensive monastery training. This keeps the system both legitimate and continuous.

## China Takes Over Tibet and the Government-In-Exile Is Formed:

China's 1950 military occupation of Tibet, which it called "peaceful liberation," challenged the region's long-standing autonomy and raised serious concerns under the international legal principle of self-determination, which is set out in Article 1(2) of the UN Charter and Common Article 1 of the ICCPR and ICESCR ( International Covenant on Economic, Social and Cultural Rights). The 1951 Seventeen Point Agreement, which was signed under duress, may not be valid according to Articles 51 and 52 of the Vienna Convention on the Law of Treaties (1969), which say that treaties can't be made under duress.

Under the UDHR, religious and minority rights were infringed when people were repressed and forced to fit in with the culture. The 1959 revolt forced a lot of Tibetans, including the 14th Dalai Lama, to leave their

homes. This led to the foundation of the Central Tibetan Administration (CTA) in exile in India. The Montevideo Convention (1933)[1] says that the CTA is not a state since it does not meet the requirements for statehood. However, the 1991 Charter of the Tibetans-in-Exile says that it has a functional division of powers. The Dalai Lama's decision in 2011 to give power to an elected Sikyong was a step toward democratic self-governance. This made the CTA more legitimate as a representative entity in light of changing international standards for non-state actors. Even though it doesn't have formal diplomatic recognition, the CTA works with countries and international organizations to protect Tibetans' right to self-determination, cultural preservation, and religious freedom in line with international human rights standards.

## The Traditional Succession Process:

> The conventional way to find out who the Dalai Lama is in a new life is spiritual and organized. Senior monks and regents interpret visions, look for signs left behind, and consult sacred oracles and sites such as Lhamo Lhatso[2]. They use these signals to hunt for possible candidates, mainly young boys who were born around the time the Dalai Lama died. To make sure it is the correct child, a series of tests are conducted, such as asking the child to identify personal things that belonged to the previous Dalai Lama from among similar objects[3]. Monks also look for indicators of continuity in the child's physical appearance and spiritual behavior. Once a candidate is chosen, there is a ceremonial ceremony to honor them.

Then, for years, they learn about Buddhist doctrines, ethics, and how to be a leader. The whole point of this is to make sure that the new Dalai Lama is ready and accepted by the Tibetan people.

## The 14th Dalai Lama and The Current Dilemma:

The 14th Dalai Lama, Tenzin Gyatso, had an important role in the modern history of the institution. After China's occupation of Tibet in 1950 and a failed uprising in 1959, he came to India and established the Central Tibetan Administration (CTA), which is often called as the Tibetan


government-in-exile, in Dharamshala[4]. Over time, he became an international recognized moral leader, Nobel Peace Prize laureate, and symbol of peaceful resistance and cultural preservation. His public statements about succession have deviated from tradition and have also challenged China's authority. Though he hinted before at being the last Dalai Lama, he has since confirmed the continuation of the institution[5] . He has declared that only the 'Gaden Phodrang' Trust, a nonprofit entity based in Dharamshala, has the authority to recognize his successor, saying that "no one else has any such authority to interfere in this matter'[6] . The Dalai Lama's statements, which range from the prospect of the next Dalai Lama being born in exile to the possibility of a female or adult reincarnation, are both religiously important and legally smart. They are meant to stop China from interfering and strengthen the Gaden Phodrang Trust's exclusive authority.

## China's Stance and Ongoing Interferece:

China maintains comprehensive legal and political authority over Tibetan religious and political matters, employing a blend of constitutional stipulations, historical regulations, and modern legislation.

The foundation of its legal assertion is significantly dependent on:

1. **Order No. 5 (2007) – Measures on Reincarnation**[7] Promulgated by the State Administration for Religious Affairs, this regulation mandates:

   **a.** Government approval of all reincarnations.

   **b.** Compulsory use of the Golden Urn for historical lineages unless exempted.
   **c.** Prohibition of unauthorized recognition ceremonies.

2. **Chinese Constitution**[8]
   **a.** Article 36: Recognizes freedom of religion.

   **b.** Article 4: Affirms minority rights but subordinates them to national unity.

3. **The Panchen Lama Precedent:** The 1995 kidnapping of Gedhun Choekyi Nyima, who was recognized by the 14th Dalai Lama as the 11th Panchen Lama, and China's later nomination of Gyaincain Norbu are examples of how the government

interferes directly in Tibetan religious practices. The 2007 "Measures on the Management of the Reincarnation of Living Buddhas" give the Chinese government control over religious succession. This goes against international law that protects religious freedom, like the ICCPR and UDHR. Beijing's threats to foreign nations, particularly India, not to "interfere" make its plan to unilaterally define Tibetan religious authority and strengthen political control in the area very clearer.

China's use of its own laws to manage the process of reincarnation goes against what it has to do under international law. China is a member of the United Nations and a party to the ICCPR, but it has not ratified it. Article 18 of the ICCPR protects freedom of religion, and Article 27 protects the rights of minorities. Article 5 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) says that the government should not get involved in spiritual matters. Article 52 of the Vienna Convention on the Law of Treaties (1969) makes this point even stronger: it says that treaties made under duress are not valid. This raises legal questions about the validity of the 1951 Seventeen Point Agreement, which was signed under duress. China's interpretation of succession rules also goes against the concept of non-derogability of religious freedom under international law, which puts it at odds with acknowledged jus cogens norms.

## India's Strategic Position:

The strategic position of India regarding the Dalai Lama's succession and the broader Tibetan issue is multifaceted, influenced by historical, political, and cultural dimensions. India has historically supported the Dalai Lama and the Tibetan cause, viewing it as a matter of human rights and regional stability. This support is crucial, especially as the Dalai Lama has asserted his authority over his reincarnation, which China contests, claiming the right to appoint the next Dalai Lama[9]. India's stance changes between strategic ambiguity and humanitarian commitment because of its asylum policy and its calculations about regional stability. It recognizes Tibet as part of China, but by hosting the Dalai Lama and the CTA, it quietly promotes Tibetan independence.

On one hand, India officially recognizes Tibet as part of China and doesn't allow the Tibetan government-in-exile to engage in political activities against China from Indian soil. On the other hand, India continues to host the Dalai Lama and provides sanctuary to thousands of Tibetan refugees[10]. This approach reflects India's effort to manage its historical ties to Tibet, unresolved border disputes, and strategic rivalry with China, while still honouring its moral and humanitarian commitments to the Tibetan people.

## View of Central Tbetan Administration (CTA):

The CTA unequivocally endorses the assertion made by the Dalai Lama that the authority to ascertain his reincarnation resides solely with the Gaden Phodrang Trust. CTA President Penpa Tsering has asserted that a regime devoid of belief, such as China, lacks both moral and legal grounds to intervene in a religious process. Their position is firmly established in:

- Article 18 of the Universal Declaration of Human Rights and the Internatio nal Covenant on Civil and Political Rights safeguards the freedom of religion and belief [11].

- Article 27 of the ICCPR safeguards the rights of minorities to engage in their cultural and religious practices[12].

- The Central Tibetan Administration (CTA) doesn't have formal statehood under Article 1 of the Montevideo Convention (1933), but it does have a democratic charter, an institutional structure, and it still represents the Tibetan diaspora. This gives it functional legitimacy according to modern interpretations of effective self-governance under international law.

Thus, the recognition of the 15th Dalai Lama ought to adhere to Tibetan religious traditions and the explicit guidance of the Dalai Lama, rather than being influenced by governmental interference.

## Different Points of View From The International Community:

The subject of who will succeed the Dalai Lama has gotten a lot of attention from around the world, not just because of its religious aspects but also because of its effects for international law, human rights, and geopolitical sovereignty. Several states and international organizations have issued legal and policy statements that have an effect on the Tibetan question, either directly or indirectly.

**The Tibetan Policy and Support Act (TPSA) of 2020** is a clear example of how the United States has adopted a strong legislative stance. It officially states that the process of choosing the next Dalai Lama is a religious matter that should not be interfered with by the government. The Act allows for targeted sanctions against Chinese

officials who try to change the reincarnation process, which is against international conventions on religious freedom[13]. The TPSA is a big step forward for religious freedom in U.S. foreign policy, but it can't be enforced by the law unless the president wants it to be, and even then it is typically limited by other diplomatic concerns.

Amnesty International and the United States Commission on International Religious Freedom (USCIRF) are two examples of non-governmental organizations that have consistently condemned China's actions in Tibet. They say that these actions violate international human rights standards, especially those set out in documents like the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. These groups are very important in creating international legal discourse, especially when there are no binding judicial remedies. They do this by keeping track of how states act and having an impact on legislative initiatives in democratic countries

Since the 1950s, the United Nations General Assembly (UNGA) has approved many resolutions expressing concern over China's occupation of Tibet and how it affects religious and cultural rights. Resolution 1353 (1959)[14] asked for respect for the Tibetan people's basic human rights and their unique way of life. Resolution 1723 (1961)[15] took a step further by officially recognizing the Tibetan people's right to self-determination. Resolution 2079 (1965)[16] echoed past reservations[17]. Even while these resolutions are not legally enforceable, they have a lot of moral and persuasive weight in international law, especially when it comes to setting standards for how to respect religious and ethnic minorities. Their continuous use in diplomatic settings supports the idea that Tibet's status is still a live subject that the world is watching, even if China claims it is sovereign.

