VOLUME I · ISSUE I

JULY 2026

VERDICT
VOICES
LAW. LEARN. LEAD.

Verdict Voices

A JOURNAL OF LAW & JUSTICE

LAW · LEARN · LEAD



ABOUT THE JOURNAL

Verdict Voices is a journal of law and justice devoted to rigorous scholarship and fearless commentary. Each issue brings together articles, case notes and interviews that examine the law as it is — and as it ought to be.

SUBMISSIONS

We welcome articles, case comments and book reviews from students, scholars and practitioners. Manuscripts may be sent to law.verdictvoices@gmail.com

FROM THE EDITOR

Foreword

It is indeed with great pride that the first edition of Verdict Voices Law Journal is launched as it comes as the result of a venture based on the belief that the most challenging legal scholarship is often created not due to youth and inexperience, but due to the unhampered curiosity that these bring to both timeless and novel challenges.

The diversity of this curiosity is evident in the articles in this book. Starting with a discussion of how the social media viral culture is influencing the exercise of individual rights in India, and ending with a critique of corporate governance and ESG compliance. This wide scope of topics demonstrates that in today's legal scholarship, one should be able to operate seamlessly from the personal to the institutional, and in between, there are numerous topics that cannot easily be put into categories. In them, the authors discuss the unrealized potential of climate justice in international environmental law, develop a framework for mediation to reduce the complexity of direct tax litigation.

A considerable part of this discussion focuses on the relationship between technology and vulnerability, especially when it comes to issues like algorithmic policing and its constitutional limitations, the institutionalization of digital violence against women, the right to digital death, and the regulation challenges faced by artificial intelligence, blockchain, and cybercrime

We thank all authors who have placed their papers in our hands, all reviewers for their thorough but constructive criticism, and our readers for making our scholarly endeavor meaningful. This first issue should not be considered a final word; it is rather an introduction to an argument, which the larger legal community is invited to review and expand upon.

Editor-in-Chief

Mr. Rachit Sharma

© 2025 VERDICT VOICES LAW JOURNAL · LAW. LEARN. LEAD.

Editorial Policy & Double-Blind Peer Review

A. EDITORIAL POLICY

Verdict Voices Law Journal is a peer-reviewed academic publication dedicated to advancing legal scholarship through original, rigorous, and ethically sound research. The Journal welcomes submissions from academicians, legal practitioners, researchers, professionals, and law students across diverse fields of law. Manuscripts submitted for publication must be original, unpublished, and must not be under consideration by any other journal or publisher.

All submissions undergo an initial editorial assessment to determine their relevance to the Journal's scope, originality, research quality, analytical depth, and compliance with the prescribed submission and citation guidelines. Manuscripts that fail to satisfy these requirements or do not meet the Journal's ethical standards may be declined at this stage.

B. DOUBLE-BLIND PEER REVIEW PROCESS

Eligible manuscripts are subjected to a Double-Blind Peer Review process, whereby the identities of both the author(s) and the reviewer(s) remain confidential throughout the review. Each manuscript is evaluated by at least two independent reviewers with expertise in the relevant field of law, who assess the submission on the basis of originality, legal reasoning, methodological rigor, clarity of expression, citation accuracy, and its overall contribution to legal scholarship. Based on the reviewers' recommendations, the Editorial Board may accept the manuscript, accept it subject to revisions, invite resubmission after substantial revisions, or reject the manuscript. Where necessary, the Editorial Board may obtain an additional independent review before reaching a final decision.

© 2025 VERDICT VOICES LAW JOURNAL · LAW. LEARN. LEAD.

Copyright © 2026

ALL RIGHTS RESERVED

No part of this publication may be reproduced, distributed, transmitted, stored in a retrieval system, or translated in any form or by any means, whether electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher and editorial team, except for brief quotations used for academic, educational, and review purposes in accordance with applicable copyright law. This publication is intended solely for academic, research, and educational use.

DISCLAIMER

This publication is a bona fide work of the authors and editors. Verdict Voices Law Journal (VVLJ), along with its associates, bears no liability for the views and opinions expressed herein. The research material presented is the result of collective academic efforts based on existing data, sources, and references.

All due care has been taken to acknowledge and credit original sources, and no copyright infringement is intended. Any inadvertent errors or omissions are purely unintentional. The publisher and editors shall not be held responsible for any adverse consequences arising from the use or interpretation of the research contained in this publication.

Published by

Verdict Voices Law Journal

LAW. LEARN. LEAD.

EDITORIAL BOARD



Mr. Rachit Sharma
EDITOR IN CHIEF



Ms. Ruhi Phadte
ASSOCIATE EDITOR



Mr. Suyash K Joshi
ASSOCIATE EDITOR



Dr. Ravi Gangwar
ASSOCIATE EDITOR



Mr. Evans Kiprop
ASSOCIATE EDITOR

FOUNDING MEMBERS



KARAN GUPTA

PUBLISHER &
EDITORIAL HEAD



PRIYANK SRIVASTAVA

JOURNAL ADMINISTRATION
& OPERATIONAL HEAD



DAKSH GAUR

STRATEGY, BRANDING
& OUTREACH HEAD

TABLE OF

CONTENTS

01 The Impact of Viral Social Media Culture on Individual Rights in India
Avani Agrawal

02 The Architecture of Inequity: International Environmental Law and the Unmet Promise of Climate Justice
Devarchit Singh

03 Beyond Litigation: Structuring a Mandatory Mediation Framework for Direct Tax Disputes in India
Sameer Panda & Pradipta Roy

04 Admissibility of Electronic Evidence in India: A Comparative Jurisprudential Study of the IEA, 1872 and the BSA, 2023
Shashwat Prashar

05 Interstate Water Dispute: A Critique
Vedant Vivek Pimprikar

06 Prior Means Prior: Mandatory CCI Clearance and the Limits of the Committee of Creditors' Commercial Wisdom
Vansh Vyas

07 Political Defection and Constitutional Vacuum in Nigeria: A Critique of the Unequal Consequences for Legislators and Executive Office Holders
Amatari Penniel

08 Case Comment: Nakul Kohli v. State, 2010 SCC OnLine Del 2328
Gowri Nair & Shruti Shrivastava

09 Policing Before the Crime: Algorithmic Bias, Privacy, Opacity, and Constitutional Limits in India
Eshan Chauhan

10 Custodial Sexual Violence in India: Examining the Need for a Dedicated Legal Framework
Rahul Kumar & Nishay Jagdish Dwivedi

Contents

11 Confronting the Digital Paradox: Unraveling the Legal and Regulatory Challenges of AI, Blockchain, and Cybersecurity in India's Cyber Crime Landscape
Harshita Pandey & Dr. Tapan Chandola

12 Innovation, Protection, and Prosperity: A Legal-Empirical Analysis of Intellectual Property Rights in India
Priyam Pratik

13 Click, Harass, Repeat: The Normalization of Digital Violence Against Women
Samikshaa

14 Women in Afghanistan: A Comparative Lens on Rights and Realities
Aditi Kulkarni & Bhavya Shaw

15 From Ashes to Algorithms: Reimagining the Right to Digital Death in India's Data Protection and Succession Laws
K. Kavya & P. Ganesh

16 Between Bedroom and Courtroom: The Unresolved Constitutionality of the Marital Rape Exception in India
Mohammad Farhan C N & Alaka Sarangi P

17 Frozen in Litigation: Doctrine of Lis Pendens and Its Chilling Impacts on Real Estate Transactions
Damini M

18 Right to Privacy in the Digital Era: Constitutional Contours and Statutory Safeguards in India
Dr. Bhanupriya Kumawat & Dr. Phalgun Purohit

19 Ramesh Kumar Pati v. State of Odisha: Economic Offences & Privileged VCs
Siba Prasad Panigrahi

20 Corporate Governance and ESG Compliance: Emerging Challenges and Opportunities
Maheta Amit Kiritbhai

THE IMPACT OF VIRAL SOCIAL MEDIA CULTURE ON INDIVIDUAL RIGHTS IN INDIA

AVANI AGRAWAL[1]

ABSTRACT

The rapid growth of social media has transformed communication, information sharing, and public discourse in unprecedented ways. While digital platforms have empowered individuals by providing greater access to information and freedom of expression, they have also become spaces where privacy is routinely violated, misinformation spreads rapidly, and online harassment has become increasingly normalized. In India, the culture of instant virality has created an environment where public opinion is often formed without verification, context, or due process. One recent example is the viral circulation of photographs of a happily married couple, who became the target of widespread trolling and hateful comments solely because of the difference in their skin tones. Such incidents reflect how social media frequently amplifies prejudice, encourages digital mob behaviour, and causes severe emotional, social, and reputational harm to individuals. The paper argues that contemporary social media has shifted public attention away from pressing national and social concerns by disproportionately highlighting sensational, trivial, or irrelevant content. Instead of fostering informed discussions on issues such as education, healthcare, unemployment, or environmental challenges, digital platforms often reward controversy, personal attacks, and viral trends that invade individual privacy and damage lives. Once a post gains momentum, thousands of users participate in online criticism without verifying facts or considering the consequences, creating a cycle of hate that spreads with unprecedented speed. This paper critically examines the intersection of media freedom, privacy rights, and data protection law in India, questioning whether the existing legal framework is adequate to address the growing misuse of social media and protect individuals from digital harm. It further explores the responsibility of media platforms, content creators, and users in shaping ethical online spaces. The study recommends stronger legal accountability for digital platforms, effective enforcement of privacy and data

[1] Avani Agrawal, 3rd Year BSC LLB National Law Institute University Bhopal

protection laws, and nationwide digital literacy initiatives that encourage responsible online behavior and critical evaluation of viral content.

Keywords: Social Media, Privacy Rights, Data Protection Law, Digital Ethics, Online Harassment, Viral Misinformation, India.

I. INTRODUCTION

India's rapid digital transformation has fundamentally reshaped how information is created, disseminated, and consumed.[2] Driven by affordable internet services, widespread smartphone penetration, and government initiatives promoting digital governance, the country has emerged as one of the world's largest digital societies.[3] Social media platforms have become a primary medium through which citizens express opinions, participate in public discourse, consume news, and engage with social and political issues.[4] While this technological revolution has democratized communication by reducing traditional barriers to participation, it has simultaneously generated unprecedented challenges relating to privacy, dignity, misinformation, and accountability.[5]

The architecture of modern social media platforms is designed to maximize user engagement by algorithmically amplifying emotionally charged, sensational, and controversial content.[6] Consequently, issues that evoke outrage or curiosity often receive greater visibility than discussions concerning education, healthcare, unemployment, environmental protection, or other matters of significant public

[2] Government of India, *The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021* (updated 6 April 2023) https://www.meity.gov.in/content/information-technology-intermediary-guidelines-and-digital-media-ethics-code-rules-2021 accessed 9 July 2026

[3] Government of India, *Digital India at 11: How a decade of technology is transforming governance, economy and everyday life* (28 June 2026) https://ddindia.co.in/2026/06/digital-india-at-11-how-a-decade-of-technology-is-transforming-governance-economy-and-everyday-lif... accessed 9 July 2026.

[4] Government of India, *The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021* (updated 6 April 2023) https://www.meity.gov.in/content/information-technology-intermediary-guidelines-and-digital-media-ethics-code-rules-2021 accessed 9 July 2026.

[5] Ministry of Information and Broadcasting, Government of India, *The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021*; see also Digital Personal Data Protection Act, 2023.

[6] *Social media 'PR' posture on content* (The Telegraph, 5 May 2022) https://www.telegraphindia.com/india/study-seeks-parliamentary-oversight-to-fight-misinformation/cid/1863792 accessed 9 July 2026.

interest.[7] The attention economy thus rewards virality over accuracy, encouraging users to react instantly rather than critically evaluate the authenticity or context of online content.[8]

This phenomenon has contributed to the emergence of "digital mob justice," wherein individuals are subjected to widespread public scrutiny, harassment, and reputational damage based on incomplete or misleading information.[9] A recent example involved a married couple whose photographs became viral on social media and attracted abusive comments centered on skin colour bias, illustrating how ordinary citizens can become targets of mass online hostility despite having committed no legal or moral wrongdoing.[10] Once content achieves viral momentum, countless users participate in online condemnation without verifying facts, often causing irreversible psychological, social, and professional consequences.[11]

These developments raise critical constitutional and legal questions regarding the balance between freedom of speech under Article 19(1)(a) of the Constitution and the right to privacy and dignity recognised as an integral part of Article 21 by the Supreme Court in *Justice K.S. Puttaswamy (Retd.) v. Union of India*.[12] India's evolving legal framework including the Digital Personal Data Protection Act, 2023, and the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 reflects an ongoing effort to regulate digital platforms while preserving constitutional freedoms.[13] However, the increasing frequency of online harassment,

[7] *Social media 'PR' posture on content* (The Telegraph, 5 May 2022) https://www.telegraphindia.com/india/study-seeks-parliamentary-oversight-to-fight-misinformation/cid/1863792 accessed 9 July 2026.
[8] *Social media 'PR' posture on content* (The Telegraph, 5 May 2022) https://www.telegraphindia.com/india/study-seeks-parliamentary-oversight-to-fight-misinformation/cid/1863792 accessed 9 July 2026.
[9] *Digital dichotomies: navigating non-consensual image-based harassment and legal challenges in India* (2025) https://doi.org/10.1080/13600834.2024.2408914 accessed 9 July 2026.
[10] BBC News, *Jabalpur: Indian couple trolled over skin colour after wedding video goes viral* (9 December 2025) https://www.bbc.com/news/articles/c62vnlg6v6wo accessed 9 July 2026.
[11] *Digital dichotomies: navigating non-consensual image-based harassment and legal challenges in India* (2025) https://doi.org/10.1080/13600834.2024.2408914 accessed 9 July 2026.
[12] *Justice K.S. Puttaswamy (Retd.) v Union of India* (2017) 10 SCC 1.
[13] Digital Personal Data Protection Act, 2023, No 22 of 2023, India Code https://www.indiacode.nic.in/handle/123456789/22037?locale=en accessed 9 July 2026; Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

privacy violations, and misinformation demonstrates that significant regulatory and institutional gaps remain.[14]

II. THEORETICAL UNDERPINNINGS: THE ATTENTION ECONOMY AND ALGORITHMIC AMPLIFICATION

Understanding the rapid spread of privacy violations, online harassment, and reputational harm in contemporary India requires examining the attention economy and the role of algorithmic amplification.[15] In the digital age, human attention has become a valuable economic resource.[16] Economist Herbert A Simon observed that an abundance of information creates a scarcity of attention, compelling institutions and platforms to compete for user's limited cognitive capacity.[17]

Most major social media platforms operate through advertising-based business models, so their revenue depends heavily on user engagement, including time spent on the platform, clicks, shares, comments, and similar interactions.[18] Their recommendation systems and machine-learning tools are therefore designed to optimize engagement and personalization rather than to independently verify whether content is accurate, balanced, or socially beneficial.[19] Research in communication and social-media studies also shows that emotional expression is a major driver of online sharing.[20] In particular, emotionally charged content especially material associated with anger, outrage, fear, or moralized reactions tends to spread more rapidly and attract stronger engagement than neutral information.[21]

[14] Government of India, *The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021* (updated 6 April 2023) https://www.meity.gov.in/content/information-technology-intermediary-guidelines-and-digital-media-ethics-code-rules-2021 accessed 9 July 2026; Digital Personal Data Protection Act, 2023.

[15] *The Attention Economy and the Impact of Artificial Intelligence* (Springer chapter) https://link.springer.com/chapter/10.1007/978-3-030-86144-5_18 accessed 10 July 2026.