**India's** stance on the Tibetan question is still strategically complex. India is home to the Dalai Lama and the Tibetan Government-in-Exile, , but it hasn't taken a clear legal stance on the question of reincarnation because of regional geopolitical concerns. India is trying to find a balance between protecting freedom of religion and refuge under both domestic and international law and without making things too political, which could upset China. This kind of attitude is smart from a diplomatic point of view, but it shows how hard it is to implement the law on religious matters that cross national borders when national interests clash.

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**The United Nations Security Council (UNSC)** has mostly stayed out of the Tibet issue because China is a permanent member and can veto any action. This institutional impasse shows how international law has trouble dealing with violations of religious or cultural rights when they are done by a significant state. The UNSC has indirectly recognized human rights issues in China, which has helped raise awareness around the world of Tibet's lack of autonomy and cultural oppression[18].

The USCIRF, on the other hand, is more active since it keeps an eye on religious repression in Tibet.

The findings help shape U.S. foreign policy and have backed laws like the TPSA[19] . However, as numerous scholars have pointed out, international campaigning is often ineffective because of the differences in geopolitical power, making these channels more declarative than helpful.

So, even though there is no international law that requires the reincarnation of religious figures and no global court that hears cases of violations of spiritual autonomy, the growing number of resolutions, national laws, and advocacy reports is adding to a body of soft law and transnational normative pressure. These changes, while not enough to force states to follow the rules, are very important for keeping religious freedom as a recognized tenet of international law.

## A Juridicial Dillema Of Concurrent Heirs:

A scenario involving two Dalai Lamas is anticipated:

- The successor of China: Selected through the Golden Urn, with the endorsement of Beijing.

• The successor to the CTA has been discerned through conventional spiritual methodologies, presumably in a state of exile.

• This split creates a one-of-a-kind legal problem since international human rights law may favour the exile-recognized successor, but enforcing it is hard because there is no higher power over sovereign states like China.

## The Future of Faith in a World with Laws:

The lineage of the 14th Dalai Lama is not merely a spiritual tradition; it's also a legal and ideological battleground where rigorous claims of state sovereignty meet with international human rights principles. China's ongoing efforts to restrict reincarnation via things like the Golden Urn and Order No. 5 (2007) are clear violations of international protections under the ICCPR, UDHR, and UNDRIP. These actions damage religious freedom and cultural independence, and they also make human rights less universal by putting political aims before of spiritual identity.

International law doesn't provide the Central Tibetan Administration (CTA) official sovereignty, but its democratic growth and continued representation of the Tibetan diaspora give it functional legitimacy in altering people's minds about self-governance. The Dalai Lama's claim that the Gaden Phodrang Trust is only organization that may recognize his succession shows that the community can decide for itself what is spiritual and questions outside influence over religious matters.

The U.S. Tibetan Policy and Support Act, United Nations resolutions, and civil society campaigns all support spiritual rights around the world, yet there are still not many legal mechanisms to defend these rights. In a world where hard sovereignty always wins out over soft norms, the subject of succession reveals the way law's idealism and geopolitics' reality are always at odds with each other.

It's not simply about a baby born into a spiritual family who will recognize the next Dalai Lama. This is also a test of whether international law can safeguard faith from power and whether religious groups can fight up to government attempts to take them over. This means that the succession is not simply a problem for Tibetans; it is a problem for people all across the world. It shows that people are still fighting to protect their cultural and religious identity against authoritarianism.

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# OF PHONES, PRIVILEGES & PROFESSIONAL PERIL

## The Dual Narrative Shaping Legal Ethics in India

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In August 2025, the Hon'ble Supreme Court of India refused to quash criminal proceedings against a lawyer accused of conspiring with the main accused, making it clear that legal professionals cannot claim immunity from prosecution solely on account of their profession. A Bench comprising Justices Pankaj Mithal and P.B. Varale asserted that phone conversations between a lawyer and an accused, even in the absence of direct evidence, can still form valid grounds for criminal charges if incriminating material emerges. Justice Mithal emphasized that giving legal advice over the phone might raise suspicions akin to criminal collusion. Importantly, he noted that such matters should be examined at trial, not dismissed prematurely.

**The Court observed:**

"Always call the client to chamber, not on phone... even calls can land lawyers in trial."

Through this observation the Hon'ble Supreme Court has warned the lawyers which consist of three implications: Presumption of participation (Telephonic legal advice may be construed as aiding the accused), Due process vulnerability (In absence of face-to-face professional documentation, the lawyer's role may appear ambiguous) and Precautionary jurisprudence (The Supreme Court is urging preventive conduct to shield lawyers from legal entanglement) .[1]

## JUNE 2025

The Call That Shook the Bar: In June 2025, the Enforcement Directorate (ED) sent summonses to two Senior Advocates, Mr. Arvind Datar and Mr. Pratap Venugopal, regarding the legal advice they had given to their client, Care Health Insurance. This has raised the issue of how far investigative powers can extend regarding the rights and protections of lawyers. The issue concerned providing advice on Employee Stock Ownership Plans (ESOPs) to Dr. Rashmi Saluja, who previously served as the Chairperson of Religare and is currently being reviewed by the ED.[2] It's important to note that the summonses didn't say anything bad about either lawyer.

Even so, the ED's actions raised serious legal and institutional issues, particularly regarding attorney-client confidentiality, constitutional safeguards under Article 19(1)(g) of The Constitution of India (COI), and the autonomy of the legal profession. There may be a conflict between the extensive authority of summons under Section 50 of the Prevention of Money Laundering Act, 2002 (PMLA), and the evidentiary protections in Section 132 of the Bharatiya Sakshya Adhiniyam, 2023 (BSA). This article examines closely whether coercive summonses sent to lawyers are legal and constitutional, their implications for professional privilege and the rule of law, and how legal institutions, such as the Hon'ble Supreme Court and the ED itself, have responded to them. Through this lens, it calls for clearer procedural safeguards and a balanced strategy that protects both the integrity of legal representation and the effectiveness of investigations.

## Briefing the Bar Battle:

The summonses by ED were sent under Section 50 of PMLA which grants ED the authority to summon "any person" during hearings. However, these summonses, which were aimed at advocates, caused considerable anger from prominent bar groups, including but not limited to the Supreme Court Advocate on Record Association (SCAORA), the Supreme Court Bar Association (SCBA), and the DHCBA, who claimed they violated the legal professional privilege[3]. In response, Mr. Datar officially claimed attorney-client confidentiality, and both summonses were then dropped.[4]

## Analyzing Legal Issues:

**1. Can practicing lawyers be called to advise on a professional setting under Section 50 PMLA?**

**2. If these kinds of summons break Section 132 of BSA (privileged communication),**

**3. Does this action violate Article 19(1)(g) of COI?**

**The Laws That Allow Professional Privilege also cast duty on the Advocates:**

As per Section 132 of the BSA which expressly prohibits Advocates from disclosing any communication made to them by or on behalf of a client during, and for, their professional engagement, unless the client provides express consent. This statutory duty of confidentiality extends to documents that the advocate becomes acquainted with in the course of his/her service, as well as to legal advice rendered during engagement.

**However, Section 132 contains two key exceptions:**

- **Communications made in furtherance of an illegal purpose.**
- **Facts observed by the advocate suggest that a crime or fraud may have been committed since the engagement began.[5]**

As per Section 132 of the BSA is to promote candid communication between clients and their legal representatives, thereby enabling lawyers to provide fearless, independent advice. Yet, in the absence of clear procedural safeguards, coercive summons threatens to render these protections ineffective, endangering both individual rights and the integrity of the justice system.

## The constitutional protection

As per Article 19(1)(g)[6] of COI which protects advocates' right to conduct their jobs. It also ensures the freedom to practice any profession, including law. This protection includes the right to provide legal advice, represent clients, and maintain the confidentiality of private correspondence. Section 132 of the Bharatiya Sakshya Adhiniyam, 2023, strengthens this idea by legally recognizing legal professional privilege and making it illegal to force a lawyer to reveal any communication with a client made during professional work, except in certain situations, such as when the communication helps an illegal act or reveals a crime that has happened since the start of the engagement.[7]

**Article 19(1)(g) and Section 132** work together to ensure the independence of the legal profession. Any forceful action by investigating authorities, such as issuing summonses without good reason or adequate protections, could deter people from exercising this constitutionally protected right. It breaks the confidentiality between lawyers and their clients, makes it harder for lawyers to do their jobs without fear or favour, and may even make them less likely to do their jobs without fear or favour. Therefore, when the state takes action that contradicts these protections, it not only infringes upon people's rights but also compromises the integrity of the legal system.