[16] Herbert A Simon, 'Designing Organizations for an Information-Rich World' in Martin Greenberger (ed), *Computers, Communication, and the Public Interest* (Johns Hopkins University Press 1971).

[17] ibid.

[18] Sarah Cole, 'Virtual Friend Fires Employee' (Naked Law, 1 May 2009) http://www.nakedlaw.com/2009/05/index.html accessed 10 July 2026; *The Attention Economy and the Impact of Artificial Intelligence* (n 1).

[19] *The Attention Economy and the Impact of Artificial Intelligence* (n 1); Perceived Influence Capital and Algorithmic Amplification: A Strategic Analysis of Attention-Economy Asymmetries in Social Media Commerce (SSRN, 5 May 2025) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5243669 accessed 10 July 2026.

[20] *The Psychology of Attention Economy* (IJIP) https://ijip.in/wp-content/uploads/2025/11/18.01.035.20251304.pdf accessed 10 July 2026.

[21] *Shreya Singhal v Union of India* AIR 2015 SC 1523.

This incentive structure can create a feedback loop: highly emotional content receives greater visibility, increased visibility generates more engagement, and the resulting engagement data further informs recommendation systems about what captures user attention.[22] Over time, this may contribute to the amplification of polarizing narratives and online outrage.[23] Digital interactions that provide social validation, such as likes, shares, and comments, can also activate neural reward mechanisms associated with positive reinforcement, encouraging repeated engagement with attention-grabbing content.[24]

A democratic public sphere ideally depends on informed, diverse, and reasoned discussion, but the attention economy can encourage environments in which users are repeatedly exposed to content that reinforces existing beliefs or provokes strong emotional reactions.[25] As a result, public attention may shift away from complex issues such as education, healthcare, unemployment, environmental protection, and economic policy toward sensational controversies, private disputes, and viral trends. This transformation can weaken critical evaluation and encourage rapid, emotionally driven judgments, contributing to forms of online harassment and digital mob behavior that may have serious consequences for individual dignity, privacy, and reputation.

The impact of algorithm-driven social media ecosystems is best understood through real-life incidents that demonstrate how ordinary individuals can become victims of widespread online harassment.[26] These cases highlight the intersection of privacy, dignity, discrimination, and platform accountability, illustrating how viral content can cause significant emotional and social harm even when no unlawful conduct is involved by the individuals concerned.[27]

[22] *Justice K S Puttaswamy (Retd) and Another v Union of India and Others* (2017) 10 SCC 1.
[23] Information Technology Act 2000, ss 66C, 66E, 67, 67A, 79
[24] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021.
[25] Indian Penal Code 1860, ss 354A, 354C, 354D, 509, 499–500.
[26] *The Attention Economy and the Impact of Artificial Intelligence* (Springer) < https://link.springer.com/chapter/10.1007/978-3-030-86144-5_18 accessed 10 July 2026.
[27] *Digital dichotomies: navigating non-consensual image-based harassment and legal challenges in India* (2025) https://www.tandfonline.com/doi/full/10.1080/13600834.2024.2408914 accessed 10 July 2026.

III. THE JABALPUR WEDDING CASE: COLORISM AND DIGITAL MOB BEHAVIOR

In late 2025, Rishabh Rajput and Sonali Chouksey, a newly married couple from Jabalpur, Madhya Pradesh, unexpectedly became the subject of nationwide discussion after photographs and videos from their wedding were widely circulated on social media.[28] The couple reportedly knew each other for over a decade, having first met in college, and chose to share moments from their wedding celebration online.

The photographs attracted significant public attention because of the noticeable difference in the couple's skin tones. A post on the social media platform X questioning their marriage gained millions of views, after which thousands of users began posting abusive and discriminatory comments. The groom was subjected to colour-based ridicule and derogatory remarks about his appearance, while the bride faced misogynistic accusations that she had married for financial security, professional status, or family influence.[29] As the content spread, criticism extended beyond the couple to members of their families, exposing them to unnecessary public scrutiny and emotional distress.

Although the couple responded with dignity and publicly rejected the hateful comments, the incident illustrates how rapidly social media can convert a private and joyful occasion into a subject of nationwide ridicule. Once content becomes viral, users frequently participate in online criticism without verifying facts or considering the emotional consequences for those involved. This pattern reflects the broader phenomenon of digital mob behaviour, where collective online reactions often replace empathy and reasoned judgment.[30]

From a legal perspective, such incidents raise important concerns regarding the constitutional right to dignity and privacy under Article 21 of the Constitution of India.[31] While the couple voluntarily shared their wedding photographs, this cannot

[28] BBC News India, 'Couple trolled for their skin colour on social media' https://www.youtube.com/watch?v=RokFebPmnAQ accessed 10 July 2026.
[29] *Cyber Harassment of Women in India: Issues, Legal Responses and Policy Gaps* (2026) https://lexscriptamagazine.com/cyber-harassment-of-women-in-india-issues-legal-responses-and-policy-gaps/ accessed 10 July 2026.
[30] *Perceived Influence Capital and Algorithmic Amplification: A Strategic Analysis of Attention-Economy Asymmetries in Social Media Commerce* (SSRN, 5 May 2025) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5243669 accessed 10 July 2026.
[31] *Justice K S Puttaswamy (Retd) and Another v Union of India and Others* (2017) 10 SCC 1.

be interpreted as consent to widespread harassment, discrimination, or character assassination.[32] The episode also highlights the continuing prevalence of colourism and gender stereotypes in Indian society, which are often amplified through social media rather than challenged.[33]

A similar pattern has been observed in the repeated online trolling of public personalities such as Suhana Khan, who has frequently faced appearance-based criticism because of her natural skin tone.[34] These incidents demonstrate that digital platforms often mirror and amplify existing social prejudices, reinforcing discriminatory beauty standards instead of encouraging respectful public discourse.[35]

The Jabalpur wedding case therefore serves as an important example of how viral culture, combined with algorithmic amplification and unchecked online behaviour, can undermine an individual's dignity, mental well-being, and right to lead a private life free from unwarranted public harassment.[36] It also underscores the need for stronger platform accountability, effective grievance redressal mechanisms, and greater public awareness regarding responsible digital conduct.[37]

One of the most concerning consequences of the digital age is the emergence of the "social media trial," where allegations are judged and punished by the online public long before any competent authority has investigated the facts.[38] Such incidents undermine the constitutional principles of fair trial, presumption of innocence, and procedural due process, which form the foundation of the Indian criminal justice system.[39]

[32] Information Technology Act 2000, ss 66C, 66E, 67, 67A, 79.
[33] *Algorithmic Bias and Discrimination in India: A Looming Crisis* (2025) https://journals.sagepub.com/doi/abs/10.1177/24551333251343358 accessed 10 July 2026.
[34] *The Jabalpur Wedding Case* is not a reported judgment; for the broader point on appearance-based online abuse and colourism, see BBC News India (n 3) and *Algorithmic Bias and Discrimination in India* (n 14).
[35] *Algorithmic Bias and Discrimination in India* (n 14).
[36] *Shreya Singhal v Union of India* AIR 2015 SC 1523; *Puttaswamy* (n 12).
[37] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021; *Digital dichotomies* (n 2).
[38] *Shreya Singhal v Union of India* AIR 2015 SC 1523.
[39] *Justice K S Puttaswamy (Retd) and Another v Union of India and Others* (2017) 10 SCC 1.

IV. THE KOZHIKODE BUS VIDEO INCIDENT

In January 2026, a tragic incident in Kozhikode, Kerala, highlighted the devastating consequences of unverified social media accusations.[40] A woman uploaded a short video on social media alleging that Deepak, a 42-year-old sales manager, had behaved inappropriately during a bus journey.[41] Within hours, the video spread rapidly across multiple platforms, attracting thousands of comments, shares, and public reactions despite the absence of any completed police investigation or judicial determination regarding the allegations.[42]

According to media reports, Deepak was subjected to intense public criticism, social isolation, and reputational damage.[43] Two days after the video was posted, he was found dead at his residence. Following the incident, the police registered a case against the complainant under Section 108 of the Bharatiya Nyaya Sanhita, 2023, relating to the alleged abetment of suicide.[44] The criminal proceedings remain subject to judicial determination, and the facts must ultimately be established through the legal process rather than public opinion.[45]

This incident demonstrates how quickly online narratives can transform allegations into perceived facts. Once a post becomes viral, thousands of users often participate in condemnation without verifying the authenticity of the claim or appreciating that every accused person is entitled to a fair investigation and legal defence. Unlike courts, social media platforms provide no procedural safeguards, no evidentiary standards, and no meaningful opportunity for the accused to present their version of events.

[40] 'Kerala woman's bus harassment claim, viral video, man's suicide, Kozhikode, her arrest case' *Hindustan Times* (22 January 2026)
[41] 'Man found dead following circulation of video alleging sexual misconduct on bus' *The Hindu* (18 January 2026) https://www.thehindu.com/news/national/kerala/man-found-dead-following-circulation-of-video-alleging-sexual-misconduct-on-bus/ar... accessed 10 July 2026.
[42] ibid.
[43] 'Kerala man's suicide over viral bus video: Night before death, he ...' *Onmanorama* (19 January 2026) https://www.onmanorama.com/news/kerala/2026/01/19/kozhikode-man-suicide-viral-video-public-outrage.html accessed 10 July 2026.
[44] Bharatiya Nyaya Sanhita 2023, s 108.
[45] *Shreya Singhal* (n 1); *Puttaswamy* (n 2).

Recognising these dangers, the Supreme Court of India has repeatedly cautioned against "trial by media." In Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi) (2010), the Court observed that excessive and prejudicial media coverage has the potential to interfere with the administration of justice and compromise the right to a fair trial.[46] Although the judgment concerned traditional media, its underlying principles are equally relevant in the era of social media, where information spreads at an unprecedented speed and reaches millions within minutes.

V. MISINFORMATION AND ITS IMPACT ON PUBLIC INSTITUTIONS

The consequences of misinformation extend beyond private individuals and increasingly affect democratic institutions.[47] Viral posts based on incomplete, misleading, or fabricated information often generate public outrage before official clarification can be issued.[48]

For instance, photographs from the All India Judges Badminton Championship were circulated online with misleading claims about their context, leading to unnecessary public criticism of members of the judiciary. Similarly, in the Bandi Bhageerath matter, misleading social media campaigns targeting judicial officers prompted the High Court administration to take legal action to safeguard the integrity and independence of the judicial process.

These incidents demonstrate that misinformation on digital platforms does not merely harm individual reputations; it can also erode public confidence in constitutional institutions and the administration of justice.[49]

[46] *Sidhartha Vashisht @ Manu Sharma v State (NCT of Delhi)* (2010) 6 SCC 1.
[47] *The Attention Economy and the Impact of Artificial Intelligence* (Springer) https://link.springer.com/chapter/10.1007/978-3-030-86144-5_18 accessed 10 July 2026.
[48] *Perceived Influence Capital and Algorithmic Amplification: A Strategic Analysis of Attention-Economy Asymmetries in Social Media Commerce* (SSRN, 5 May 2025) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5243669 accessed 10 July 2026.
[49] *Justice K S Puttaswamy* (n 2); Information Technology Act 2000, ss 66C, 66E, 79.

VI. CASE ANALYSIS: PREDATORY DIGITAL LOAN APPLICATIONS AND PRIVACY-BASED EXTORTION

The misuse of personal data by illegal digital lending applications represents another serious manifestation of privacy violations in India. While digital financial services have expanded access to credit, several unauthorised loan applications have exploited vulnerable borrowers by collecting excessive personal data and using it as a tool of intimidation.

Many such applications require users to grant extensive permissions to access contact lists, photographs, call records, messages, and other personal information as a condition for obtaining a loan. In numerous reported cases, this information has allegedly been used for coercive recovery practices. Borrowers who defaulted or in some instances disputed inflated charges reported that recovery agents sent abusive messages to their family members, friends, and colleagues, publicly disclosed their personal information, and circulated morphed or defamatory images intended to shame and humiliate them.

These practices amount to far more than unethical debt recovery. They constitute serious violations of an individual's right to privacy, dignity, and informational autonomy, recognised under Article 21 of the Constitution, and may also attract liability under the Information Technology Act, 2000, the Digital Personal Data Protection Act, 2023, and various provisions of the Bharatiya Nyaya Sanhita, 2023, depending on the facts of each case. The human consequences have been severe. Across several states, reports have linked coercive digital recovery methods with extreme psychological distress and, in certain cases, suicides. These incidents illustrate that personal data, when collected without meaningful safeguards and misused for intimidation, can become a powerful instrument of exploitation rather than empowerment.[50]

Collectively, these cases demonstrate that the greatest threat posed by contemporary digital platforms is not merely the rapid circulation of information, but the ease with which personal data, online narratives, and public opinion can be weaponised against

[50] *Right to Privacy under Article 21 in the Digital Era* (n 1).

individuals. They reinforce the urgent need for stronger platform accountability, effective enforcement of data protection laws, faster grievance redressal mechanisms, and greater public awareness regarding responsible digital behaviour.

VII. THE HUMAN COST OF PREDATORY DIGITAL LENDING

The misuse of personal data by illegal digital lending applications has emerged as one of the most alarming forms of digital exploitation in India. Several unauthorised loan applications have reportedly collected excessive personal information including contact lists, photographs, call logs, and messages and subsequently used this data to intimidate and extort borrowers. In many instances, recovery agents have allegedly circulated defamatory messages, morphed photographs, and abusive content among the borrower's family members, friends, and professional contacts in an attempt to force repayment.

The consequences of these coercive practices have been devastating. Across different states, police investigations and media reports have linked several suicides to harassment by illegal digital loan applications.

VIII. SUGGESTIONS AND REFORMATIVE POLICY PATHWAYS

The increasing misuse of social media, personal data, and artificial intelligence demonstrates that legal responses alone cannot adequately address emerging digital harms. While India has introduced important legislative measures through the Digital Personal Data Protection Act, 2023, the Information Technology Act, 2000, and the Bharatiya Nyaya Sanhita, 2023, the rapidly evolving nature of technology calls for a more comprehensive and forward-looking regulatory approach. Protecting privacy, dignity, and freedom of expression in the digital age requires coordinated legal, institutional, technological, and educational reforms.

IX. LEGISLATIVE REFORM: A COMPREHENSIVE FRAMEWORK FOR SYNTHETIC MEDIA

The emergence of deepfakes and AI-generated content has exposed significant gaps in India's existing legal framework. Rather than relying solely on traditional provisions on defamation, forgery, or identity theft, India should consider introducing a

dedicated legal framework for synthetic media and AI-generated content. Such legislation should clearly define malicious deepfakes, establish civil and criminal liability for the deliberate creation or dissemination of harmful synthetic content, and provide effective remedies for victims. It should also recognise and strengthen the protection of personality rights, ensuring that an individual's name, voice, image, and likeness cannot be commercially exploited or digitally manipulated without informed consent. Equally important is the establishment of expedited civil remedies, including injunctions and compensation, enabling victims to secure timely relief before irreparable reputational harm occurs.

X. Strengthening Institutional Capacity for Digital Forensics

The growing sophistication of AI-generated content requires specialized technical expertise within existing regulatory and investigative institutions. Instead of relying solely on digital platforms to identify manipulated content, the Government should strengthen the forensic capabilities of agencies such as the Ministry of Electronics and Information Technology (MeitY), the Indian Cyber Crime Coordination Center (I4C), CERT-In, and state cyber forensic laboratories. Establishing specialized deepfake detection units equipped with advanced forensic tools would enable faster verification of suspected synthetic media, improve the quality of digital evidence available to investigating agencies, and support courts in determining the authenticity of disputed audio, video, and photographic material. Enhanced cooperation between these agencies, academic institutions, technology companies, and international organisations would further improve India's preparedness to combat AI-enabled misinformation and identity fraud.