**PMLA's Summoning Powers:** The Section 50 of the Prevention of Money Laundering Act, 2002[8] gives the Enforcement Directorate (ED) power of civil court to call people, including lawyers, to provide documents or testimony during investigations. While these powers facilitate effective enforcement, their use, especially against lawyers, raises significant questions about the constitutional guarantee in Article 19(1)(g), which safeguards the right to practice any profession. As highlighted in modern legal criticism, in one case, it was noted that the lack of procedural safeguards under the PMLA may deter people from hiring a lawyer, which would compromise both professional independence and client confidentiality. Therefore, even though the ED's powers are judicial, they must be exercised in a manner consistent with the Constitution and subject to judicial review to prevent arbitrary violations of fundamental rights.

**Verdict of the Hon'ble Supreme Court:** On June 25, 2025, the Hon'ble Supreme Court of India made a landmark decision in ***Ashwinkumar Govind bhai Prajapati v. State of Gujarat*** that strengthened the importance of legal professional privilege. Under Section 179 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), the petitioner, a practicing lawyer, was summoned to court solely for assisting a client in obtaining bail. The Gujarat High Court upheld the summons since the petitioner was a witness. Still, it didn't consider the protection offered by Section 132 of the Bharatiya Sakshya Adhiniyam, 2023 (BSA), which says that counsel cannot be compelled to reveal confidential communication.

**AI generated image of The Supreme Court of India**

A bench of Justices K.V. Viswanathan and N. Kotiswar Singh vehemently disagreed and said:
*"Bringing lawyers in to give clients advice can break the core of legal independence and be a major problem for the administration of justice."*
The Hon'ble Supreme Court said again that having a lawyer is an important part of the right to a fair trial under Article 21. It also warned against investigative overreach that threatens the independence of the legal profession.
The ruling also came at a time when people were even more worried because the Enforcement Directorate (ED) had called in Senior Advocates Arvind Datar and Pratap Venugopal, who were both representing clients being investigated by the ED. The Supreme Court Advocates-on-Record Association (SCAORA) asked the Chief Justice to act suo-moto in response, saying that lawyers' legal rights were being violated and that lawyers were being threatened. The verdict and recent events make it clear that advocating is not a crime and that any violation of legal professional privilege puts the integrity of the justice system at risk.

## Circular on Legal Safeguards:

Amid mounting criticism, the ED issued a Technical Circular bearing Ref No. 03 of 2025 on June 20, 2025, instructing its field formations to refrain from summoning advocates during investigations under the PML Act.
The circular recognized that compelling lawyers to disclose client communications or documents would violate Section 132 of the BSA, which codifies the attorney-client privilege. While acknowledging the exceptions under the provision, the ED mandated that any summons falling within those exceptions must receive prior approval from the Director of the ED.
This internal directive, though welcome, remains administrative, and its future enforcement will depend on institutional discipline and legal oversight.[9]

## Summative Reflections:

At the heart of this episode lies a deeper constitutional challenge i.e., protecting the legal profession from coercion. As established by Section 132 of the BSA and Article 19(1)(g) of the Constitution, advocates are entitled to confidentiality and professional freedom. Thus, any coercive action by investigative agencies risks rendering these safeguards hollow promises. What's at stake is not merely the autonomy of individual lawyers but the credibility, functionality, and fairness of the entire justice delivery system at large. Ultimately, the law needs to strike a balance. Investigative powers shouldn't be more important than the constitutional and professional protections that protect the integrity of legal representation.


**END NOTES**


1. *Supreme Court: "Lawyers Not Above Law, Phone Calls Can Be Evidence in Criminal Cases" available at https://lawchakra.in/supreme-court/criminal-lawyers-not-above-law/; see also Legal Professionals Not Immune from Prosecution: Supreme Court Refuses to Quash Criminal Case Against Lawyer; see also https://lawtrend.in/legal-professionals-not-immune-from-prosecution-supreme-court-refuses-to-quash-criminal-case-against-lawyer/*

2. *Supreme Court takes suo motu case on ED summons to lawyers for their legal opinions to clients, The Hindu, July 1, 2025, available at: https://www.thehindu.com/news/national/supreme-court-takes-suo-motu-case-on-ed-summons-to-lawyer 0511.ece*

3. *Shaffi Mather, "Summoning Advocates By Enforcement Directorate", June 26, 2025, https://www.livelaw.in/articles/summoning-advocates-enforcement-directorate-295855*

4. *Apurva Vishwanath, "ED retreats after uproar, withdraws summons to top advocates", June 21, 2025, https://indianexpress.com/article/india/ed-retreats-after-uproar-withdraws-summons-to-top-advocates- 10079076/*

5. *Section 132 of Bhartiya Nyaya Sanhita, 2023*

6. *Constitution of India- Article 19(1)(g)*

7. *Attorney-Client Privilege in India, Mondaq, (March 17, 2023), available at https://www.mondaq.com/india/trials-amp-appeals-amp-compensation/1324972/attorney-client-privilege-in-india*

8. *Prevention of Money Laundering Act, 2002 – Section 50(2)*

9. *Technical Circular No. 03/2025, dated 20.06.2025, bearing Ref No. Leg-19/7/2025-LEGAL-HO, issued by the Directorate of Enforcement, Government of India.*

# CUSTODIAL TORTURES

## JOURNEY FROM D.K. BASU GUIDELINES (1996) TO CUSTODY TORTURE BILL 2023

Shubham Pandey & Surbhi Rashmi, Advocates

> **"Torture is a wound in the soul so painful that sometimes you can almost touch it, but it is also so intangible that there is no way to heal it. Torture is anguish squeezing in your chest, cold as ice and heavy as a stone, paralyzing as sleep and dark as the abyss. Torture is despair and fear and rage and hate. It is a desire to kill and destroy including yourself."** -Adriana P. Bartow

Custodial death refers to the death of an individual in the custody of law either Police custody or Judicial custody. Custodial death is one of the worst crimes in a civilised society governed by the rule of law.

"Custodial torture" is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever human dignity is wounded, civilisation takes a step backward, flag of humanity must on each such occasion fly half-mast."[1]

The most common forms of custodial torture are electric shock, hammering nails in the body, hanging upside down and beating mercilessly, inserting rods in body parts.

Any form of torture or cruel, inhuman or degrading treatment would fall within the ambit of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise.[2]

## STATISTICAL OVERVIEW:

The NHRC data on this issue is available for 2010-2020. According to this, at least 17,146 people were reported to have died in judicial/police custody - nearly five per day, on average - in cases registered in the decade up to March 2020. Between January-July 2020, the NHRC reported 914 deaths in custody - 53 of these in police detention.[3]

The latest NCRB data relates to two categories: the first category includes persons not on remand. Persons Not on Remand includes Persons Arrested and yet to be produced before court. The second category includes persons in remand. Persons in remand includes Persons in Police/Judicial Remand.
For persons not on remand, a total of 41 deaths were reported across the country, of which 16 cases were charge-sheeted, 17 led to convictions, and 12 resulted in acquittal or discharge. Gujarat reported the highest number of such deaths (14 reported, 10 charge-sheeted, 4 convicted), followed by Maharashtra (6 deaths, all convicted), and Rajasthan (3 deaths, all convictions). Many states and UTs like Arunachal Pradesh, Goa, and Kerala reported zero custodial deaths in this category.

For deaths of persons in remand, 34 deaths were reported in 2022. Madhya Pradesh (6), Maharashtra (5), and Andhra Pradesh (5) reported the highest numbers. Out of these, 17 magisterial inquiries and 9 judicial inquiries were ordered. Only 9 cases led to arrests and charge-sheets, and none resulted in conviction or discharge by the end of the year. These figures indicate a severe gap in police accountability.[4]

## RECENT CASES OF CUSTODIAL TORTURE

Somnath Suryawanshi (Parbhani Custodial Death, 2024): On 15 December, 2024, Somnath Suryawanshi, a 35-year-old man, died in custody at the Parbhani district jail, Maharashtra. According to the provisional post-mortem report, he sustained multiple injuries, raising serious concerns of custodial torture.[5]

## LEGAL FRAME WORK

Constitutional Provisions

### ARTICLE 21

Right to Life and Personal Liberty

"21. Protection of life and personal liberty. —No person shall be deprived of his life or personal liberty except according to procedure established by law."

The expression "life or personal liberty" has been held to include the right to live with human dignity and thus it would also include within itself a guarantee against torture and assault by the State or its functionaries. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials, detenus and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law.

Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. [6]

### ARTICLE 22

"22. Protection against arrest and detention in certain cases.—(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice."

Article 22 guarantees protection against arrest and detention in certain cases and declares that no person who is arrested shall be detained in custody without being informed of the grounds of such arrest and he shall not be denied the right to consult and defend himself by a legal practitioner of his choice.

> ***"(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate."***

Clause (2) of Article 22 directs that the person arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest, excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate.

### ARTICLE 20(3)

"20 (3) No person accused of any offence shall be compelled to be a witness against himself."

Article 20(3) of the Constitution lays down that a person accused of an offence shall not be compelled to be a witness against himself. These are some of the constitutional safeguards provided to a person with a view to protect his personal liberty against any unjustified assault by the State.