XI. Regulating the Attention Economy through Platform Accountability

The design of social media recommendation systems significantly influences the spread of misinformation, hate speech, and privacy violations. Consequently, regulatory efforts should move beyond individual content moderation and focus on improving systemic platform accountability. Major social media platforms should be encouraged to conduct periodic assessments of the societal impact of their recommendation algorithms and adopt "safety-by-design" principles that minimise

foreseeable risks to users. Greater transparency regarding algorithmic decision-making, independent audits of recommendation systems, effective user reporting mechanisms, and meaningful user control over personalized content feeds would promote responsible platform governance while preserving freedom of expression.

XII. Strengthening Oversight of Digital Lending Platforms

The misuse of personal data by illegal digital lending applications demonstrates the need for stricter regulatory oversight. The Reserve Bank of India, in collaboration with MeitY, the Ministry of Home Affairs, and law enforcement agencies, should strengthen the regulation of digital lending platforms by ensuring that only applications associated with authorized banks or registered Non-Banking Financial Companies (NBFCs) are permitted on recognized app marketplaces. Regulatory authorities should also enforce the principle of data minimisation by preventing lending applications from collecting excessive personal information unrelated to credit assessment. Since many cyber-extortion networks operate across jurisdictions, enhanced international cooperation through Mutual Legal Assistance Treaties (MLATs) and cross-border cybercrime investigations is essential. Furthermore, stronger compliance and audit mechanisms should be introduced to ensure that digital lending platforms adhere to data protection, cybersecurity, and consumer protection standards on a continuous basis rather than only at the time of registration. Technology platforms should be required to conduct periodic verification of listed applications and promptly remove those found engaging in deceptive or unlawful practices. Dedicated grievance redressal mechanisms, coupled with faster investigation and compensation procedures for victims, would enhance public confidence while deterring operators from exploiting borrowers through coercive recovery methods, privacy violations, and unauthorized data processing.

XIII. Promoting Digital Literacy and Responsible Digital Citizenship

Legal reforms alone cannot create a safe digital ecosystem without corresponding changes in public behavior. Digital literacy should therefore become an essential component of school and university education, equipping individuals with the skills to critically evaluate online information, identify misinformation and manipulated media, understand privacy risks, and practise safe digital behaviour. Public awareness

campaigns should also promote responsible online engagement by discouraging cyberbullying, trolling, digital vigilantism, and the unverified sharing of personal content. Cultivating empathy, critical thinking, and respect for the privacy and dignity of others is equally important in ensuring that technological advancement strengthens, rather than undermines, constitutional values. In addition, fostering collaboration among governments, educational institutions, technology companies, civil society organizations, and the media is essential to creating a culture of digital responsibility. Regular workshops, awareness programs, and community outreach initiatives can help individuals of all age groups stay informed about emerging cyber threats and evolving digital rights. Special attention should also be given to vulnerable groups, including children, senior citizens, and first-time internet users, who are often at greater risk of online exploitation. By promoting continuous digital education and shared responsibility, society can build a resilient digital ecosystem where innovation coexists with accountability, trust, and respect for fundamental rights.

XIV. CONCLUSION

Social media has undoubtedly transformed the way people communicate, share information, and participate in public life. It has created opportunities for greater expression and connectivity, but it has also given rise to new challenges that existing legal frameworks struggle to address. In today's attention-driven digital environment, viral content often spreads faster than verified facts, and public opinion is frequently shaped by sensationalism rather than truth. As a result, individuals can become victims of online harassment, privacy violations, misinformation, and public shaming within a matter of hours. The case studies discussed in this paper from the online trolling of ordinary citizens to social media trials, illegal digital loan app extortion, and AI-generated deepfakes demonstrate that the consequences of digital abuse are not merely virtual; they can profoundly affect a person's reputation, mental health, livelihood, and, in extreme cases, even lead to the loss of life.

India has taken important steps towards regulating the digital ecosystem through the Bharatiya Nyaya Sanhita, 2023, the Digital Personal Data Protection Act, 2023, and the Information Technology Act, 2000 along with the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. However, technology continues to evolve far more rapidly than the law. Therefore, legal

responses must move beyond reacting to individual incidents and instead focus on preventing harm before it occurs. This requires stronger accountability for digital platforms, more effective protection of personal data, faster grievance redressal mechanisms, responsible use of artificial intelligence, and widespread digital literacy that encourages users to think critically before sharing or engaging with online content.

Ultimately, safeguarding privacy, dignity, and reputation in the digital age is not solely the responsibility of legislators or technology companies. It is a shared responsibility involving governments, platforms, courts, educational institutions, and every digital citizen. A truly democratic digital society is one in which innovation coexists with accountability, freedom of expression is balanced with respect for individual rights, and technology serves humanity without compromising constitutional values. Only through such a balanced and rights-oriented approach can India build a digital future that is both progressive and just.

VERDICT
VOICES
LAW. LEARN. LEAD.

THE ARCHITECTURE OF INEQUITY: INTERNATIONAL ENVIRONMENTAL LAW AND THE UNMET PROMISE OF CLIMATE JUSTICE

Devarchit Singh[1]

ABSTRACT

Climate change at the global level, among other issues, is one of the greatest examples of an asymmetric situation. The developed states have been industrializing their economies through fossil fuel-based development for almost two centuries and half, gaining power and prosperity in the process. The environmental effects caused by such an economic system have disproportionately affected countries from the Global South, who played only a minor role in the process. The international environmental law, which should have served as a correction to this system, has often served as its reinforcement. From the structure of compromises contained in the UNFCCC framework to the structure of voluntary pledges included in the Paris Agreement, international climate governance is shaped by the negotiating capacity of their creators. The aim of this article is to discuss the undue burden on developing countries, analyze the concept of common but differentiated responsibilities and its political watering down, carbon colonialism in today's green economy transition process, loss and damage mechanism at COP27 & COP28, and finally India's nuanced stance on climate issues against the larger backdrop of Global South politics. The main point here is that, without any radical restructuring of climate finance, legal emission obligations on historical polluters, and reparative justice, international environmental law would only be a tool for managing inequalities.

Keywords: Climate Justice; Carbon Colonialism; Loss and Damage; Climate Finance; International Environmental Law; Climate Litigation

I. INTRODUCTION

There is a particular cruelty in the geography of climate change. The nations most devastated by rising seas, erratic monsoons, intensifying droughts, and collapsing agricultural seasons are, almost without exception, the nations that burned the least

[1] Devarchit Singh, 2nd Year Law Student Dr. Ram Manohar Lohiya, National Law University, Lucknow

carbon to produce them.[2] Bangladesh did not industrialise its way to global economic dominance. The Maldives did not build an automotive economy. Sub-Saharan African nations did not power their growth through coal-fired electricity grids for over a century. And yet these are the places where climate change is already killing people, destroying livelihoods, and threatening the physical continuity of human settlement.[3]

This was highlighted by the Sixth Assessment Report from the Intergovernmental Panel on Climate Change, published over 2021 and 2022, in a scientifically accurate way, that is, climate risks are not distributed proportionally according to historical emissions and the most vulnerable groups exist in poor countries.[4] This is not a new finding. It has been documented for decades.[5] The more pressing question is why international law has proven so persistently incapable of addressing it.[6]

The answer lies partly in law and partly in power. International environmental law does not exist in a vacuum. It is negotiated by states whose delegations reflect their domestic political economies, their relationships with fossil fuel industries, their debt obligations, and their geopolitical ambitions.[7] The result is a body of law that speaks frequently of equity and justice but rarely compels either.[8] This article traces that failure through its historical roots, its institutional expressions, and its contemporary political contests.

The stakes of this failure cannot be overstated. We are not debating the fine print of treaty obligations in some abstract diplomatic register. We are debating whether the international legal order is capable of responding to the most consequential collective action problem in human history in a manner that does not simply reproduce the inequalities that characterise global economic and political life.[9] The evidence, examined honestly, gives considerable cause for pessimism. But pessimism is not the

[2] Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2022) ch 16.
[3] United Nations Development Programme (UNDP), *Human Development Report 2021/2022*.
[4] IPCC (n 1) Summary for Policymakers, B.2 and C.2.
[5] United Nations Framework Convention on Climate Change, adopted 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994) *preamble*.
[6] Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (United Nations University 1989).
[7] Peter Newell and Matthew Paterson, *Climate Capitalism: Global Warming and the Transformation of the Global Economy* (Cambridge University Press 2010).
[8] Lavanya Rajamani, *Differential Treatment in International Environmental Law* (Oxford University Press 2006).
[9] Henry Shue, 'Climate Justice: Vulnerability and Protection' (2014) 13(1) *Oxford Handbook of Climate Change and Society*.

same as fatalism. The legal and political tools to do better exist.[10] The question is whether there is sufficient political will among those with the power to deploy them.

II. HISTORICAL RESPONSIBILITY AND THE CARBON DEBT

A. THE ACCUMULATION PROBLEM

There is no real debate regarding the scientific basis of historical responsibility. The concentration of carbon dioxide in the atmosphere takes place over many years. The greenhouse gases that are contributing to global warming today do not emanate from the industrialization of developing countries, but rather from about 150 years of intense burning of fossil fuels in relatively few rich nations.[11] Data from the Global Carbon Project confirms that the United States alone is responsible for approximately 25% of cumulative CO_2 emissions since industrialization began, while the entire African continent, with over a billion people, contributes less than 4%.[12]

This matters because the greenhouse effect is cumulative. Every tonne of carbon dioxide emitted in 1900 by a coal-fired power plant in the English Midlands is still, in some physical sense, contributing to contemporary warming.[13] Developed nations built their infrastructure, financial systems, universities, and welfare states partly on the proceeds of carbon-intensive industrialisation.[14] As Srinivasan and colleagues documented in the Proceedings of the National Academy of Sciences,[15] the ecological debts incurred through industrial accumulation are disproportionately concentrated in wealthy economies. The developing world is being asked to forego a comparable developmental pathway in the interests of a global commons they did not disproportionately exploit.[16]

The term “carbon debt” is more than a slogan. It uses the metaphor of debt in a financial context: where one side uses up the common resource beyond their fair share,

[10] Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press 2017)
[11] IPCC, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2021) ch 5.
[12] Pierre Friedlingstein and others, 'Global Carbon Budget 2023' (2023) 15 *Earth System Science Data*.
[13] IPCC (n 10).
[14] Andreas Malm, *Fossil Capital: The Rise of Steam Power and the Roots of Global Warming* (Verso 2016).
[15] Srinivasan, U.T. et al., 'The debt of nations and the distribution of ecological impacts from human activities' (2008) 105(5) *Proceedings of the National Academy of Sciences* 1768.
[16] Henry Shue, 'Subsistence Emissions and Luxury Emissions' (1993) 15(1) *Law & Policy*.

and gains from it, they have a debt to those who lost out because of it.[17] When applied to the atmosphere as a common resource of humanity, this will result in a duty for the early and extensive industrializers to pay for the damage they have done to others.[18] The legal architecture of international climate governance has partially acknowledged this logic, principally through the CBDR principle,[19] but has systematically avoided its more demanding implications: quantified reparative obligations, binding compensation mechanisms, and enforceable limits on legacy emitters' future consumption of atmospheric space.[20]

B. CBDR AND ITS POLITICAL EROSION

The principle of Common but Differentiated Responsibilities, enshrined in Principle 7 of the Rio Declaration[21] and incorporated into the UNFCCC framework,[22] was meant to codify this historical asymmetry into binding legal obligation. Developed countries were to take the lead in emissions reduction; they were to provide finance and technology to developing nations for adaptation and mitigation; and they were to acknowledge their greater historical contribution to the problem.[23]

In practice, CBDR has been progressively diluted through the very negotiating processes it was supposed to govern.[24] The shift from the Kyoto Protocol's binding differentiated obligations[25] to the Paris Agreement's nationally determined contributions (NDC) architecture[26] was a decisive retreat. Under Paris, every state submits its own emission reduction pledges without any binding international

[17] Simon Caney, 'Climate Change, Energy Rights, and Equality' in Denis Arnold (ed), *The Ethics of Global Climate Change* (Cambridge University Press 2011).
[18] Stephen M Gardiner, *A Perfect Moral Storm: The Ethical Tragedy of Climate Change* (Oxford University Press 2011).
[19] United Nations Framework Convention on Climate Change, adopted 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994) art 3(1).
[20] Lavanya Rajamani, 'The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime' (2000) 9(2) *Review of European Community & International Environmental Law*.
[21] United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development* (adopted 14 June 1992) UN Doc A/CONF.151/26 (Vol I), Principle 7.
[22] United Nations Framework Convention on Climate Change, adopted 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994) arts 3(1), 4(1) and 4(2).
[23] Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press 2017).
[24] Lavanya Rajamani, 'The Changing Fortunes of Differential Treatment in the Evolution of International Environmental Law' (2012) 88(3) *International Affairs*.
[25] Kyoto Protocol to the United Nations Framework Convention on Climate Change, adopted 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005) arts 3 and 10.
[26] Paris Agreement, adopted 12 December 2015, UN Doc FCCC/CP/2015/10/Add.1 (entered into force 4 November 2016) arts 3 and 4.

standard for what those pledges should contain.[27] Developed nations argued this was necessary to achieve universal participation. Developing nations accepted it, partly under diplomatic pressure and partly because Paris also promised financial support that has not materialised at the scale required.[28]

Lavanya Rajamani's landmark study *Differential Treatment in International Environmental Law*[29] documents how the legally binding differentiation of Kyoto was progressively softened through successive COPs, culminating in a Paris Agreement that achieves universality at the cost of enforceable equity.[30] The principle remains in the treaty texts; its operational content has largely been bargained away.[31] What survives of CBDR in the Paris architecture is largely aspirational, a rhetorical frame without the procedural and institutional mechanisms necessary to translate it into differentiated legal duties.[32] For the countries most vulnerable to climate change, this erosion is not merely a technical legal disappointment; it is a denial of the justice to which their situation plainly entitles them.[33]

III. THE GEOGRAPHY OF SUFFERING: CLIMATE IMPACTS IN THE GLOBAL SOUTH

Climate science abstraction becomes concrete with context within specific localities. In 2022, India had its warmest March in history with temperatures rising above 45 degrees centigrade throughout the northwestern regions causing damage to wheat harvests and health crises.[34] The massive flooding event in Pakistan in 2022, which flooded one-third of the nation, has been scientifically attributed to human-induced warming.[35] The economic toll of these events was above thirty billion dollars in a country already dealing with the restructure of its debt due to the IMF.[36] In the Horn of Africa, a succession of failures to receive rain in the area has caused the most serious

[27] Paris Agreement (n 25) arts 4(2), 4(3) and 4(9).
[28] United Nations Environment Programme, *Adaptation Gap Report 2023* (UNEP 2023) xvii-xxii.
[29] Lavanya Rajamani, *Differential Treatment in International Environmental Law* (Oxford University Press 2006).
[30] ibid.
[31] Lavanya Rajamani and Emmanuel Guérin, 'Central Concepts in the Paris Agreement and How They Evolved' (2017) 28(12) *Climate Policy*.
[32] Benoit Mayer, 'The Place of Equity in the Paris Agreement' (2016) 6(2) *Climate Law*.
[33] Henry Shue, *Climate Justice: Vulnerability and Protection* (Oxford University Press 2014).
[34] World Meteorological Organization, *State of the Climate in Asia 2022* (WMO 2023).
[35] Friederike Otto and others, *Climate Change Likely Increased Extreme Monsoon Rainfall, Highly Vulnerable Communities Experienced Substantial Impacts in Pakistan* (World Weather Attribution, 2022).
[36] World Bank, *Pakistan Floods 2022: Post-Disaster Needs Assessment* (World Bank, Asian Development Bank, European Union and United Nations 2022).

famine conditions in many years, affecting millions of people.[37] According to the IPCC Working Group II report, these tendencies will become significantly more acute even in the low warming scenarios.[38]

Small island developing states face a different but equally existential problem. Kiribati, Tuvalu, and the Marshall Islands are not dealing with adaptation in any meaningful sense; they are dealing with the prospect of national dissolution.[39] Entire atolls are expected to become uninhabitable within decades.[40] The legal and political questions this raises, including the status of populations displaced from territories that may cease to exist, have no adequate resolution within existing international law.[41] The concept of 'statelessness' was not designed for geophysically erased nations.[42] This lacuna is itself a form of institutional negligence: the international legal community has had sufficient warning of these scenarios to develop adequate frameworks, and has largely declined to do so.[43]

Bangladesh illustrates the depth of the injustice. One of the most densely populated countries on earth, with per capita emissions a fraction of the global average,[44] it sits in a river delta that is subsiding while sea levels rise. Cyclone intensity has increased. Saltwater intrusion is destroying agricultural land in coastal zones. Seasonal flooding has grown more severe and unpredictable.[45] The country has invested heavily in adaptation, building embankments and cyclone shelters but it cannot adapt its way out of a problem created by others.[46] Domestic adaptation spending in Bangladesh represents a significant proportion of the national budget, constituting a de facto tax on poverty imposed by the emissions of wealthy economies.[47]

---

[37] Food and Agriculture Organization and World Food Programme, *Hunger Hotspots: FAO-WFP Early Warnings on Acute Food Insecurity* (2023).
[38] IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability* (Cambridge University Press 2022) chs 9, 16.
[39] Maxine Burkett, 'The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era' (2011) 2(1) *Climate Law*.
[40] Intergovernmental Panel on Climate Change, *Special Report on the Ocean and Cryosphere in a Changing Climate* (2019).
[41] Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press 2012).
[42] Convention Relating to the Status of Stateless Persons, adopted 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960).
[43] Rosemary Rayfuse and Emily Crawford, *International Law and Disappearing States: Utilising Maritime Entitlements to Overcome the Statehood Dilemma* (UNSW Press 2013).
[44] World Bank, *World Development Indicators* (2024 edn).
[45] IPCC (n 37) ch 10.
[46] Saleemul Huq and Hannah Reid, 'Mainstreaming Adaptation in Development' (2007) 36(8) *IDS Bulletin*.
[47] Government of Bangladesh, *Bangladesh Climate Fiscal Framework* (Ministry of Finance 2020).

Africa's situation is particularly stark when viewed against the emissions data. The continent emits roughly 3.8% of global greenhouse gases yet contains some of the most climate-vulnerable populations in the world.[48] The Sahel is experiencing desertification and reduced rainfall that is driving pastoral communities into conflict with farming communities over shrinking resources.[49] The IPCC has noted that Africa will likely face compounded risks from multiple simultaneous climate hazards, and that the window for effective adaptation is narrowing rapidly.[50] Sub-Saharan farmers operating on rain-fed agriculture with minimal technological support are confronting shifting seasons and unpredictable precipitation with virtually no financial support from the international climate architecture that supposedly exists to serve them.[51]

The Latin American and Caribbean region presents yet another dimension of vulnerability. Andean glaciers that supply freshwater to tens of millions of people are retreating at accelerating rates, threatening both urban water security and highland agricultural systems.[52] Coral bleaching events, intensified by warming oceans, are devastating Caribbean reef ecosystems on which coastal fisheries and tourism industries depend.[53] Amazon deforestation, driven partly by the speculative dynamics of international commodity markets, is disrupting the moisture recycling systems that sustain rainfall patterns across the continent.[54] These are not speculative future risks; they are present crises unfolding in regions whose historical contribution to the atmospheric stock of greenhouse gases is negligible relative to the damage they are absorbing.[55]

VERDICT VOICES LAW. LEARN. LEAD.

[48] United Nations Environment Programme, *Africa Adaptation Gap Report 2023* (UNEP 2023).
[49] Tor A Benjaminsen and others, 'Does Climate Change Drive Land-Use Conflicts in the Sahel?' (2012) 41(1) *Journal of Peace Research*.
[50] IPCC (n 37) ch 9.
[51] United Nations Environment Programme, *Adaptation Gap Report 2023* (UNEP 2023).
[52] Mark Carey, *Glaciers, Climate Change and Andean Society* (Oxford University Press 2010).
[53] IPCC, *Special Report on the Ocean and Cryosphere in a Changing Climate* (2019).
[54] Carlos A Nobre and others, 'Land-Use and Climate Change Risks in the Amazon and the Need of a Novel Sustainable Development Paradigm' (2016) 113(39) *Proceedings of the National Academy of Sciences*.
[55] Henry Shue, *Climate Justice: Vulnerability and Protection* (Oxford University Press 2014).

IV. CARBON COLONIALISM AND THE GREEN ECONOMY'S HIDDEN HIERARCHIES

The language of the green transition is full of optimism. Renewable energy, electric vehicles, circular economies, net-zero pathways. But the political economy of this transition, if examined carefully, reproduces some disturbing structural patterns.[56]

Consider the minerals required for the clean energy economy: lithium, cobalt, nickel, manganese, and rare earth elements. These are concentrated in the Global South.[57] The Democratic Republic of Congo holds roughly 60% of global cobalt reserves.[58] Chile, Argentina, and Bolivia constitute the lithium triangle.[59] The IEA's World Energy Outlook acknowledges that the clean energy transition will dramatically increase demand for these critical minerals, yet the governance frameworks for their extraction remain dominated by the commercial interests of multinational corporations headquartered in wealthy states.[60] The environmental and social costs, land degradation, water contamination, and displacement of local communities are borne locally. Profits are extracted globally.[61]

This is what scholars and activists have begun calling carbon colonialism: the appropriation of Global South resources, land, and ecological space in service of a green transition primarily benefiting wealthy consumers in the Global North.[62] It takes several forms. One is the straightforward extraction of transition minerals under conditions that leave resource-rich countries with little of the value added.[63] Another is the use of carbon offsetting mechanisms to allow wealthy countries and corporations to purchase the right to continue emitting by funding ostensible emission reductions in developing countries, often through forest conservation schemes that dispossess indigenous and local communities of land they have managed sustainably for generations.[64]

---

[56] Thea Riofrancos, *Resource Radicals: From Petro-Nationalism to Post-Extractivism in Ecuador* (Duke University Press 2020).
[57] International Energy Agency, *The Role of Critical Minerals in Clean Energy Transitions* (IEA 2021).
[58] United Nations Conference on Trade and Development (UNCTAD), *Commodities at a Glance: Special Issue on Strategic Battery Raw Materials* (UNCTAD 2020).
[59] ibid.
[60] International Energy Agency, *World Energy Outlook 2023* (IEA 2023).
[61] United Nations Environment Programme, *Sustainability of Critical Minerals for Energy Transitions* (UNEP 2024).
[62] Max Ajl, *A People's Green New Deal* (Pluto Press 2021) 91-113; Françoise Vergès, *A Decolonial Feminism* (Pluto Press 2021).
[63] Jason Hickel, *Less is More: How Degrowth Will Save the World* (Penguin 2020).
[64] Larry Lohmann, 'Carbon Trading, Climate Justice and the Production of Ignorance' (2009) 51(3) *Development*.

The REDD+ program under the UNFCCC aims to reward developing nations for preventing deforestation.[65] The performance of the program has been heavily criticized.[66] One such example is when in 2023, a peer-reviewed study in Science showed that the voluntary REDD+ projects in the Amazonian region of Brazil were grossly exaggerating their carbon emissions reductions, creating carbon credits for emissions reductions that never took place, all the while infringing on the land rights of the communities depending on the forests.[67] The carbon market does not always do what it says, and its failures have consequences for the Global South.[68]

A more fundamental structural problem is that green transition, as it is currently envisaged, is at risk of reproducing colonial economy in a new technological form, the Global South supplying the raw materials and hosting production externalities while the Global North monopolizing the higher-value-added phases of manufacturing, technology development, and intellectual property.[69] To disrupt such a trend, industrial policy, technology transfer that is not licensed to exclude, priority access to the supply chain for sustainable manufacturing, and regulation of mining activities that actually aid the development of the host nation, rather than maximizing shareholder wealth, are needed.[70] However, none of these is adequately supported by current international laws and economic structures.[71]

V. THE FAILURE OF INTERNATIONAL CLIMATE ARCHITECTURE

A. FROM KYOTO TO PARIS: A STORY OF RETREATING AMBITION

It can be said that the Kyoto Protocol of 1997 was the first real effort in giving different legal obligations to developed countries.[72] According to this Protocol, the Annex I

[65] UNFCCC, 'The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention' UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011).
[66] Esteve Corbera and Katrina Brown, 'Offsetting Benefits? Analysing Access to Forest Carbon' (2010) 39(9) *Environment and Planning A*.
[67] Thales AP West and others, 'Overstated Carbon Emission Reductions from Voluntary REDD+ Projects in the Brazilian Amazon' (2023) 381(6657) *Science*
[68] Lisa Sachs, Jeffrey D Sachs and Nathan Lobel, 'The Risks and Opportunities of Carbon Markets for Sustainable Development' (2021) 13(5) *Sustainability*.
[69] Sam Adelman, 'The Sustainable Development Goals, Anthropocentrism and Neocolonialism' (2018) 15(1) *International Environmental Agreements*.
[70] Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (Anthem Press 2002).
[71] UNCTAD, *Trade and Development Report 2023: Growth, Debt and Climate* (UNCTAD 2023).
[72] Kyoto Protocol to the United Nations Framework Convention on Climate Change, adopted 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005).

countries had to cut down their emission of greenhouse gases by 5.2 percent of their level in 1990 for the first commitment period (2008–2012).[73] Though this was not a perfect approach, nor did the objectives seem sufficient, yet at least this was an effort to make CBDR legally binding.[74] In the case of the second commitment period which was decided upon in Doha in 2012, such has been the erosion of its provisions that even Canada withdrew itself from the Protocol, while Russia and Japan have refused to participate in it.[75]

The Paris Agreement represented a fundamental architectural shift.[76] Gone were the binding differentiated emission reduction targets. In their place: a universal system of nationally determined contributions, a long-term temperature goal of limiting warming to 1.5–2 degrees Celsius above pre-industrial levels, and promises of climate finance and technology transfer.[77] The temperature goal was politically significant. The mechanism for achieving it was structurally weak.[78]

The problem is not just that current NDCs are insufficient. The UN Environment Programme's Emissions Gap Report 2023 found that even full implementation of submitted NDCs would lead to warming well in excess of 2 degrees Celsius by century's end.[79] The deeper problem is structural: the Paris Agreement has no enforcement mechanism for the ambition of NDCs, only for the procedural obligation to submit them.[80] A country can submit an NDC that does nothing meaningful and remain in full legal compliance.[81] This is not an accident; it reflects the negotiating reality that the

[73] ibid art 3(1); Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press 2010).
[74] Lavanya Rajamani, *Differential Treatment in International Environmental Law* (Oxford University Press 2006).
[75] Doha Amendment to the Kyoto Protocol, adopted 8 December 2012, UN Doc FCCC/KP/CMP/2012/13/Add.1; Harro van Asselt, *The Fragmentation of Global Climate Governance* (Edward Elgar 2014).
[76] Paris Agreement, adopted 12 December 2015, UN Doc FCCC/CP/2015/10/Add.1 (entered into force 4 November 2016).
[77] ibid arts 2(1)(a), 4 and 10.
[78] Daniel Bodansky, 'The Legal Character of the Paris Agreement' (2016) 25(2) *Review of European, Comparative & International Environmental Law*.
[79] United Nations Environment Programme, *Emissions Gap Report 2023: Broken Record, Temperatures Hit New Highs, Yet World Fails to Cut Emissions Again* (UNEP 2023) xviii-xxii.
[80] Paris Agreement (n 74) arts 4(2), 4(9), 13 and 14.
[81] Benoit Mayer, 'The Place of Equity in the Paris Agreement' (2016) 6(2) *Climate Law*

United States would not accept binding emission reduction targets,[82] and without US participation, the climate regime lacks both political legitimacy and collective will.[83]

B. THE SYMBOLISM PROBLEM IN CLIMATE DIPLOMACY

COPs have often turned into mere management of optics rather than achieving tangible results.[84] The disparity between the declarations made at the COP plenary meetings and the policy measures adopted nationally may be quite significant in many instances.[85] The studies on the implementation of climate pledges revealed recurring mismatch between the ambition and action.[86]

The dynamics of COP negotiations themselves reflect global power inequalities.[87] Small island states and least developed countries have consistently advocated for stronger ambition, higher finance commitments, and binding loss and damage mechanisms.[88] They are routinely outmanoeuvred by the negotiating capacity of large, wealthy states with hundreds of technical experts, diplomatic leverage, and the ability to walk away from deals without facing immediate existential consequences.[89] The Alliance of Small Island States has been a powerful moral voice within the UNFCCC; it has had considerably less success converting that moral authority into legal outcomes.[90]

The procedural inequities of climate diplomacy are themselves a justice issue. When wealthy states can field delegations of dozens of technical, legal, and political specialists to each COP, while the least developed countries attend with skeleton teams

[82] Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press 2017).
[83] Lavanya Rajamani and Emmanuel Guérin, 'Central Concepts in the Paris Agreement and How They Evolved' (2017) 28(12) *Climate Policy*.
[84] Karin Bäckstrand and Eva Lövbrand, 'The Road to Paris: Contending Climate Governance Discourses in the Post-Copenhagen Era' (2019) 28(4) *Journal of Environmental Policy & Planning*.
[85] Thomas Hale, 'Catalytic Cooperation' (2020) 117(4) *Global Policy*.
[86] United Nations Environment Programme, *Emissions Gap Report 2023: Broken Record, Temperatures Hit New Highs, Yet World Fails to Cut Emissions Again* (UNEP 2023) 16-31; Climate Action Tracker, *Warming Projections Global Update 2023* (2023).
[87] Peter Newell, *Globalization and the Environment: Capitalism, Ecology and Power* (Polity Press 2012).
[88] Saleemul Huq, Erin Roberts and Rachel J Tye, 'Loss and Damage and Vulnerable Countries at the Climate Negotiations' (2015) 14(6) *Climate Policy*.
[89] Joanna Depledge, *The Organization of Global Negotiations: Constructing the Climate Change Regime* (Earthscan 2005).
[90] Michele M Betsill, 'Environmental NGOs and the International Negotiation Process' in Michele M Betsill and Elisabeth Corell (eds), *NGO Diplomacy: The Influence of Nongovernmental Organizations in International Environmental Negotiations* (MIT Press 2008) 43-58; Maxine Burkett, 'A Justice Paradox: Climate Change, Small Island Developing States, and the Absence of International Legal Remedy' (2011) 35(2) *University of Hawai'i Law Review*.

that may lack expertise in the arcane procedural rules that govern negotiating outcomes, the formal equality of state participation masks a profound substantive inequality in the capacity to shape treaty text.[91] Genuine reform of the climate negotiating architecture would require capacity-building support for developing country delegations at a scale that has never been seriously contemplated, let alone funded.