### Code of Criminal Procedure, 1973/ Bharatiya Nagarik Suraksha Sanhita, 2023

Chapter V of the Criminal Procedure Code, 1973/ Chapter V of Bharatiya Nagarik Suraksha Sanhita deals with the arrest of a person.
Section 41 Cr.P.C/ 35 B.N.S.S. confers powers on any police officer to arrest a person under the circumstances specified therein without any order or a warrant of arrest from a Magistrate.

Section 46 Cr.P.C/ 43 B.N.S.S. provides the method and manner of arrest, "Arrest how made". Under this section no formality is necessary while arresting a person.

Under Section 49 Cr.P.C/ 46 B.N.S.S., the police is not permitted to use more restraint than is necessary to prevent the escape of the person. "No unnecessary restrain"

Section 50 Cr.P.C/47 B.N.S.S. enjoins every police officer arresting any person without warrant to communicate to him the full particulars of the offence for which he is arrested and the grounds for such arrest. The police officer is further enjoined to inform the person arrested that he is entitled to be released on bail and he may arrange for sureties in the event of his arrest for a non-bailable offence.

Section 56 Cr.P.C/57 B.N.S.S. contains a mandatory provision requiring the police officer making an arrest without warrant to produce the arrested person before a Magistrate without unnecessary delay.
"Person arrested to be taken before Magistrate or officer in charge of police station."

Section 57 Cr.P.C/ 58 B.N.S.S. echoes clause (2) of Article 22 of the Constitution of India that "Person arrested not to be detained more than twenty-four hours."

There are some other provisions also like Sections 53, 54 and 167 Cr.P.C/ 51, 53 and 187 B.N.S.S. which are aimed at affording procedural safeguards to a person arrested by the police.

Whenever a person dies in custody of the police, Section 176 Cr.P.C/ 196 B.N.S.S requires the Magistrate to hold an enquiry into the cause of death.

## INDIAN EVIDENCE ACT, 1872,
### Bhartiya Sakshya Adhiniyam, 2023

The Law Commission in its 113th Report recommended the insertion of Section 114-B in the Indian Evidence Act.[7]

> Section 25 IEA/23 BSA provides that, "No confession made to a police-officer, shall be proved as against a person accused of any offence."
>
> Section 26 IEA/ 26 BSA "Confession by accused while in custody of police not to be proved against him. — No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person."

## JUDICIAL GUIDELINES

The Indian judiciary played a crucial role in preventing custodial torture through directives issued in various cases, including D.K. Basu case [8], Arnesh Kumar case[9] , Sunil Batra[10] case and others. In Arnesh Kumar v. State of Bihar, the Supreme Court issued guidelines to prevent unnecessary arrests and detention by police officers and Magistrates.[11] In the case D.K. Basu v. State of W.B.[12] , the Hon'ble Supreme Court provides certain guidelines or requirement in all cases of arrest or detention. The Extract of the guidelines is produced below for ease and reference.

> *"35. We, therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures:*
>
> *(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.*
>
> *(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.*
>
> *(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.*

*(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.*

*(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.*

*(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.*

*(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.*

*(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a panel for all tehsils and districts as well.*

*(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illaqa Magistrate for his record.*

*(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.*

*(11) A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board."*

# INTERNATIONAL HUMAN RIGHTS BODIES

Custodial deaths is one of the most grievous forms of human rights violations. The growing number of custodial deaths has compelled global human rights institutions to call for stronger legal safeguards. Following are some key international bodies play a pivotal role in addressing and preventing custodial deaths worldwide:

## UNIVERSAL DECLARATION OF HUMAN RIGHTS[13]

Article 1: All human beings are born free and equal in dignity and rights.
Article 3 – Everyone has the right to life, liberty and security of person.
Article 5-No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 9 - No one shall be subjected to arbitrary arrest, detention or exile.

International Covenant on Civil and Political Rights[14]
Article 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.
Article 9

*1.Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*

*2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*

*3.Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.*

*4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*

*5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation*

**CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (1984);**

**THE EUROPEAN CONVENTION OR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (1953);**

## ANALYSIS

Despite constitutional safeguards and statutory protections, custodial violence continues to be practiced.

The image shows a persistent trend of custodial violence (approx. 30 years). According to the data, the highest number of reported custodial violence was 191 as reported in the year 1997-98. The lowest rate of custodial violence was in the year 2020–21 which is 103 due to the release of prisoners because of Covid-19 pandemic which subsequently rose to 175 immediately in the year 2021-22.

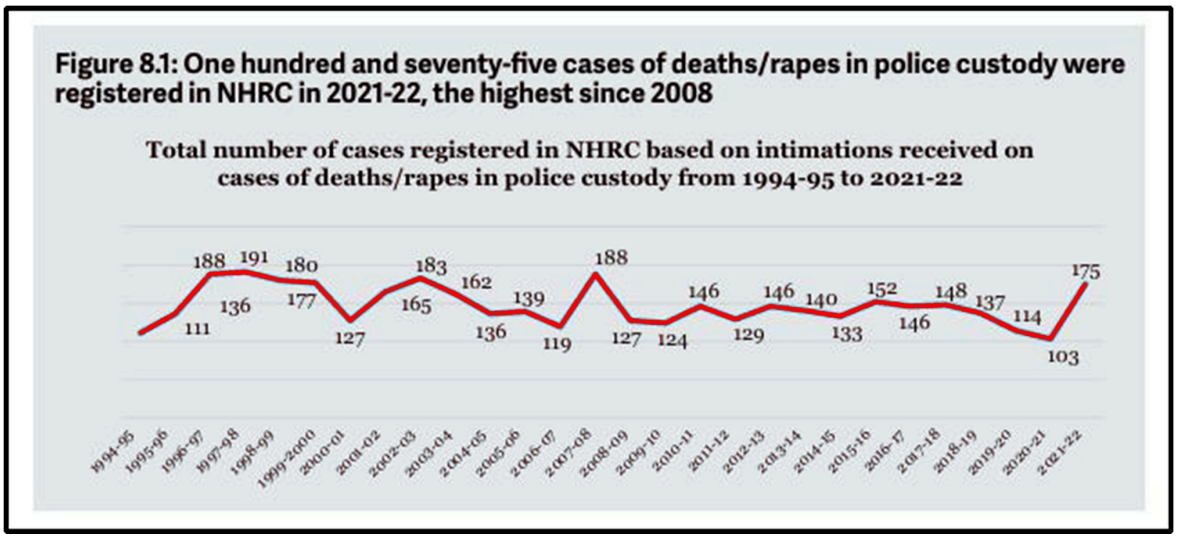
> "The state of custodial violence is such that there is at least one custodial violence in every 3.5 days (which peaks to one custodial violence every second day in some years)."

It is ironical that the Hon'ble Supreme Court's issued guidelines on Custodial death in D.K. Basu in 1996 and the highest number of custodial violence was recorded in the next year, 1997–98, reflecting the gap between judicial directives and ground-level enforcement.

From 2012 to 2020, the number of custodial violence stayed approximately the same, with around 120 to 150 cases reported each year. These are the cases which are officially registered with the NHRC. There are many cases of custodial torture, deaths, and sexual violence are either unreported, or misrepresented as natural deaths or suicides.

Despite several directions and guidelines issued by the Hon'ble Supreme Court particularly in landmark judgments D.K. Basu v. State of West Bengal and other statutory obligations under CrPC and the Constitution, custodial violence continues to prevail as a critical and unresolved issue.

Furthermore, India lacks a law criminalizing custodial violence. In the absence of specific legislation, most cases are addressed under general provisions of the Indian Penal Code (IPC)/ Bharatiya Nyaya Sanhita, which are not sufficient to deal with the gravity of the Custodial violence.




Source: Status of Policing in India Report 2025 Police Torture and (Un) Accountability and Source: NHRC Annual Reports 1994-95 to 2021-22

The Prevention of Torture Bill, 2023." is pending in Parliament according to which if a public servant, or any person abets by or with the consent or acquiescence of such public servant, tortures or attempts to torture any person, they shall be punished with imprisonment for minimum three years which can extend to ten years and with fine of at least one lakh rupees.

> "According to the bill, in cases where the death of a person is caused due to such custodial torture, the person committing such an offence shall be punishable with imprisonment for life and shall also be liable to fine."