VI. CLIMATE FINANCE AND THE POLITICS OF LOSS AND DAMAGE

A. THE HUNDRED BILLION DOLLAR PROMISE

At Copenhagen in 2009, developed countries pledged to mobilise one hundred billion dollars per year in climate finance for developing nations by 2020.[92] That target was not met.[93] The OECD's own tracking data has been contested by developing countries who argue that loan-heavy finance portfolios that increase debt burdens cannot fairly be described as climate support.[94] The promised one hundred billion dollars was itself widely recognised as inadequate relative to developing country needs; the UNEP Adaptation Gap Report has estimated that annual adaptation costs in developing countries may reach several hundred billion dollars by mid-century, against adaptation finance flows that currently represent a fraction of that figure.[95]

The new collective quantified goal on climate finance, agreed at COP29 in Baku in 2024,[96] set a target of 300 billion dollars per year by 2035, with an aspiration to mobilise 1.3 trillion from all sources.[97] Developing country negotiators expressed deep frustration with this outcome, arguing the amounts were wholly inadequate and that the 'from all sources' language allows wealthy states to count private finance that

[91] Farhana Yamin and Joanna Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (Cambridge University Press 2004).
[92] United Nations Framework Convention on Climate Change, Report of the Conference of the Parties on its Fifteenth Session, Held in Copenhagen from 7 to 19 December 2009 UN Doc FCCC/CP/2009/11/Add.1 (30 March 2010) para 8.
[93] Organisation for Economic Co-operation and Development (OECD), *Climate Finance Provided and Mobilised by Developed Countries in 2013-2022* (OECD 2024).
[94] Oxfam International, *Climate Finance Shadow Report 2023: Assessing the Delivery of Climate Finance* (Oxfam 2023).
[95] United Nations Environment Programme, *Adaptation Gap Report 2023* (UNEP 2023) xviii-xxiii.
[96] Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement (CMA), *New Collective Quantified Goal on Climate Finance* (COP29, Baku, 2024).
[97] ibid.

developing countries cannot access on affordable terms.[98] The gap between what climate justice requires and what climate diplomacy delivers remains cavernous.[99]

The structure of climate finance in its present configuration is flawed not only by the small amounts but by the format of these payments, which is also a major issue.[100] Many of the funds designated as climate finance from the industrialized nations take the form of loans, even market rate loans.[101] Where countries are struggling already with an unsustainable level of debt, compounded by the coronavirus crisis and monetary tightening following from it in developed countries, further debt, even under the guise of climate adaptation, will make the country more fragile rather than resilient.[102] A country borrowing to construct a sea wall will be paying back that debt in such a way that the education budget suffers, which means the people of that country cannot cope with another climate shock.[103] This is not happenstance, but structural in the current framework of climate finance.

B. Loss and Damage: Justice or Nomenclature?

The formal recognition of loss and damage as a distinct element of the climate finance architecture, including the establishment of a dedicated Loss and Damage Fund at COP27 in Sharm el-Sheikh, was a significant political achievement.[104] It represented the formal acknowledgement that some climate impacts are unavoidable even with adaptation, and that historical emitters bear some responsibility for the consequences.[105] As Huq and colleagues have analysed, the operationalisation of that acknowledgement has been far less impressive.[106] The initial pledges to the new fund

[98] International Institute for Environment and Development (IIED), *Developing Country Perspectives on the New Climate Finance Goal* (IIED 2025).
[99] Farhana Yamin and Joanna Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (Cambridge University Press 2004).
[100] Inge Kaul, *Global Public Goods and Sustainable Development Finance* (Oxford University Press 2021).
[101] Oxfam International (n 93) 18-24; OECD (n 92).
[102] United Nations Conference on Trade and Development (UNCTAD), *Trade and Development Report 2023: Growth, Debt and Climate* (UNCTAD 2023).
[103] Ulrich Volz and others, *Debt Relief for a Green and Inclusive Recovery* (London School of Economics Grantham Research Institute 2021).
[104] Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement (CMA), *Funding Arrangements for Responding to Loss and Damage Associated with the Adverse Effects of Climate Change, Including a Focus on Addressing Loss and Damage* UN Doc FCCC/PA/CMA/2022/L.18 (20 November 2022).
[105] Harjeet Singh and Cassie Flynn, 'Loss and Damage Finance after COP27: The Long Road to Climate Justice' (2023) 32(4) *Climate Policy*.
[106] Saleemul Huq, Erin Roberts and Rachel Tye, 'Loss and Damage and Vulnerable Countries at the Climate Negotiations' (2015) 14(6) *Climate Policy* .

totalled less than 800 million dollars, against loss and damage estimates in developing countries running to hundreds of billions annually.[107] The fund is housed at the World Bank, a decision contested by many developing nations who questioned whether an institution dominated by wealthy country shareholders was an appropriate steward of climate reparations.[108]

The loss and damage debate also raises deeper jurisprudential questions that climate diplomacy has conspicuously avoided.[109] If developed states are responsible for the loss and damage occurring in developing countries as a result of their historical emissions, does that responsibility sound in international law?[110] The International Court of Justice's advisory opinion on climate change, requested by the UN General Assembly at the initiative of Vanuatu, is expected to address some of these questions, though advisory opinions are not binding.[111] A more grounded basis for legal responsibility might be found in human rights law, in the emerging doctrine of climate litigation, and in the application of the no-harm principle of customary international environmental law.[112] What is notable is how determinedly the major emitting states have resisted any language in climate agreements that might be read as acknowledging legal liability — a resistance that reveals precisely the reparative logic that the loss and damage framework, at its most ambitious, implies.[113]

VII. INDIA BETWEEN DEVELOPMENT AND DECARBONISATION

India's position in international climate negotiations is complex enough to resist simple characterisation. It is the world's third-largest emitter in absolute terms, but its per capita emissions remain a fraction of the global average and a small fraction of

[107] United Nations Environment Programme, *Adaptation Gap Report 2023* (UNEP 2023) 39-52; United Nations Development Programme, *Human Development Report 2023/24* (UNDP 2024).
[108] Centre for Science and Environment, *The Loss and Damage Fund: Governance, Finance and Equity Concerns* (CSE 2024).
[109] Benoit Mayer, *The International Law on Climate Change* (Cambridge University Press 2018).
[110] Richard Lord and others, *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press 2012).
[111] United Nations General Assembly Resolution 77/276, 'Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change' UNGA Res 77/276 (29 March 2023); International Court of Justice, *Advisory Proceedings on Obligations of States in Respect of Climate Change*.
[112] Trail Smelter Arbitration (1938) 3 RIAA 1905; Trail Smelter Arbitration (1941) 3 RIAA 1938; Urgenda Foundation v State of the Netherlands ECLI:NL:HR:2019:2007; Verein KlimaSeniorinnen Schweiz v Switzerland App No 53600/20.
[113] Paris Agreement, adopted 12 December 2015, UN Doc FCCC/CP/2015/10/Add.1 (entered into force 4 November 2016) Decision 1/CP.2.

US or European per capita figures.[114] It is a democracy with over 300 million people still lacking reliable electricity access. It has enormous developmental aspirations for a young and growing population. And it is simultaneously one of the most climate-vulnerable large economies in the world, already experiencing heatwaves, monsoon disruption, and agricultural stress that the IPCC's Working Group II findings confirm will intensify with warming.[115]

India has made significant renewable energy commitments, announcing targets for 500 GW of non-fossil fuel electricity capacity by 2030.[116] Its solar power expansion has been among the fastest in the world.[117] The IEA's World Energy Outlook recognises India as central to the trajectory of global energy demand over the coming decades, and the direction of its energy policy carries significant weight for global emissions pathways.[118] These are genuine achievements and should not be dismissed.

In climate negotiations, India has constantly upheld the right to develop, demanded more financial pledges from the industrialized world, and opposed any mention of binding emission reduction commitments without any financing and technology transfer.[119] This position has sometimes been caricatured in Western media as obstructionism. It is more accurately understood as a principled insistence that the costs of decarbonisation not be borne disproportionately by a country that did not cause the crisis in the same measure as those demanding rapid change.[120] When Europe built its coal-fired industrial base, no international body told it to stop on the grounds that the atmosphere was a finite commons requiring equitable management.[121] The selective memory required to treat India's coal dependence as the central obstacle to climate progress, while treating Europe's historical emissions as a

[114] Global Carbon Project, *Global Carbon Budget 2024* (Earth System Science Data 2024) 5318-24; International Energy Agency, *CO_2 Emissions in 2024* (IEA 2025).
[115] IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2022) ch 10 (Asia).
[116] Government of India, *India's Updated First Nationally Determined Contribution under the Paris Agreement* (Ministry of Environment, Forest and Climate Change 2022).
[117] International Renewable Energy Agency (IRENA), *Renewable Capacity Statistics 2024* (IRENA 2024).
[118] International Energy Agency, *World Energy Outlook 2023* (IEA 2023).
[119] Government of India, *India's Updated First Nationally Determined Contribution under the Paris Agreement* (Ministry of Environment, Forest and Climate Change 2022); Navroz K Dubash and Lavanya Rajamani, 'India and the Paris Agreement: Nationally Determined Contributions and Climate Justice' (2018) 27(4) *Climate Policy*.
[120] Henry Shue, 'Subsistence Emissions and Luxury Emissions' (1993) 15(1) *Law & Policy*.
[121] Andreas Malm, *Fossil Capital: The Rise of Steam Power and the Roots of Global Warming* (Verso 2016).

settled fact without continuing relevance, is a form of bad faith that India's negotiators are right to call out.[122]

In addition, there are certain contradictory aspects to India's environmental policy within the country.[123] Forest clearance for mining and infrastructure projects still takes place. Air pollution in Indian cities is one of the most serious in the world, resulting in heavy public health consequences for Indian residents regardless of the international climate aspect.[124] The demands India makes of the international system for equity are not always matched by corresponding equity in domestic environmental governance. This is an acknowledgment that is a part of real engagement with climate justice and not a way of backing out of it. For an argument of climate equity to be convincing on the international plane, it needs to go hand in hand with an engagement with the issue of environmental justice domestically.[125]

VIII. CLIMATE JUSTICE AS HUMAN RIGHTS

Human rights framing of climate change issues has attracted much attention both in academic discourse and through litigation. Logically speaking, the reasoning behind the approach seems very simple, because climate change poses a threat to life, health, livelihoods, and even to future generations' ability to inherit a stable climate regime.[126] The OHCHR has formally recognised that climate change has direct and immediate implications for the full enjoyment of human rights, a position that has begun to influence domestic courts.[127]

Climate litigation is translating these arguments into judicial outcomes. The Urgenda Foundation v Netherlands case,[128] decided by the Dutch Supreme Court in December 2019, held that the Netherlands had a positive obligation under the European Convention on Human Rights to take adequate steps to protect its citizens from

[122] Lavanya Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (2016) 65(2) *International and Comparative Law Quarterly*.
[123] Upendra Baxi, 'The Environmental Justice Imagination in India' (2010) 22(3) *Journal of Human Rights and the Environment*.
[124] World Health Organization, *Ambient Air Pollution Database 2024*; State of Global Air, *State of Global Air 2024 Report* (Health Effects Institute 2024).
[125] Philippe Cullet, 'Environmental Justice in India: The Constitutional and Legal Framework' (2017) 29(2) *Journal of Environmental Law*.
[126] John H Knox, 'Climate Change and Human Rights Law' (2009) 50(1) *Virginia Journal of International Law*.
[127] Office of the United Nations High Commissioner for Human Rights, *Understanding Human Rights and Climate Change* (OHCHR 2015).
[128] Urgenda Foundation v State of the Netherlands ECLI:NL:HR:2019:2007

climate change, and ordered more ambitious emission reductions. The case was path-breaking because it compelled a national government to strengthen its climate action through judicial intervention on human rights grounds.[129] The German Federal Constitutional Court's 2021 ruling built on this logic, finding that the German Climate Action Act inadequately protected the rights of future generations by deferring too much of the emissions reduction burden to the post-2030 period.[130]

In the Global South context, climate litigation faces different structural challenges.[131] Many of the most climate-vulnerable countries lack robust judicial infrastructure and the legal resources to pursue complex climate cases.[132] That said, there are encouraging developments. The Inter-American Court of Human Rights, in Advisory Opinion OC-23/17, recognised the relationship between environmental protection and human rights in terms that have direct implications for climate obligations.[133] Indian constitutional jurisprudence has a long tradition of environmental public interest litigation that is beginning to engage more directly with climate dimensions.[134]

The intergenerational dimension deserves particular emphasis. The most severe impacts of climate change will fall on generations not yet born, or on children who had no role in producing the emissions now locked into the atmospheric system.[135] The legal systems that protect property rights across generations have not yet found adequate mechanisms to protect ecological rights across them.[136] Youth climate movements have insisted that this temporal asymmetry is itself a form of injustice, and the courts that have heard them have, in several jurisdictions, agreed. The question of whether international law can develop genuinely effective intergenerational obligations binding present decision-makers to preserve the climatic conditions that future generations depend upon, remains unresolved, but the direction of travel in

[129] Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) *Transnational Environmental Law*.
[130] Neubauer and Others v Germany BVerfG, 1 BvR 2656/18, 24 March 2021.
[131] César Rodríguez-Garavito, *Litigating the Climate Emergency: How Human Rights, Courts and Legal Mobilization Can Bolster Climate Action* (Cambridge University Press 2022).
[132] United Nations Development Programme, Human Development Report 2023/24 (UNDP 2024).
[133] Advisory Opinion OC-23/17 Environment and Human Rights, Advisory Opinion OC-23/17, 15 November 2017.
[134] Shibani Ghosh, 'Climate Litigation in India: Opportunities and Constraints' (2023) 35(2) *Journal of Environmental Law*; M K Ranjitsinh v Union of India (2024) SCC OnLine SC 269.
[135] Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (United Nations University Press 1989).
[136] Stephen M Gardiner, *A Perfect Moral Storm: The Ethical Tragedy of Climate Change* (Oxford University Press 2011).

domestic constitutional jurisprudence suggests that the moral and legal case is gaining ground.[137]

The human rights framing also offers a potential avenue for closing the gap between state responsibility and state accountability that characterises much of international climate law.[138] Human rights treaty bodies have begun issuing recommendations to states on their climate obligations, and in some jurisdictions, these recommendations carry domestic legal weight.[139] The UN Human Rights Committee's finding in *Teitiota v New Zealand*, that climate-related displacement can engage non-refoulement obligations broke important new ground by linking the international refugee and hum,an rights frameworks to climate vulnerability in ways that have direct implications for how wealthy destination states manage the movement of climate-affected populations.[140] It represents precisely the kind of incremental legal innovation that, accumulated over time, may eventually force the architecture of international law into closer alignment with the demands of climate justice.[141]

IX. CONCLUDING OBSERVATIONS

International environmental law is neither irrelevant nor sufficient. The frameworks that exist have channelled billions in climate finance, created spaces for diplomatic engagement, and occasionally produced meaningful commitments.[142] But they have not corrected the fundamental inequity at the heart of the climate crisis: that the nations most responsible for causing it have retained both the wealth generated by carbon-intensive growth and the political leverage to shape the international rules that govern its consequences.[143] The IPCC's Working Group III findings make clear that the

[137] Brown Weiss (n 134).
[138] Lavanya Rajamani, *Innovation and Experimentation in the International Climate Change Regime* (Oxford University Press 2020).
[139] United Nations Human Rights Council, *Resolution 48/13: The Human Right to a Clean, Healthy and Sustainable Environment* UN Doc A/HRC/RES/48/13 (8 October 2021).
[140] Teitiota v New Zealand, Views adopted 7 January 2020.
[141] Jane McAdam, *Climate Change, Forced Migration and International Law* (Oxford University Press 2012).
[142] Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press 2017).
[143] Henry Shue, *Climate Justice: Vulnerability and Protection* (Oxford University Press 2014); Stephen M Gardiner, *A Perfect Moral Storm: The Ethical Tragedy of Climate Change* (Oxford University Press 2011)

technical pathways to rapid decarbonisation exist; what is missing is not scientific knowledge but political will.[144]

The gap between climate justice as a concept and climate governance as a practice is not merely technical. It reflects a structural feature of international law: that it is made by powerful states through processes that reflect their interests, and that equity-advancing provisions tend to be the first casualty of political bargaining.[145] The CBDR principle has been diluted. The one hundred billion dollar finance promise was late, contested, and inadequate. The loss and damage fund is dramatically undercapitalised. The Paris Agreement's NDC architecture places ambition on a voluntary basis, with predictable results.