## A WAY FORWARD

In August 2021, former Chief Justice of India expressed his concerns over the custodial deaths. He said: "Police stations pose the highest threat to human rights and dignity as custodial torture, violence, and police atrocities still prevail, notwithstanding constitutional guarantees." While the struggle and journey to completely eradicate custodial tortures and deaths will be long, "The Prevention of Torture Bill, 2023" pending in the Indian Parliament, once notified can go a long way to uproot this evil from the civilised society. (srng)

## END NOTES


1. Khursheed Ahmad Chohan Versus Union of Territory of Jammu and Kashmir and Ors. Citation: 2025 LiveLaw (SC) 732

2. D.K. Basu v. State of W.B., (1997) 1 SCC 416

3. National Human Rights Commission, Business Standard, Online, 12.9.2022

4. Crime in India, 2022 Statistics Volume-III, National Crime Records Ministry of Home affairs

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6. D.K. Basu v. State of W.B., (1997) 1 SCC 416

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8. D.K. Basu v. State of W.B., (1997) 1 SCC 416

9. Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273

10. Sunil Batra v. State (UT of Delhi), (1978) 4 SCC 494

11. Dr J. Lakshmi Charan, Custodial Torture in India: Intersection of Criminal Law and Constitutional Rights, SCC Online (Mar. 23, 2024), available at https://www.scconline.com/blog/post/2024/03/23/custodial-torture-in-india-intersection-of-criminal-law-and-constitutional-rights (last visited Aug. 2, 2025).

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13. United Nations, Universal Declaration of Human Rights, available at https://www.un.org/en/about-us/universal-declaration-of-human-rights (last visited Aug. 2, 2025).

14. United Nations Human Rights office of the High Commissioner, International Covenant on Civil and Political Rights, available at https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights (last visited Aug. 2, 2025).



# DECOMMISSIONED BY NOTIFICATION?

## A Constitutional and Statutory Analysis of Delhi-NCR's Crackdown on Overaged Vehicles

Naimesh Gupta & Raman Sharma, Advocates

On July 31, 2025, a landmark legal challenge emerged in the Gurgaon Sessions Court that could fundamentally reshape the balance between environmental policy and constitutional rights in India. Mr. Mukesh Kulthia, Advocate filed petition against the seizure and forced scrapping of end-of-life (EOL) vehicles in the Delhi-NCR region represents more than just another environmental law dispute, whereby it challenges the very foundations of executive power and constitutional governance in contemporary India. The petition's central contention that current enforcement practices constitute executive overreach, violation of constitutional rights, and misapplication of the Motor Vehicles Act, 1988 (MV Act) strikes at the heart of how environmental policies should be implemented within India's constitutional framework[1].

## Legal Framework and Constitutional Foundations

The Motor Vehicles Act: Legislative Intent vs. Administrative Interpretation

The cornerstone of Kulthia's legal challenge rests on a fundamental statutory interpretation issue: the Motor Vehicles Act, 1988, and the Central Motor Vehicles Rules (CMVR) do not make vehicle scrapping obligatory based purely on age criteria. This distinction is crucial because it reveals a significant gap between legislative intent and administrative implementation. The Act, designed to regulate vehicle registration, fitness, and operation, establishes a framework that prioritizes roadworthiness and emissions compliance over arbitrary age-based restrictions.

Under Section 41 of MV Act, vehicle registration validity is set at 15 years for non-transport vehicles, with provisions for renewal upon meeting fitness requirements. Importantly, Section 46 ensures the validity of nationwide registration, creating a unified system that should prevent arbitrary state-level restrictions. . The legislative scheme suggests a preference for fitness-based rather than age-based vehicle regulation,

aligning with international best practices that focus on emissions and safety rather than chronological age.

## CONSTITUTIONAL RIGHTS AT STAKE

Constitutional Violations in Delhi-NCR Vehicle Seizure Case

The petition invokes four fundamental constitutional provisions, each representing a distinct but interconnected sphere of citizen rights. The arbitrary classification becomes particularly problematic when vehicles that meet all fitness and emission standards are still subjected to seizure purely due to their manufacturing date.

**Article 19(1)(g)'s protection of the right to practice any profession or trade** extends beyond individual economic activity to encompass the broader right to livelihood[2]. For commercial vehicle operators, taxi drivers, and small business owners dependent on their vehicles for income generation, seizure represents a direct assault on their constitutional right to earn a living. The Hon'ble Supreme Court's recognition in Olga Tellis v. Bombay Municipal Corporation (1985) that the right to livelihood forms an integral part of Article 21 provides strong precedential support for this argument[3].

**Article 21's expansive interpretation** by Indian courts has transformed it from a narrow protection against unlawful detention into a comprehensive guarantee of dignified existence[4]. The right encompasses not merely biological survival but extends to include the right to livelihood, human dignity, and freedom from arbitrary state action. The forcible seizure of vehicles essential for earning livelihood directly contravenes this expanded understanding of the right to life.

**Article 300A protection of property rights**, though not a fundamental right, ensures that "no person shall be deprived of his property save by authority of law". The key question becomes whether executive orders and administrative circulars constitute sufficient "authority of law" for property deprivation. The constitutional history suggests that only Parliamentary or state legislative enactments, not executive fiats, can authorize property seizure[5].

## THE ENVIRONMENTAL LAW PRECEDENT: NGT AND SUPREME COURT ORDERS

**The Genesis: Vardhaman Kaushik and Environmental Activism**

The current legal framework originated from environmental activism in the National Green Tribunal case of **Vardhaman Kaushik & Ors v. Union of India (2014)**[6] . The NGT's initial order banned vehicles older than 15 years from operating in Delhi-NCR, later refined in 2015 to specifically target diesel vehicles older than 10 years and petrol vehicles older than 15 years. This judicial intervention represented a paradigm shift from traditional automotive regulation toward aggressive environmental protection measures.

The NGT's rationale centred on Delhi's deteriorating air quality and the significant contribution of vehicular emissions to ambient pollution levels. Scientific evidence presented showed that older vehicles, lacking modern emission control technologies, contributed disproportionately to air pollution. However, the blanket age-based ban represented a judicial policy choice that prioritized environmental protection over individual property rights and economic considerations.

## SUPREME COURT ENDORSEMENT AND IMPLEMENTATION DIRECTIVES

The Hon'ble Supreme Court in M.C. Mehta v. Union of India fundamentally altered the enforcement landscape by providing explicit judicial backing for the NGT's environmental directives. The Court's order stating that "all diesel vehicles more than 10 years old and petrol vehicles more than 15 years old shall not ply in NCR" carried the imprimatur of India's highest judicial authority.

Crucially, the Supreme Court directed that "vehicles violating the order will be impounded" and mandated publication of affected vehicle lists on transport department websites. This enforcement mechanism transformed what began as an environmental protection measure into a comprehensive vehicle seizure program with significant constitutional implications[7].

Source : financialexpress.com

However, the current legal challenge argues that these judicial orders have been systematically misrepresented and exceeded in their implementation. The petition contends that courts intended regulation of vehicle operation, not wholesale seizure and scrapping of legally registered vehicles.

# THE COMMISSION FOR AIR QUALITY MANAGEMENT (CAQM): ADMINISTRATIVE OVERREACH?

## CAQM'S REGULATORY FRAMEWORK AND DIRECTION NO. 89

The CAQM, established under the Commission for Air Quality Management in National Capital Region and Adjoining Areas Act, 2021, represents the latest institutional evolution in environmental governance. The CAQM's Direction No. 89, issued on April 23, 2025, mandated fuel stations to deny service to end-of-life vehicles, effectively creating an economic blockade against older vehicles[8].

This administrative approach raises fundamental questions about the separation of powers and the limits of executive authority. Can an administrative body, however well-intentioned, effectively create criminal penalties and property forfeitures through executive orders? The petition argues that such powers require explicit legislative authorization, not merely administrative convenience.

## THE AIR PREVENTION AND CONTROL OF POLLUTION ACT: SCOPE AND LIMITATIONS

The CAQM derives its authority from the Air (Prevention and Control of Pollution) Act, 1981, which provides a framework for pollution control but does not explicitly authorize vehicle seizure or property confiscation. The Act empowers pollution control boards to regulate emissions and establish standards but stops short of granting quasi-judicial powers for property seizure.[9]

Source : caqm.nic.in

Section 20 of the Air Act empowers state governments to give instructions regarding emission standards for automobiles, but these instructions must operate within the broader legal framework established by the Motor Vehicles Act. The current enforcement regime appears to have inverted this hierarchy, with environmental regulations overriding transportation law rather than complementing it.

## JUDICIAL PRECEDENTS AND CONSTITUTIONAL INTERPRETATION

### M.C. Mehta v. Union of India: Environmental Protection and Constitutional Balance

The **M.C. Mehta** in catena of cases represents one of India's most significant environmental law developments, establishing the principle that environmental protection constitutes a fundamental state obligation. The decision mandating CNG conversion for Delhi's bus fleet demonstrated judicial willingness to impose significant economic costs for environmental benefits.[10]

However, the current vehicle seizure regime extends far beyond the CNG mandate's scope. Where the earlier orders targeted specific vehicle categories (commercial buses) and provided alternative fuel options, the current policy affects millions of private vehicle owners without offering practical alternatives or compensation mechanisms.

## CONSUMER EDUCATION & RESEARCH CENTRE V. UOI: WORKERS' RIGHTS AND DUE PROCESS

The 1995 Supreme Court decision in Consumer Education & Research Centre v. Union of India established important precedents regarding state obligations to protect workers from occupational hazards while ensuring due process protections. The Court recognized that environmental and health protection measures must operate within constitutional constraints, not outside them. This precedent becomes particularly relevant when considering the impact of vehicle seizures on commercial drivers and transport workers. The arbitrary enforcement of age-based bans disproportionately affects lower-income vehicle owners who cannot afford newer vehicles, raising questions about the policy's social equity and constitutional validity[11].

## PROPERTY RIGHTS JURISPRUDENCE: KAMLA MILLS AND BEYOND

**The Hon'ble Supreme Court's decision in Municipal Corporation of Greater Mumbai v. Kamla Mills Ltd** addressed the complex relationship between property rights, regulatory authority, and constitutional limitations. The case established that property rights, while not absolute, cannot be arbitrarily restricted without due process and adequate justification.

The Kamla Mills precedent becomes relevant in analysing whether current vehicle seizure practices provide adequate due process protections. The petition argues that vehicle owners receive insufficient notice, lack meaningful opportunity to contest seizures, and face arbitrary enforcement without scientific justification.[12]

## NATIONAL VEHICLE SCRAPPAGE POLICY: VOLUNTARY VS. MANDATORY FRAMEWORK

### Policy Design and Implementation Gaps

The Government of India's National Vehicle Scrappage Policy, introduced in 2021, explicitly establishes a voluntary framework for vehicle retirement. The policy includes incentive structures, tax concessions, and facilitative mechanisms designed to encourage rather than compel vehicle owners to scrap older vehicles. The Motor Vehicles (Registration and Functions of Vehicle Scrapping Facility) Rules, 2021 provide detailed procedures for voluntary vehicle scrapping but do not mandate age-based retirement. This creates a fundamental legal contradiction: the national policy framework remains voluntary while regional enforcement has become coercive.[13]

Source : nsws.gov.in

## INTERNATIONAL COMPARISONS AND BEST PRACTICES

The developed nations including the European Union, Japan, and the United States do not impose blanket age-based vehicle bans. Instead, these jurisdictions focus on emissions standards, safety requirements, and periodic testing regimes that ensure vehicle roadworthiness regardless of age. This international perspective strengthens the argument that age-based bans represent an overly blunt policy instrument that fails to achieve environmental objectives while imposing disproportionate economic costs on vehicle owners. A more nuanced approach focusing on actual emissions performance rather than chronological age would better serve both environmental and constitutional objectives.

## THE CURRENT LEGAL CHALLENGE: GROUNDS AND IMPLICATIONS

### Procedural Due Process Violations

The petition highlights systematic violations of procedural due process, including vehicle seizures without adequate notice, absence of meaningful hearing opportunities, and lack of transparent appeal mechanisms. These procedural defects become particularly problematic when combined with the significant economic impact of vehicle seizure on affected owners.

The **Delhi Transport Department's enforcement guidelines** appear to prioritize seizure efficiency over due process protections, creating a system where vehicle owners face fait accompli seizures with limited recourse options. This enforcement approach contradicts established constitutional principles requiring fair procedures before property deprivation.[14]

## ENVIRONMENTAL POLICY VS. CONSTITUTIONAL RIGHTS: STRIKING THE BALANCE

**The Proportionality Principle:** Constitutional law requires that restrictions on fundamental rights meet proportionality standards, ensuring that regulatory means are reasonably related to legitimate governmental ends. The current vehicle seizure regime raises questions about whether blanket age-based bans represent proportionate responses to air pollution concerns. However research suggests that well-maintained older vehicles may pollute less than poorly maintained newer vehicles. This scientific uncertainty undermines arguments for blanket age-based restrictions and supports more nuanced, emissions-based regulatory approaches.

### ALTERNATIVE REGULATORY MECHANISMS

The argument of fitness based rather than age-based vehicle assessment, aligns with international best practices and the original legislative intent of the Motor Vehicles Act. Such an approach would focus on actual vehicle emissions and safety performance rather than manufacturing dates, providing more precise environmental protection while respecting property rights.

Enhanced Pollution Under Control (PUC) certification systems, which mandates periodic emissions testing, and graduated restrictions based on actual environmental impact would provide more constitutionally sound alternatives to current blanket bans. These mechanisms would achieve environmental objectives while preserving due process protections and property rights.

### ECONOMIC AND SOCIAL IMPACT ANALYSIS

Distributional Effects and Social Equity: The current enforcement regime disproportionately affects lower-income vehicle owners who cannot afford newer vehicles, raising significant social equity concerns. Middle-class families often depend on older vehicles for transportation needs, and arbitrary seizure creates severe economic hardship without corresponding environmental benefits.

Commercial vehicle operators, taxi drivers, and small transport businesses face particularly severe impacts, with vehicle seizure threatening their primary source of livelihood. The constitutional right to livelihood, recognized as part of Article 21, requires consideration of these economic impacts in policy formulation and implementation.

### MARKET DISTORTIONS AND ECONOMIC EFFICIENCY

The arbitrary nature of current enforcement creates significant market distortions, with vehicle values subject to sudden, unpredictable governmental intervention. This regulatory uncertainty undermines property rights and discourages investment in vehicle maintenance, potentially creating perverse environmental incentives.
The absence of compensation mechanisms for seized vehicles violates basic principles of regulatory fairness and constitutional property protection. Even if environmental regulation justifies some restrictions on vehicle use, the complete confiscation of valuable property without compensation exceeds constitutional limits.

### RECOMMENDATIONS FOR CONSTITUTIONAL COMPLIANCE & LEGISLATIVE REFORM FRAMEWORK

The Amendments to the Motor Vehicles Act could provide explicit statutory authority for environmental vehicle restrictions while incorporating adequate due process protections. Such amendments should establish clear criteria for vehicle restrictions, transparent appeal procedures, and compensation mechanisms for affected owners.
The legislative framework should also establish clear boundaries between central and state authority regarding vehicle regulation, preventing the current confusion where state-level enforcement exceeds central policy parameters. Constitutional federalism requires respect for jurisdictional boundaries and legislative supremacy over executive action.

**Administrative Process Improvements:** Enhanced due process protections should include adequate notice periods, meaningful hearing opportunities, and transparent appeal mechanisms before vehicle seizures. The current system's emphasis on enforcement efficiency must be balanced against constitutional requirements for fair procedures. Scientific basis requirements for vehicle restrictions would ensure that environmental policies rest on credible evidence rather than administrative convenience. Regular review of restriction criteria based on updated environmental and technological data would maintain policy relevance while respecting constitutional constraints.

**Compensation and Transition Mechanisms:** Just compensation for seized vehicles would address constitutional property rights concerns while maintaining environmental policy effectiveness. Compensation mechanisms could include market value payments, trade-in credits toward newer vehicles, or graduated transition periods allowing owners to recover investment value. Voluntary retirement incentives aligned with the National Vehicle Scrappage Policy would achieve environmental objectives through market mechanisms rather than coercive enforcement. Enhanced incentives for voluntary scrapping could accelerate fleet modernization while respecting property rights and individual choice.

# WAY FORWARD

The Delhi-NCR vehicle seizure controversy represents a fundamental test of India's commitment to constitutional governance in the environmental policy arena. While environmental protection constitutes a legitimate and urgent governmental objective, the means employed must respect constitutional constraints and individual rights.

## END NOTES


*1. Times of India, "Petition challenges 'unlawful' seizure and scrapping of old vehicles," July 31, 2025; available at:https://transport.delhi.gov.in/sites/default/files/Transport/circulars-orders/guidelines_for_handling_elvs_of_delhi_2024.pdf*

*2. Constitution of India, Articles 14, 19(1)(g), 21, 300A;*

*3. Olga Tellis v. Bombay Municipal Corporation, (1985) 3 SCC 545 (Supreme Court of India)*

*4. The Constitution of India, Articles 14, 19(1)(g), 21, 300A*

*5. The Constitution of India, Article - 300A*

*6. Vardhaman Kaushik & Ors v. Union of India, O.A. No. 21 of 2014 (National Green Tribunal)*

*7. M.C. Mehta v. Union of India, (2002) 4 SCC 356 (Supreme Court of India)*

*8. Commission for Air Quality Management in National Capital Region and Adjoining Areas Act, 2021*

*9. Air (Prevention and Control of Pollution) Act, 1981, No. 14, Acts of Parliament*

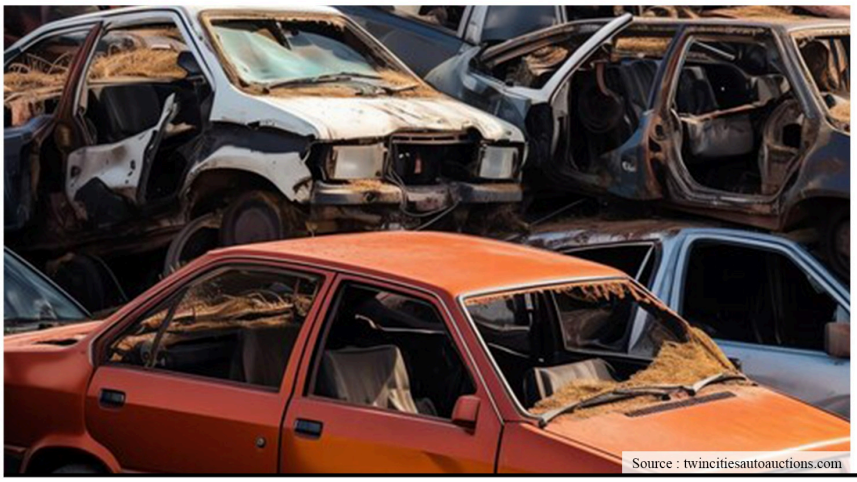
*10. M.C. Mehta v. Union of India, (2002) 4 SCC 356*