What true climate justice would entail, at a bare minimum, would be emission reduction commitments that are proportional to past responsibilities, climate finance that actually meets the real needs of developing countries, a regime on loss and damage that is explicitly reparative in nature and not simply an act of charity, and reforms to the international economic system such that clean energy transitions are made less costly for those who cannot afford it.[146] It would also demand an honest confrontation with the politics of the transition to green energy, which includes acknowledging the threat that decarbonization, in its current state, replicates rather than destroys the extractive structures that have defined the relationship between the Global North and Global South over many years.[147]

The path from where we are to where justice requires us to be is long and obstructed by entrenched interests. But the analytical work of identifying the gap between the rhetoric of climate equity and the reality of climate governance is a necessary precondition for closing it.[148] The institutions, principles, and legal precedents examined in this article are not monuments to failure alone; they are also sites of

[144] IPCC, *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2022) Summary for Policymakers.
[145] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, rev edn, 2005).
[146] Simon Caney, 'Climate Change and the Duties of the Advantaged' (2010) 13(1) *Critical Review of International Social and Political Philosophy*.
[147] Thea Riofrancos, *Resource Radicals: From Petro-Nationalism to Post-Extractivism in Ecuador* (Duke University Press 2020); Jason Hickel, *Less is More: How Degrowth Will Save the World* (Penguin 2020).
[148] Amartya Sen, *The Idea of Justice* (Penguin 2009).

ongoing contest.[149] The outcome of that contest depends partly on legal argument, partly on political mobilisation, and partly on whether the international community is willing to take seriously the proposition that a rules-based international order must apply its rules equitably or forfeit its legitimacy entirely.[150]

The developing world is not asking for charity. It is asking for acknowledgement that a global commons was unequally exploited, that the consequences of that exploitation are being unequally borne, and that international law has the capacity, if not always the political will, to take both of those facts seriously.[151] That is not an unreasonable demand. It is the minimum threshold of what justice ought to mean in a world that claims to be governed by rules rather than power alone.

VERDICT VOICES LAW. LEARN. LEAD.

[149] César Rodríguez-Garavito, *Litigating the Climate Emergency: How Human Rights, Courts and Legal Mobilization Can Bolster Climate Action* (Cambridge University Press 2022).
[150] Thomas Pogge, *World Poverty and Human Rights* (2nd edn, Polity Press 2008).
[151] Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (United Nations University Press 1989).

BEYOND LITIGATION: STRUCTURING A MANDATORY MEDIATION FRAMEWORK FOR DIRECT TAX DISPUTES IN INDIA

SAMEER PANDA [1] & PRADIPTA ROY[2]

ABSTRACT

India's direct tax regime and its approach to cross-border disputes are notoriously adversarial, resulting in a staggering backlog of cases before appellate tribunals and stalled Mutual Agreement Procedure (MAP) negotiations. While ad-hoc domestic amnesty schemes, such as the recent Direct Tax Vivad Se Vishwas Scheme, 2024, temporarily alleviate docket congestion, they fail to address the systemic procedural inefficiencies inherent in tax assessments. This article advocates for a paradigm shift from traditional zero-sum litigation to a formalized, mandatory mediation framework. By analyzing the structural limitations of the current appellate hierarchy and the psychological barriers specifically the fear of vigilance inquiries among revenue officers, this paper argues that evaluative mediation can effectively bridge the trust deficit between taxpayers and the state. Drawing upon comparative successes in the United Kingdom and Australia, the article proposes a comprehensive, two-pronged structural model. Domestically, it recommends integrating a pre-assessment Independent Tax Evaluator (ITE) mechanism into the Income Tax Act 2025, safeguarded by a Supervisory Collegium to shield assessing officers. Internationally, the framework tackles the escalating complexities of treaty-based disputes by proposing the integration of mandatory 'Last Best Offer' (baseball) mediation into Double Taxation Avoidance Agreements (DTAAs) to resolve MAP deadlocks without diluting sovereign authority. Ultimately, institutionalizing Alternative Dispute Resolution (ADR) will not only recover locked revenue expeditiously but also foster a collaborative, robust, and economically progressive tax compliance culture.

Keywords: Alternative Dispute Resolution (ADR), Direct Tax Litigation, Mandatory Evaluative Mediation, Tax Dispute Settlement, Income Tax Act 2025

[1] Sameer Panda , 2nd Year Law Student, L.L.B (Hons), National Law University Odisha
[2] Pradipta Roy, 2nd Year Law Student, L.L.B (Hons), National Law University Odisha

I. INTRODUCTION

The intersection of sovereign taxation powers and Alternative Dispute Resolution (**ADR**) has historically been viewed with scepticism.[3] Taxation is inherently an exaction of wealth by statutory right,[4] leaving ostensibly little room for the mutual concessions that characterize traditional dispute resolution. Consequently, the Indian direct tax landscape has evolved into a highly adversarial arena. The prevailing paradigm assumes that the interests of the Revenue and the taxpayer are diametrically opposed, inevitably pushing disputes through a labyrinthine appellate hierarchy from the Commissioner of Income Tax (Appeals) [**CIT(A)**] to the Income Tax Appellate Tribunal (**ITAT**), and frequently onward to the High Courts and the Supreme Court of India.[5]

This relentless cycle of litigation has precipitated a severe crisis of docket explosion.[6] Billions of rupees of tax revenue remain locked in protracted legal battles, representing a profound economic deadweight loss.[7] The systemic delay not only deprives the exchequer of timely revenue realization but also inflicts immense compliance costs and prolonged uncertainty upon corporate and individual taxpayers. Traditional adjudicatory mechanisms have proven ill-equipped to handle the sheer volume and escalating complexity of modern commercial transactions, transfer pricing issues, and cross-border tax assessments.[8]

At the heart of this congestion lies a structural and psychological rigidity within the tax administration. Assessing Officers (**AOs**) often operate under aggressive revenue

---

[3] Supriyo De and others, *Direct Taxes Litigation Management and Alternate Dispute Resolution* (National Institute of Public Finance and Policy 2023) <https://www.nipfp.org.in/media/documents/Paper_LITIGATION_MANAGEMENT_and_ADR.pdf > accessed 11 February 2026.

[4] The Constitution of India 1950, art 265.

[5] Income-tax Act 2025, ss 356, 362, 365 and 367.

[6] Atri Prasad Rout, *Vital Stats: Direct Taxes in India* (PRS Legislative Research 2025) 3 <https://prsindia.org/files/policy/policy_vital_state/Vital_Stats-Direct_Taxes_in_India.pdf> accessed 20 February 2026.

[7] Ministry of Finance, *Economic Survey 2017-18 Volume 1* (Government of India 2018) 133 <https://www.indiabudget.gov.in/budget2018-2019/economicsurvey2017-2018/pdf/000_Preface_Ten_Facts_2017-18_Vol_1-18_pages.pdf> accessed 20 February 2026.

[8] Suranjali Tandon and Devendra Damle, 'An Analysis of Transfer Pricing Disputes in India' (Working Paper No 266, National Institute of Public Finance and Policy 2019) 2 <https://www.nipfp.org.in/media/medialibrary/2019/05/WP_266_2019.pdf> accessed 7 February 2026.

collection targets.[9] Furthermore, the persistent fear of subsequent vigilance inquiries or audits by the Comptroller and Auditor General (**CAG**) creates a 'revenue bias', compelling officers to make high-pitched, defensive assessments and mechanically file appeals even in legally tenuous cases.[10] In this environment, the nuanced evaluation of litigation risk, a cornerstone of commercial negotiation and dispute resolution, is entirely absent.[11] Instead of assessing the probability of success at the ITAT or higher forums, the default administrative posture is to litigate.[12]

Recognising the unsustainability of this model, the Government of India has periodically introduced dispute resolution and amnesty schemes, most notably the *Direct Tax Vivad Se Vishwas Scheme*, 2024.[13] While such schemes have been remarkably successful in clearing targeted tranches of legacy arrears, they remain episodic, ad-hoc interventions. They operate retrospectively to clear existing bottlenecks rather than prospectively re-engineering the dispute resolution architecture to prevent backlogs from forming.[14] Furthermore, the gradual dilution and eventual phasing out of the Income Tax Settlement Commission (**ITSC**),[15] has left an institutional vacuum for negotiated settlements in direct tax matters.[16]

There is, therefore, an urgent imperative to pivot from ad-hoc amnesty to institutionalised dispute resolution. Integrating formal mediation into the tax assessment and appellate process offers a viable, structured alternative to the current zero-sum litigation model.[17] Mediation, particularly when customised to accommodate the statutory bounds of tax law, introduces the essential elements of

---

[9] *UTI Mutual Fund v Income Tax Officer* (2012) 345 ITR 71.
[10] Comptroller and Auditor General of India, *Report No. 14 of 2020: Performance Audit on Search and Seizure Assessments in Income Tax Department* (Government of India 2020) 11 <https://cag.gov.in/uploads/download_audit_report/2020/AR%20No.14%20of%202020_Union(E)-05f809cc743f894.65924216.pdf> accessed 9 February 2026.
[11] n 1.
[12] Comptroller and Auditor General of India, *'Performance Audit of The Appeal Process-Union Government-Direct Taxes'* (Report No 20 of 2009-10, 2010) <https://cag.gov.in/en/audit-report/details/1482> accessed 11 March 2026.
[13] *Direct Tax Vivad Se Vishwas Scheme* 2024 (India).
[14] n 1.
[15] *The Finance Act, 2021*, No. 13 of 2021, Acts of Parliament, 2021 (India).
[16] SR Wadhwa, 'Abolition of Settlement Commission and Constitution of Dispute Resolution Committee' (2021) 23 *AIFTP Journal* 29 <https://itatonline.org/digest/wp-content/uploads/2021/03/S-R-Wadhawa.pdf> accessed 20 March 2026.
[17] Parthasarathi Shome, *Tax Administration Reform in India: Spirit, Purpose and Empowerment* (LexisNexis 2014) 150 <https://nadt.gov.in/writereaddata/MenuContentImages/First_report_TARC635480254365343004.pdf> accessed 17 March 2026.

principled negotiation focusing on underlying interests (such as early certainty and revenue realisation) rather than rigid legal positions.[18] By employing neutral facilitators to guide the Revenue and the taxpayer through an objective evaluation of the dispute's merits,[19] mediation can filter out frivolous additions and unsustainable claims before they crystallise into formal appeals.[20]

II. THE CURRENT PARADIGM: A SYSTEM IN GRIDLOCK

In order to comprehend the need to integrate mediation into direct tax litigation, one needs to first take stock of the statistics and structure of the dispute resolution framework prevalent in India.[21] The present system suffers from an enormous backlog coupled with a multi-tiered appeal process that consistently holds up capital for decades on end.[22]

A. THE STATISTICAL REALITY OF TAX LITIGATION

Recent data presented to Parliament underscores the severity of the crisis. As of the 2024–2025 financial year, over 5.39 lakh income tax cases were pending before various appellate authorities, with disputed tax claims exceeding ₹16.75 lakh crore. The bottleneck is most severe at the first appellate stage the CIT(A) where the pendency consistently hovers around the half-million mark.[23] Even at higher judicial forums, the congestion remains critical, with thousands of appeals clogging the dockets of the ITAT, the High Courts, and the Supreme Court.[24]

---

[18] Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In* (3rd edn, Penguin Books 2011) 11.
[19] Law Reform Commission of Ireland, *Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98-2010, 2010) 18 <https://www.lawreform.ie/_fileupload/reports/r98adr.pdf> accessed 17 March 2026.
[20] Duncan Bentley, Taxpayers' Rights: Theory, Origin and Implementation (Kluwer Law International 2007) 210.
[21] Atri Prasad Rout, Vital Stats: Direct Taxes in India (PRS Legislative Research 2025) 4 <https://prsindia.org/files/policy/policy_vital_state/Vital_Stats-Direct_Taxes_in_India.pdf> accessed 16 March 2026.
[22] Ministry of Finance, *Economic Survey 2023-24* (Government of India 2024) 142 <https://www.indiabudget.gov.in/budget2024-25/economicsurvey/doc/echapter.pdf> accessed 14 March 2026.
[23] Comptroller and Auditor General of India, *Report No. 13 of 2024: Compliance Audit on Direct Taxes* (Government of India 2024) 10 <https://cag.gov.in/en/audit-report/download/121131> accessed 18 March 2026.
[24] n 20.

To mitigate this, the Central Board of Direct Taxes (**CBDT**) periodically increases the monetary thresholds for filing appeals by the Revenue. For instance, recent revisions raised the limits to ₹60 lakh for the ITAT, ₹2 crore for High Courts, and ₹5 crore for the Supreme Court.[25] While these measures temporarily artificially reduce the docket by forcing the withdrawal of low-value appeals, they are purely cosmetic fixes. They do not address the fundamental question of *why* so many frivolous or high-pitched assessments are generated by Assessing Officers (AOs) in the first place, nor do they provide relief to taxpayers embroiled in high-value, complex commercial disputes.[26]

B. The Vacuum Left by the Settlement Commission

Historically, the ITSC, established in 1976 on the recommendations of the *Wanchoo Committee*,[27] served as a crucial quasi-judicial body for ADR. It allowed errant taxpayers to make a full and true disclosure of their income in exchange for immunity from prosecution and penalties.[28] However, the Finance Act, 2021 abruptly abolished the ITSC, replacing it with Interim Boards for pending cases.[29]

The legislative intent behind dismantling the ITSC was to pivot toward a stricter, zero-tolerance approach to tax evasion and to promote the Faceless Assessment Scheme. While the government subsequently introduced a Dispute Resolution Committee (**DRC**), its utility is severely restricted. The DRC is only available to small taxpayers where the returned income is up to ₹50 lakh and the disputed addition does not exceed ₹10 lakh.[30] For the vast majority of corporate taxpayers, medium enterprises, and high-net-worth individuals facing substantial tax demands, the door to negotiated settlement has been firmly shut.