*11. Consumer Education & Research Centre v. Union of India, (1995) 3 SCC 42 (Supreme Court of India)*

*12. Kamla Mills Ltd. v. State of Bombay, AIR 1965 SC 1123*

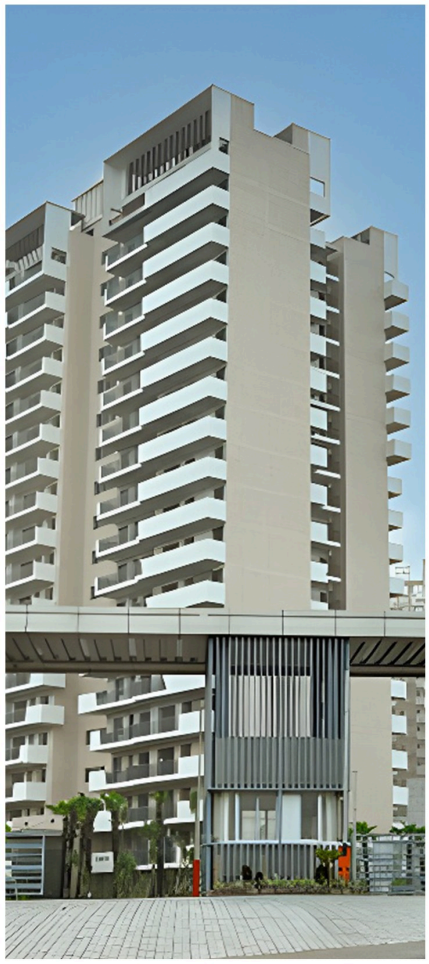
*13. National Vehicle Scrappage Policy, 2021, Ministry of Road Transport and Highways*

*14. Delhi Transport Department Guidelines for Handling End-of-Life Vehicles, 2024*

Source : twincitiesautoauctions.com

**"Recently, Hon'ble Supreme Court was pleased to stay any action against 10 + years old diesel and 15+ years old petrol vehicles.**



# CLUB HOUSE CONUNDRUM

## "Club ownership: Law vs. Loopholes"

**Rajiv K. Virmani, Advocate on Record &**
**Anuj Malhotra, Advocate**

The ownership and control of "clubs" or "community centers" in group housing societies across Haryana have become a serious bone of contention between builders and resident welfare associations (RWAs). With large sums of money involved and access rights at stake, builders often resort to deed structuring, indirect pricing mechanisms, and third-party transfers to wrest control of these shared amenities. This article explores the legal and regulatory framework governing such facilities, critically examines the tactics employed by developers, and suggests reforms needed to protect the rights of homebuyers.

## Legal Framework

a. Haryana Apartment Ownership Act, 1983 (HAOA):

The Haryana Apartment Ownership Act, 1983, was enacted to regulate ownership rights in apartment buildings and ensure proper division of common areas and responsibilities. ***Section 3(f) defines "common areas and facilities" to include, among other things, "community and commercial facilities" as may be provided in the project***. However, this inclusion is subject to how these facilities are designated in the builder's Deed of Declaration.

Section 11 of the Act mandates the transfer of the title of common areas to the association of apartment owners. But the absence of a mandatory list of what constitutes common areas gives developers the leeway to structure the Deed of Declaration in a way that excludes valuable amenities like clubs. This legal ambiguity is the cornerstone of many disputes, as developers draft Declarations to retain ownership and control of revenue-generating facilities under their domain

The issue is compounded when the Deed of Declaration is registered without adequate oversight or challenge, leaving residents and RWAs powerless to claim their rights over such common utilities, despite having indirectly financed them through the sale consideration.

**b. Haryana Development and Regulation of Urban Areas Act, 1975 (HDRUAA):**

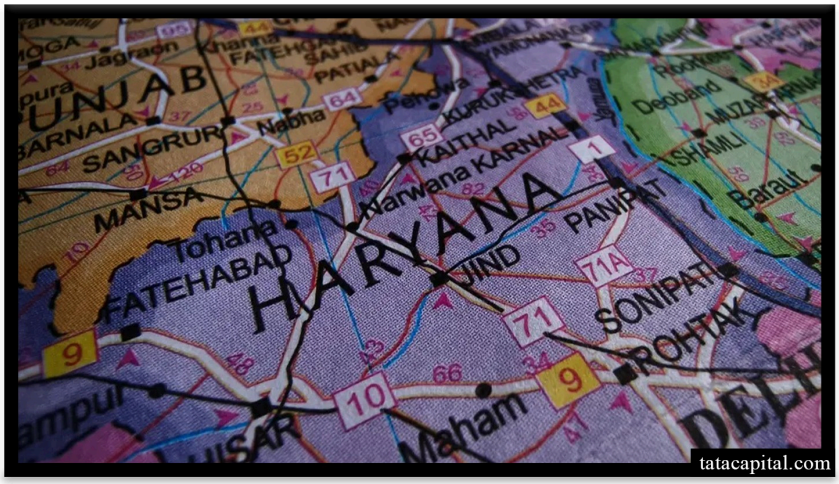
The Haryana Development and Regulation of Urban Areas Act, 1975 (HDRUAA) governs the licensing and regulation of urban development by private developers in the state. Under this Act, the Department of Town and Country Planning (DTCP) issues licenses to builders to develop group housing colonies. A key component of the licensing process involves the submission and approval of layout plans, including the designation of community and recreational spaces such as clubs, gyms, and community centers.

Rule 11 of the Haryana Development and Regulation of Urban Areas Rules, 1976 (framed under the Act) mandates that developers provide adequate social infrastructure, including community centers. These are to be developed and handed over to the local body or residents' association. DTCP, through its license conditions, often inserts specific clauses stating that ***"community buildings, including community centers, shall be transferred free of cost to the RWA or competent authority."*** However, there is no explicit statutory provision mandating the enforcement of this license condition.

Builders exploit this gap by creating Deeds of Declaration under the HAOA, wherein they either omit such facilities from the list of common areas or declare them as their private property. As a result, despite DTCP's license conditions, developers often continue to commercially exploit these clubs or transfer them to third parties, making it difficult for RWAs to assert control.

**c. Deed of Declaration vs. License Conditions:**

The Deed of Declaration, as per the HAOA, is a registered document that lays out the boundaries of common




areas and facilities in a housing project. It plays a pivotal role in determining the ownership and management of shared spaces. However, conflicts arise when these declarations contradict the license conditions imposed by DTCP under the HDRUAA.

While the license may mandate that community centers be handed over to the RWA, builders draft the Declaration to retain control or ownership of such spaces. The Registrar of Deeds often registers such documents without verifying their compliance with DTCP norms, thereby creating a legal paradox where a registered deed contradicts administrative directions.

In practice, courts have given primacy to registered documents unless successfully challenged for fraud or misrepresentation. This legal precedent is exploited by builders who, despite benefiting from approvals and infrastructure licenses contingent on community transfer conditions, retain monetization rights over clubs. Thus, a uniform enforcement mechanism aligning both statutes and documents is urgently needed.

## Judicial Trends:

Apex Court: Over the years, Indian courts have examined the legal character of common areas and the duties of developers under both statutory and contractual obligations . A seminal judgment in this regard is the Hon'ble Supreme Court's decision in Nahalchand Laloochand Pvt. Ltd. v. Panchali Co-op. Housing Society Ltd. (2010) 9 SCC 536, which held that stilt parking spaces, though not mentioned in sale agreements, are part of the common areas and cannot be sold separately by developers. The Court underscored the buyer's indirect contribution toward all common amenities.

A key case in this context is M/s DLF Qutab Enclave Complex v. State of Haryana & Ors. (CWP No. 4119 of 1993, decided on 17 February 2003), where the Punjab & Haryana High Court recognized the obligation of the colonizer to transfer common areas to the residents. The Court highlighted that facilities indicated in the approved layout plan, once constructed and used by residents, form part of the common services. The judgment reinforced the principle that developer obligations under the licensing framework must not be diluted through contrary Declarations.

Applying this principle to clubs, it logically follows that if the cost is embedded in the purchase price or charged indirectly (such as through box pricing), then the facility must be treated as a common amenity subject to transfer. In **Fortune Infrastructure v. Trevor D'Lima (2018) 5 SCC 442,** the Court reiterated that promises made in brochures and sales pitches become binding obligations. Hence, when clubs are advertised as society amenities, developers cannot later claim exclusive ownership.

Hon'ble Haryana Real Estate Regulatory Authority, Gurugram (HRERA)

**Decision against RWA: In Imperia Esfera Residents Welfare Association vs. M/s Imperia Structures Limited,** the RWA sought handover and complete control of the project including clubhouse, gym, pool, restratunt, etc. whereby, the Hon'ble HRERA held that the said relief was governed by the deed of declaration (DOD) and the same shall be regulated as per the terms and conditions of DOD.

However, the stand is still ambiguous as in the case of **Tatvam Residents Welfare Association vs. Vipul Ltd. & Ors, Complaint No. 1277 of 2018,** (remaded back from Hon'ble Supreme Court to Hon'ble HRERA and accordingly decided on 13.05.2025) the Hon'ble HRERA directed that the provision of amenities in the licensed colony are regulated in terms of the license as well as the sanctioned building plans for which the complainant-association may approach the DTCP, Haryana.

Decision in Favour of RWA: In the case of The Residency Residents Welfare Association vs. M/s Ardee Infrastructure Pvt. Ltd., Complaint No. 991 of 2022 whereby, the HRERA directed the Respondent builder to handover the possession and necessary documents, plans including common areas and facilities to the RWA (Complainant) association subjected to local laws as provided under Section 17 of The Real Estate (Regulation and Development) Act, 2016. As per Section 17 of The Real Estate (Regulation and Development) Act, 2016 which mandates that the promoter shall hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans.

A draft policy by Department of Town and Country Planning (DTCP) for handing over of completed Real Estate Projects to the Residents Welfare Association has been suggested by Hon'ble HRERA for the purpose of inviting objections /suggestions before its publication. As per the website of TCP Haryana, it was circulated on 18.07.2022. The same is yet to be notified.

## Key Takeaways:

### Policy Gaps and Exploitation by Builders

Current regulatory frameworks leave considerable room for exploitation. Builders draft the Deed of Declaration in a manner that excludes clubs from common areas, despite the fact that allottees are charged for these facilities. The Town & Country Planning Department (DTCP) imposes license conditions mandating the free transfer of community buildings, yet these remain largely unenforced.

Box pricing practices are used to mask the financial contribution of buyers toward club construction. Developers often bundle the price of the flat with charges for external amenities, allowing them to later argue that clubs were not funded by allottees. This results in developers monetizing the club, by levying fees or selling it to third parties, while RWAs are left with no rights.

Additionally, the lack of coordination between DTCP and Sub-Registrar offices means that Deeds of Declaration contradicting license conditions are registered without objection. Builders also create shell entities to which the club is transferred, making litigation by residents extremely difficult.

> *Underlying the maze of builders trying to take advantages of different statutes and procedures is the consumer who is sold a dream (imagine millions of houses, almost as many dreams) and who is expected to sign papers that say he/she has done their due diligence. This part is often the alibi which only higher courts may take a larger constitution based perspective on. Who would go all that way, who would bring different consumers together…..While the legal loopholes hopefully untangle through a proactive action by the powers that be, for every new situation now arising it may be useful to have the builder mandated to ensure certain minimum things in the sale deed - to ensure when the sale is being attempted there is no mis selling and later hiding behind buyer beware. For all old cases a class action suit to address this at umbrella level at the Supreme Court -*
>
> ***Aggrieved Resident of a Group housing in Gurgaon.***

# WAY FORWARD:

I. To address these pressing issues, a multi-pronged reform strategy is essential. First, the Haryana Apartment Ownership Act should be amended to explicitly define clubs and community centers as part of common areas unless independently developed and financed by the builder, with clear opt-in consent from allottees.

II. Second, the DTCP must be made responsible for the pre-approval of Deeds of Declaration. This will ensure that developers cannot bypass license conditions while drafting documents that legally determine ownership. RERA authorities should be given powers to review such declarations and rectify them if found inconsistent with earlier approvals or financial structures.

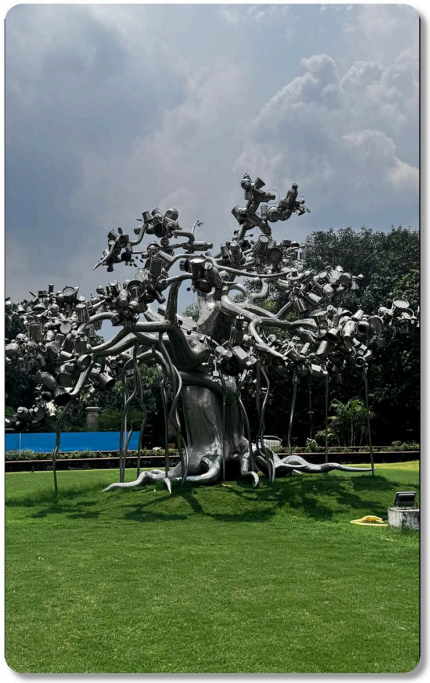
III. Third, the Odisha model of the Apartment Ownership and Management Act (2023) should serve as a precedent. Odisha has mandated the time-bound transfer of all common facilities and prohibits the sale of community buildings separately. Similar statutory enforcement in Haryana can protect residents from legal and financial exploitation.

IV. Fourthly, steps may be taken by DTCP to notify and implement guidelines regarding draft policy for handing over of maintenance of real estate projects to the Association of Allottees which is presently in the draft form. (Public Notice of 18.07.2022 inviting suggestions)

V. Finally, residents must be educated on their rights and encouraged to form proactive RWAs that can audit the flow of funds and engage legal remedies early. Greater transparency through digitised sale agreements, DoDs, and license conditions can enhance accountability.

## CONCLUSION:

Many renowned societies in Gurugram are presently facing issues in respect of the handovers of common area amenities such as Clubs/Community centres, schools, shops & more.
The issue of club ownership in Haryana's apartment projects reflects a broader failure to align consumer rights, legal frameworks, and planning regulations. Builders have leveraged ambiguity in legislation and lax enforcement to retain valuable community assets meant for shared use. The need of the hour is not only judicial clarity but statutory certainty. Reforms modeled on best practices from Odisha and other cooperative governance frameworks can restore balance and empower RWAs to function as true custodians of shared amenities. Transparent declarations, enforceable rights, and proactive oversight are essential to ensure that the question "Whose Club Is It Anyway?" is answered once and for all in favor of the rightful stakeholders, the residents. (amng)



# VINTAGE ( 1950 )

## Revisiting the Legacy of A.K. Gopalan v. State of Madras

....1950 AIR 27

A.K. Gopalan

The Hon'ble Supreme Court's decision in "A.K. Gopalan v. State of Madras" 1950 AIR 27 was the first time that Article 21 was interpreted in a constitutional way. This case set out a basic way to think about personal freedom from a procedural point of view.

What? A.K. Gopalan v. State of Madras was an important case that looked at the boundaries of personal freedom during the early years of India's constitutional democracy. The Preventive Detention Act of 1950 allowed for the arrest of A.K. Gopalan, a well-known Communist leader, without telling him why he was being held. He argued against the detention based on Articles 14, 19, and 21, saying that it violated his basic rights. The case took place during a time of political unrest in a newly independent country. It showed how that country was trying to balance its colonial legal heritage with the goals set out in its new Constitution.

Legal Issues involved: Legal problems that came up: The case raised a number of fundamental constitutional questions. Firstly, it looked at whether keeping someone in preventive detention without telling them why they were detained was against Articles 14, 19, and 21 of the Constitution. Secondly, it wanted to know if the phrase "procedure established by law" in Article 21 exclusively referred to a legal process or if it also included principles of natural justice. Thirdly, the Court looked at whether the core rights protected by Part III of the Constitution are separate from each other or interconnected. Finally, they said that the Preventive Detention Act of 1950 was unlawful because it didn't guarantee people's freedom.

Judgement: The Hon'ble Supreme Court said that the Preventive Detention Act of 1950 is still legitimate. It said that if a detention follows a legislation established by the government, it meets Article 21. The Court had a restricted view of "procedure established by law," which meant that it didn't have to be fair or reasonable, only legitimately passed. It further said that basic rights are different and not reliant on each other, therefore a law that is valid under Article 21 does not have to be valid under Article 19. Though In Maneka Gandhi v. Union of India AIR 1978 SC 597, this view was overturned. The court said that the process under Article 21 must be fair, just, and reasonable.

Why it was important in 1950: This was the Hon'ble Supreme Court's first major ruling about the Constitution that set the pattern for how basic rights, especially Article 21 (life and personal liberty), would be regarded. At a period when India was moving away from colonial rule, the ruling revealed that the state valued sustaining the peace more than advancing civil liberties. This made people think of freedom in a narrow, procedural way.

The current relevance: The A.K. Gopalan v. State of Madras remains a significant case in constitutional law due to its legal philosophy as well as its ruling. Even though it was ultimately overturned and the case's limited definition of freedom was later changed, it still helps one understand how Indian constitutional law has evolved and how crucial it is for judges to exercise caution when defending fundamental rights. It serves as a cautionary tale and a pivotal moment in India's constitutional law journey from procedural legality to substantive justice.