C. The Limitations of the Dispute Resolution Panel (DRP)

[25] Central Board of Direct Taxes, Circular No 9 of 2024 (17 September 2024) <https://itgoawbunit.org/pdf/9741-circular-09.2024.pdf> accessed 12 March 2026.
[26] Tax Administration Reform Commission, *First Report* (Government of India 2014) 215 <https://prsindia.org/policy/report-summaries/first-report-tax-administration-reforms-commission> accessed 8 March 2026.
[27] Direct Taxes Enquiry Committee, *Final Report* (Government of India 1971) ch 2 <https://www.thehinducentre.com/multimedia/archive/03091/direct-taxes-enqui_3091080a.pdf> accessed 19 March 2026.
[28] Income Tax Act, 1961, s 245C.
[29] *The Finance Act 2021*, No. 13 of 2021, Acts of Parliament, 2021 (India).
[30] Income-tax Act 2025, s 379 read with the Income-tax Rules 2026, r 196.

The Income Tax Act does feature an existing ADR mechanism in the form of the Dispute Resolution Panel (**DRP**) under Section 275.[31] A collegium of three Commissioners of Income Tax, the DRP was designed to expedite resolutions and bypass the CIT(A) stage.[32] However, its jurisdiction is strictly ring-fenced. It is exclusively available to foreign companies and for variations arising out of Transfer Pricing orders.[33]

Domestic taxpayers dealing with complex domestic corporate tax issues, general anti-avoidance rules (**GAAR**) invocations, or intricate capital gains disputes have no access to the DRP. Consequently, the current framework is fragmented; small taxpayers have the DRC, foreign entities have the DRP, but the core domestic corporate base is left to navigate the gruelling, traditional appellate route.[34]

III. INJECTING ADR INTO TAX LAW: THEORETICAL AND PRACTICAL MECHANICS

Inclusion of formalized mediation into tax disputes involves a shift of paradigms on the part of the theory. Generally speaking, taxation can only be considered from the point of view of public law and sovereignty. Under this approach, the existence of the tax liability is merely an act prescribed by legislation and hence is not a contract and cannot be 'negotiated.'[35] But such an interpretation equates the law with success.

A. THE EVALUATIVE MEDIATION APPROACH

In the context of taxation, facilitative mediation (where the mediator merely helps parties communicate) is often insufficient. What is required is evaluative mediation.[36] An evaluative mediator, typically a retired ITAT member, former High Court judge, or senior tax practitioner, actively assesses the legal merits of the dispute.

[31] Income-tax Act 2025, s 275.
[32] Income-tax Act 2025, s 275(15)(a).
[33] Income-tax Act 2025, s 275(15)(b).
[34] n 24.
[35] *The Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* [1954] SCR 1005; The Constitution of India 1950, art 265.
[36] Nadja Alexander, 'The Mediation Meta-Model: Understanding Practice' (2008) 26 *Conflict Resolution Quarterly* 97 <https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=3815&context=sol_research> accessed 20 March 2026.

Instead of negotiating the statutory tax rate (which is impossible),[37] the mediation focuses on the litigation risk. If the Revenue has made an addition based on a tenuous interpretation of a deduction under Section 138, the mediator evaluates the probability of the Revenue prevailing at the ITAT or High Court. If jurisprudence suggests the Revenue has only a 20% chance of success, the mediation centres on settling the dispute for a percentage of the disputed amount, saving the exchequer the cost and time of a 15-year appellate journey.

B. Overcoming the 'Revenue Bias' and Institutional Fear

The most significant barrier to tax mediation is not statutory, but psychological. Assessing Officers and CITs operate in a bureaucratic environment characterised by severe risk aversion.[38] A settlement or concession made by an officer during mediation puts them at risk of being looked into by the vigilance department or being audited by CAG.[39] In order to protect themselves from possible damage to their career, officers would always opt to see their case nullified by the ITAT or high court.

It is essential that in any form of ADR for Indian tax law, there needs to be an assurance that there would be a 'safe harbour' for the revenue officials involved. This will be achieved in the mediation framework if it clearly states that a settlement in good faith done through the help of an impartial mediator would not lead to an inquiry in the future.

C. Shifting from Positions to Interests

Standard tax litigation involves the two parties taking up rigid stances, the revenue department insists on the highest possible tax and penalties, while the taxpayer insists on no liability. Mediation compels the two parties to look at the interests beneath their postures.[40] The State's interest lies in the need for prompt realization of revenue to meet its budgeting needs instead of tying the funds up in escrow or depreciation of funds through a 20 year period of litigation. Conversely, the taxpayer's interest is the certainty of liability and freeing of funds from escrow.

[37] The Constitution of India, 1950, art 265.
[38] n 24.
[39] n 8.
[40] n 16.

By creating a confidential, without-prejudice forum where these interests can be aligned through risk-adjusted settlements, ADR transforms tax collection from a combative extraction into a collaborative compliance process.[41]

IV. RECONCILING STATUTORY MANDATES WITH NEGOTIATION DYNAMICS

The basic problem in reconciling ADR in direct taxation is that of an assumed inconsistency in theory. Taxation is the ultimate act of sovereignty as it is a statutory levy and not a contract entered into between two parties which may be waived by mutual consent.[42] In a case where an AO finds that there is an escapement of income, he/she is required to charge tax on the income in accordance with the provisions of the Income Tax Act, 2025.[43] The AO does not have the inherent jurisdiction to waive the income on behalf of the Government.

The solution to the problem can be found through reconceptualization of the nature of subject matter to be negotiated. In the case of tax mediation, the issue is neither the statutory tax rate nor the application of the statute; rather, what is being negotiated is the facts of the transaction, its characterization as income, and, most importantly, the litigation risk involved in winning on appeal.

A. RE-FRAMING THE DISPUTE: FROM POSITIONAL BARGAINING TO RISK ASSESSMENT

In the traditional method of making tax assessments, there is only a positional interaction between the Revenue and the taxpayer. The AO takes the extreme defensive position to safeguard the revenue interest, which leads to high pitched assessments whereas the taxpayer adopts the extreme opposite position of no liability at all. This rigid approach does not take into consideration the complexities involved in a business transaction like PE profit attribution or ALP where there are no definitive answers to the facts involved.[44]

---

[41] Tax Administration Reform Commission, *Third Report* (Government of India 2014) ch 10 <https://taxindiaonline.com/RC2/pdfdocs/TARC3rdReport.pdf> accessed 3 March 2026.
[42] *Mafatlal Industries Ltd v Union of India* (1997) 5 SCC 536; The Constitution of India 1950, art 265.
[43] Income-tax Act 2025, s 279.
[44] OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022* (OECD Publishing 2022) ch 1 <https://www.oecd.org/content/dam/oecd/en/publications/reports/2022/01/oecd-transfer-pricing-

The process of ADR demands changing this relationship to one of interest-based bargaining.[45] The interest of the State is not in the long drawn-out process of making maximalist claims but the efficient realization of its legitimate revenues. On the other hand, the interest of the corporate taxpayer is in reducing liability and unfreezing working capital.

In order to reconcile the parties' interests, the tax mediator needs to make an intensive assessment of alternatives, such as the determination of the best alternative to negotiation agreement (**BATNA**) and worst alternative to negotiation agreement (**WATNA**) of the parties.[46] For the Revenue, the BATNA could be that a favourable ruling will be delivered at the Supreme Court fifteen years later, while the WATNA will be the striking down of the addition by ITAT together with the expense incurred on the process of litigation. Preparation of the mediation session involves carrying out a similar intense analysis of the arguments made by the tax department, just like what would have been done when preparing for an ad hoc review of the case or for legal memorialization. In case there is tenuous jurisprudence in the argument of the deduction under Section 138,[47] it should be recognised first before any negotiation can start.

B. THE IMPERATIVE OF EVALUATIVE MEDIATION

Tax dispute resolution is done under statutory requirements, hence facilitative mediation in which the mediator is simply a conduit for information and takes into consideration emotions and relations among the disputants cannot work.[48] A revenue officer cannot compromise simply because it preserves a harmonious relationship with the taxpayer.

The framework must utilise evaluative mediation, often termed 'early neutral evaluation'. In this model, the mediator must be a highly specialised domain expert such as a retired ITAT member, a former High Court judge, or a designated Senior

guidelines-for-multinational-enterprises-and-tax-administrations-2022_57104b3a/0e655865-en.pdf> accessed 21 March 2026.

[45] n 16.

[46] ibid 100.

[47] Income-tax Act 2025, s 138.

[48] Leonard L Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1 *Harvard Negotiation Law Review* 7 <https://scholarship.law.ufl.edu/facultypub/668/> accessed 20 March 2026.

Advocate with extensive tax experience.[49] The mediator's role transcends facilitation; they are tasked with aggressively stress-testing the legal and factual arguments of both sides.

During confidential, without-prejudice joint and caucus sessions, the evaluative mediator breaks down the dispute issue by issue.[50] If the AO has characterized the purchase of off-the-shelf software as a 'royalty' rather than 'business income,' the mediator will evaluate the strength of this stance against prevailing Supreme Court precedents (e.g., *Engineering Analysis Centre of Excellence*).[51] By providing an objective, non-binding assessment of how an appellate tribunal is likely to rule, the mediator alters the perceived BATNAs of the parties.

If the mediator indicates that the Revenue's position has only a 30% probability of surviving appellate scrutiny, the AO is presented with a rational, defensible basis to accept a settlement for a proportion of the disputed amount. The negotiation, therefore, is not a dereliction of statutory duty, but a mathematically sound adjustment based on litigation risk.

C. Navigating the Statutory Bounds: Fact vs. Law

What can be done for the AO to mediate without infringing on the provisions of the Income Tax Act? It is mainly in the resolution of factual issues, where flexibility is evident in taxation mediation.

However, many of the high-value tax disputes that arise do not hinge on whether a law exists, but rather on how the value of a transaction is measured. Consider the valuation of unquoted equity shares for computing capital gains under Section 79, or the receipt of property for inadequate consideration under Section 92(2)(m).[52] The dispute often centers on the acceptability of the Discounted Cash Flow (**DCF**) method versus the Net Asset Value (**NAV**) method, and the specific variables (such as growth rates and discount rates) assumed by the taxpayer's valuer. Within the adversarial process, the AO could simply ignore the DCF approach and substitute it with their own valuation,

[49] n 24.
[50] n 17.
[51] *Engineering Analysis Centre of Excellence Private Limited v Commissioner of Income Tax* (2021) 432 ITR 471 (SC).
[52] Income-tax Act 2025, s 92(2)(m) read with the Income-tax Rules 2026.

resulting in a lengthy court battle for several years. Within a mediation process, the parties will have room to discuss the parameters. Through collaboration, both parties may reach a consensus regarding the modification of the discount rate or future cash flows, arriving at a mutually acceptable valuation that falls within a reasonable scale. [53] The statutory provision is preserved, but its application is bargained for.

In a similar vein, in transfer pricing cases, principles of ADR can be used to reach an agreement in the selection of comparables.[54] Whether a certain firm is included or excluded from the list, which will then be used to compute the arithmetic average of the profit margin, is purely a factual exercise based on FAR analysis. Through mediation, there will be a practical solution to the final selection of comparables so that the statutory obligation of taxing based on an arm's length price is satisfied.

D. The Institutional Prerequisites: Safe Harbors and Structural Empowerment

It is impossible to use the art of negotiations with an AO if it is not provided for in the statute. As already stated in the analysis of the current model, the most restraining element in the Indian tax system is the fear of the post-factum scrutiny (CVC/CBI or CAG audit).[55] The AO will not indulge in interest-based negotiations if he or she stands to face the accusation of corruption or malfeasance in office.

Therefore, for mediation to practically apply, the legal framework must construct an impenetrable 'safe harbour' for participating officers. Statutory Sanction, the Income Tax Act must be amended to explicitly recognise mediation as a valid mechanism for determining tax liability; Good Faith Protection, the law must stipulate that any settlement reached through the formal mediation process, guided by a certified neutral mediator, is deemed to be an action taken in 'good faith' and Committee Approval, to prevent the unilateral abuse of power, the negotiated settlement should not be finalised by the AO alone. The outcome of the mediation should take the form of a 'Draft Settlement Agreement,' which is then submitted to a supervisory collegium (e.g.,

[53] *Vodafone India Services Pvt Ltd v Union of India* [2014] 368 ITR 1 (Bom).
[54] Income-tax Act 2025, ss 162–73.
[55] n 24.

a panel of three Principal Commissioners of Income Tax) for rapid administrative approval.[56]

Through the design of the negotiation process in such a way that the ultimate outcome is reached through the findings of a neutral expert and confirmed by the top administration, the specific AO is free from any liability. This empowerment through structure is the spark that will ignite the process and allow the conversion of the revenue department from legal bullies to realistic negotiators. Only if the tax authority is able to make a legal analysis of their situation and modify their approach depending on legal risks involved will ADR succeed.[57]

V. COMPARATIVE GLOBAL ANALYSIS: LESSONS FROM THE UNITED KINGDOM AND AUSTRALIA

In the process of modernizing the framework of tax dispute resolution in India, it would be useful to analyse how some jurisdictions that have managed to move away from the traditional system of adversarial litigation to a system of alternative dispute resolution have done so. The United Kingdom and Australia have shown that it is possible for tax authorities to conduct principled negotiations without undermining their obligations under the law.[58]

A. THE UNITED KINGDOM: HMRC'S INTERNAL MEDIATOR MODEL

One of the most sophisticated systems for mediating taxpayer disputes anywhere is His Majesty's Revenue and Customs (**HMRC**) in the United Kingdom. Realizing that continuing with litigations in the First-tier Tribunal (**FTT**) was becoming highly costly and impractical,[59] HMRC implemented its ADR system on a trial basis in 2011. It became a fully-fledged part of their regular operations by 2013.[60]

---

[56] Income-tax Act 2025, s 379.
[57] OECD, *Tax Administration 2023: Comparative Information on OECD and Other Advanced and Emerging Economies* (OECD Publishing 2023) 112 <https://www.oecd.org/content/dam/oecd/en/publications/reports/2023/09/tax-administration-2023_87655bc9/900b6382-en.pdf> accessed 29 March 2026.
[58] ibid.
[59] The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, SI 2009/273, r 2.
[60] HM Revenue and Customs, *Alternative Dispute Resolution Guidance* (HMRC Internal Manual, 1 February 2023) ADRG01000 <https://www.gov.uk/hmrc-internal-manuals/alternative-dispute-resolution-guidance> accessed 29 March 2026.

The key feature of the UK approach is that it makes use of 'in-house', yet structurally independent, mediators. Instead of enforcing mediation with an outsider's assistance, HMRC resorts to using its own team of officers who were professionally trained and accredited by an outside organization, like the Centre for Effective Dispute Resolution (**CEDR**).[61]

The process of ADR at HMRC is completely voluntary and is normally used in cases in which communication between the taxpayer and case officer fails, or there are disputes based on facts (for example, in calculating the 'nature of trade' in R&D tax relief or complex VAT partial exemption procedures).[62] Significantly, HMRC excludes ADR in cases where the dispute involves tax evasion or fraud, or where the issue under dispute is only related to statutory interpretation issues with a HMRC red line position. The Process, a typical mediation process takes place quickly and normally in a 90 to 120-day period leading up to the one day mediation.[63] The mediator uses facilitative and evaluative mediation techniques.

The significant point here is that the HMRC mediator does not have any decision-making power; the decision-making lies with the original HMRC case officer and the taxpayer only.[64] This mediator will test the legal grounds and bring out the risk of the litigation. The transformation within the HMRC has been great. It has always been noted from external opinions as well as from official figures that HMRC's ADR settles about 85%-90% of the cases that enter the process, saving the trouble of going through years of tribunal proceedings.[65] It has been shown by the UK system that it is possible

[61] Peter Nias and Nigel Popplewell, 'The Use of Mediation in Tax Disputes – UK Position' (2014) 18 *Nederlands-Vlaams tijdschrift voor Mediation en conflict management* 49 <https://www.pumptax.com/wp-content/uploads/old/documents/The%20Use%20of%20Mediation%20in%20Tax%20Disputes%20-%20UK%20Position%20Peter%20Nias%20%20Nigel%20P%20%20%20.pdf> accessed 15 March 2026.

[62] HM Revenue and Customs, *Approach to Research and Development Tax Reliefs 2023 to 2024* (GOV.UK, 30 October 2024) <https://www.gov.uk/government/publications/hmrcs-approach-to-research-and-development-tax-reliefs-2023-to-2024/approach-to-research-and-development-tax-reliefs-2023-to-2024> accessed 27 March 2026.

[63] ibid.

[64] ibid.

[65] HM Revenue and Customs, *Annual Report and Accounts 2024 to 2025* (HC 1039, 2025) 131 <https://assets.publishing.service.gov.uk/media/687e5d318adf4250705c96d8/HMRC_annual_report_and_accounts_2024_to_2025.pdf> accessed 30 March 2026; HMRC dealing with backlog of ADR cases' *Tax Journal* (15 August 2025) <https://www.taxjournal.com/articles/hmrc-dealing-with-backlog-of-adr-cases> accessed 22 March 2026.

for a tax authority to have internal mediators who behave impartially, on the condition that an adequate ADR Guidance Manual is issued.[66]

B. AUSTRALIA: ATO'S INTEGRATED DISPUTE SYSTEM DESIGN

The Australian Taxation Office (**ATO**) addresses taxation disputes from a scholarly perspective of Dispute System Design (**DSD**) in understanding that conflict is an inescapable result of imposing complicated taxation laws in the business environment. The ATO is subject to the statutory requirements of being a 'model litigant' such that there are measures that must be taken in addressing the disputes before litigation in the Federal Court.[67]

Contrary to other systems where ADR is considered a standalone 'off-ramp' solution to litigation, the ATO considers dispute resolution as an integral component of the audit/assessment process. In-House Facilitation and Independent Review, the ATO utilizes a tiered system. First, there is the 'In-house facilitation', similar to the HMRC approach, whereby an unbiased facilitator within the ATO helps the audit team and the taxpayer to reduce the number of disputed facts.[68] The outstanding innovation by Australia however is the use of the 'Independent Review' procedure for both Large Market and Small Business taxpayers.[69] The Independent Review Mechanic, prior to issuing a final amended assessment (thus formalizing the litigation process), the taxpayer has an option to ask for an independent review. A different senior tax officer from the Objections and Review area who has never before taken part in the audit reviews afresh the case from a purely technical perspective.[70] The officer then holds a case conference and makes a written recommendation concerning the 'better view of the facts' and how the law should be applied.

---

[66] n 58.
[67] *Legal Services Directions 2017* (Cth) app B (Austl).
[68] Australian Taxation Office, 'In-house facilitation' (ATO Website, 12 July 2024) < https://www.ato.gov.au/individuals-and-families/your-tax-return/if-you-disagree-with-an-ato-decision/dispute-a-decision/in-house-facilitation> accessed 1 April 2026.
[69] Australian Taxation Office, 'Large market independent review' (2025) <https://www.ato.gov.au/individuals-and-families/your-tax-return/if-you-disagree-with-an-ato-decision/dispute-a-decision/large-market-independent-review> accessed 1 April 2026.
[70] Inspector-General of Taxation, *Review into the Australian Taxation Office's management of transfer pricing matters*(2013) <https://www.igt.gov.au/wp-content/uploads/2021/07/154_management-of-transfer-pricing-matters.pdf> accessed 2 April 2026.

The Code of Settlement and External Assurance, when mediation results in a proposed compromise, ATO officers are guided by a formalized *Code of Settlement*.[71] This Code legally obligates officers to weigh the relative strength of the parties' positions against the cost-benefit of continuing the dispute. Furthermore, to combat the fear of subsequent audits (a primary hurdle in India), the ATO instituted an external independent assurance process.[72] Retired Federal Court judges are engaged to retrospectively review high-value settlements to assure the public and parliament that the outcomes were 'fair and reasonable,' thereby insulating the individual ATO negotiating officer from political or vigilance backlash.[73]

C. Distilling Lessons for the Indian Tax Administration

The comparative analysis of the UK and Australia yields several critical lessons for integrating ADR into the Indian *Income Tax Act, 2025*.

Firstly, the success of ADR relies heavily on the codification of settlement parameters.[74] Both HMRC's ADR Manual and the ATO's Code of Settlement provide tax officers with the legal cover to negotiate based on litigation risk.[75] India lacks a comparable statutory directive; assessing officers are implicitly encouraged to maximise demand rather than optimise revenue realisation.

Second, structural independence is key. The present Dispute Resolution Panel (DRP) in India operates more like an offshoot of the audit team than an independent mediating body. For success, India needs to embrace the 'Independent Review' approach of the ATO or fully independent mediators who have nothing whatsoever to do with the assessing command.

---

[71] Australian Taxation Office, *Code of Settlement* (ATO Practice Statement Law Administration, PS LA 2015/1) <https://www.ato.gov.au/law/view/pdf?DocId=PSR%2FPS20151%2FNAT%2FATO%2F00001&filename=law%2Fview%2Fpdf%2Fpsr%2Fps2015-001.pdf&PiT=20260416000001> accessed 3 April 2026.

[72] Australian Taxation Office, *Annual Report 2023–24* (Commonwealth of Australia 2024) 84 <https://www.ato.gov.au/api/public/content/8a9681ac28ed48ab8f9f003202f4e333?v=5d48f157> accessed 2 April 2026.

[73] Australian Taxation Office, 'Independent assurance of settlements' (ATO Website, 4 October 2023) <https://www.ato.gov.au/individuals-and-families/your-tax-return/if-you-disagree-with-an-ato-decision/settlement/independent-assurance-of-settlements-program> accessed 28 March 2026.

[74] HM Revenue and Customs, *Litigation and Settlement Strategy* (HMRC Internal Manual, 6 February 2023) LSS10100 < https://www.gov.uk/hmrc-internal-manuals/litigation-and-settlement-strategy/lss10100> accessed 3 April 2026.

[75] n 69 para 6.

The time of intervention must also be reconsidered. In the Indian scenario, the process of dispute resolution (such as the Settlement Commission and the *Vivad se Vishwas* programs) is generally an intervention after the assessment process. The UK and Australian examples show that the process of mediation is infinitely more successful if it takes place during or right before the final assessment order.[76]

VI. CONCRETE STRUCTURAL SUGGESTIONS: A BESPOKE MEDIATION ARCHITECTURE FOR INDIA AND INTERNATIONAL TREATIES

It is impossible to integrate ADR into the taxation environment in a piecemeal fashion or via an occasional amnesty program.[77] What is needed is a complete statutory restructuring of the dispute resolution system. The first prong addresses domestic direct tax disputes through a pre-assessment mediation model, while the second prong tackles the escalating complexities of cross-border taxation by embedding mandatory mediation into international tax treaties.[78]

A. THE DOMESTIC FRAMEWORK: PRE-ASSESSMENT EVALUATIVE MEDIATION

The most critical flaw in India's current tax litigation lifecycle is that dispute resolution mechanisms are typically triggered after the final assessment order has been crystallised and the demand raised. Once the demand is formalised and the notice of demand under Section 289 is issued, institutional rigidity sets in.[79] By interceding before this formalisation, the framework prevents the artificial inflation of the dispute valuation and the subsequent mandatory pre-deposit requirements that severely cripple corporate cash flows.[80] Therefore, the proposed framework intervenes precisely at the draft assessment stage.

(i) THE 'INDEPENDENT TAX EVALUATOR' (ITE) MECHANISM

[76] PKF Bofidi, 'Tax Mediation: A Second Chance for Taxpayers and the Tax Authorities' (11 February 2025) <https://pkfbofidi.com/en/tax-mediation-a-second-chance-for-taxpayers-and-the-tax-authorities/> accessed 23 February 2026.
[77] *See also* n 21.
[78] OECD, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (OECD Publishing 2021) 4 <https://www.oecd.org/content/dam/oecd/en/topics/policy-issues/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf> accessed 25 March 2026.
[79] Income-tax Act 2025, s 289.
[80] Income-tax Act 2025, s 358(6); *See also* CBDT Instruction No 1914 (1996).

The Income Tax Act, 2025, should be amended to introduce a mandatory pre-assessment mediation phase for disputes exceeding a specified monetary threshold (e.g., proposed additions exceeding ₹10 Crores).

Under this proposed model, once an AO frames a draft assessment order proposing substantial variations to the returned income, the taxpayer is given the statutory right to invoke the Independent Tax Evaluator (**ITE**) mechanism. The ITE would not be an active jurisdictional Commissioner subject to internal administrative pressures, but rather a strictly neutral party drawn from a newly created, independent directorate under the Ministry of Finance.[81] This cadre would comprise retired ITAT members, retired High Court judges, and empanelled Senior Advocates specializing in taxation.

The scope of mandate of the ITE is strictly evaluative. Within a strict timeframe of 90 days, ensuring that there is no indefinite delay in the assessment process, the ITE conducts confidential 'without prejudice' meetings between the AO and the taxpayer.[82] The ITE evaluates the risk involved in the litigation of the proposed addition, considering the factual matrix, available evidence, and judicial precedents. If the conclusion reached by the ITE is that the addition rests on weak legal or factual grounds, such as a mechanical disallowance of legitimate business expenditure under Section 34 without appreciating commercial expediency,[83] or an addition under Section 102 where the taxpayer has already discharged the primary onus of proving identity, creditworthiness, and genuineness, then the ITE makes a non-binding 'Risk Evaluation Report' recommending a negotiated settlement or the complete dropping of the addition.[84]

(ii) INSTITUTIONAL SAFEGUARDS: THE SUPERVISORY COLLEGIUM

To address the paralyzing 'revenue bias' and the chilling effect of vigilance inquiries that plague Indian tax officers and stifle their discretionary powers, the framework must provide a robust statutory safe harbour.[85] An individual AO should not be

[81] n 24.
[82] *The Arbitration and Conciliation Act 1996*, s 75.
[83] Income-tax Act 2025, s 34.
[84] Income-tax Act 2025, s 102.
[85] n 24.

empowered to unilaterally accept the ITE's recommendation to reduce a tax demand, as this opacity could invite allegations of rent-seeking or corruption.[86]

Instead, if the taxpayer and the AO, guided by the ITE, reach a tentative consensus on the factual characterization or valuation (e.g., agreeing on a specific discount rate in a DCF valuation for unquoted shares), this consensus is formulated as a transparent 'Draft Settlement Term Sheet.' This term sheet is then escalated to a Supervisory Collegium a panel of three Principal Chief Commissioners of Income Tax (**Pr. CCIT**).[87]

The Collegium's role is solely to review the settlement for gross administrative unreasonableness or procedural irregularities, not to re-adjudicate the law or substitute the ITE's risk assessment with its own positional bias. Once ratified by the Collegium, the settlement becomes legally binding, and the AO is statutorily shielded from any subsequent scrutiny by the CAG or the Central Vigilance Commission (**CVC**) regarding that specific assessment.[88] This structural insulation, creating a verifiable paper trail of institutional consensus, is the *sine qua non* for genuine negotiation by revenue officers.

(iii) DEMOCRATIZING THE DISPUTE RESOLUTION PANEL (DRP)

To prevent jurisdictional overlap and procedural confusion, the existing DRP mechanism under Section 275 must be fundamentally overhauled and subsumed into the new ITE framework. Currently restricted primarily to eligible foreign companies and transfer pricing disputes, the DRP operates largely as an adjunct to the auditing system. Because it is composed of active Commissioners of Income Tax, it possesses an inherent 'revenue-first' institutional bias and is notorious for merely affirming the AO's draft orders. Maintaining the DRP alongside the ITE would create parallel, conflicting pre-assessment pathways. Therefore, the DRP should be phased out and replaced entirely by the ITE Directorate.[89] This democratizes dispute resolution, allowing domestic corporate taxpayers facing complex General Anti-Avoidance Rule

[86] Central Vigilance Commission, *Vigilance Manual* (8th edn, 2021) ch 10.
[87] Income-tax Act 2025, s 379.
[88] Income-tax Act 2025, s 526; Constitution of India, art 149.
[89] *Business Standard*, 'Restore judicial impartiality: scrap DRP' (18 October 2010) <https://www.business-standard.com/article/economy-policy/restore-judicial-impartiality-scrap-drp-110101800018_1.html> accessed 23 February 2026.

(**GAAR**) invocations or massive corporate restructuring disputes to access the same independent pre-assessment mediation as foreign entities.[90] By ensuring the mediating body is completely decoupled from the active assessing command, the framework breaks the institutional bias and transforms the draft assessment stage into a robust, quasi-arbitral forum.[91]

B. The International Framework: Mediation in Treaty-Based Tax Disputes

However, apart from the importance of domestic restructuring, the future of tax dispute resolution is in the international context. The increasing digitalization of the world economy, the emergence of complex intangible assets, and the adoption of the OECD/G20 Inclusive Framework BEPS including the allocation of taxing rights under Pillar One (Amount A) and the GloBE minimum tax regime under Pillar Two have dramatically increased the risk of double taxation in multiple jurisdictions.

Nowadays, cross-border tax disputes are mainly resolved under the Mutual Agreement Procedure (**MAP**) found under Article 25 of normal *Double Taxation Avoidance Agreements* (**DTAAs**).[92] The MAP process is simply a negotiation between the Competent Authorities (**CAs**) of the two sovereign nations, which is more diplomatic than legal in nature. However, MAP faces one basic deficiency because the statutory mandate of CAs to resolve the dispute is just that of 'endeavouring,' without any binding responsibility on the CA's part to conclude an agreement.[93] As a result, MAP proceedings often drag on for many years, causing the multinational taxpayer to be trapped in double taxation and huge uncertainties.[94]

---

[90] *The Finance Act 2012*, s 95; Income-tax Act 2025, s 77.
[91] Shome Committee, *Expert Committee on General Anti-Avoidance Rules (GAAR) Second Report* (Government of India 2012) 68 < https://www.pwc.com/mu/en/services/tax/assets/gaar_commitee_report.pdf> accessed 25 March 2026.
[92] OECD, *Model Tax Convention on Income and on Capital* (Condensed Version, OECD Publishing 2017) art 25.
[93] UN, *United Nations Model Double Taxation Convention between Developed and Developing Countries* (United Nations 2021) art 25; *See also Guide to the Mutual Agreement Procedure under Tax Treaties* (United Nations 2014) 12 <https://www.un.org/esa/ffd/wp-content/uploads/2014/10/ta-Guide_MAP.pdf> accessed 20 March 2026.
[94] OECD, *Making Dispute Resolution Mechanisms More Effective – Action 14: 2015 Final Report* (OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing 2015) 15 <https://www.oecd.org/content/dam/oecd/en/publications/reports/2015/10/making-dispute-resolution-mechanisms-more-effective-action-14-2015-final-report_g1g58cf2/9789264241633-en.pdf> accessed 1 April 2026.

(i) TRANSITIONING TO MANDATORY BINDING MEDIATION IN DTAAS

In order to solve the built-in inefficiencies in MAP, international tax treaties need to change to include Mandatory Binding Mediation. Although the OECD has come up with the Multilateral Convention to implement Tax Treaty Related Measures to Prevent BEPS, which has included provisions for MBA through Part VI of the MLI, most of the developing countries, such as India, have opted out.[95] The major reason behind opting out is that of constitutional sovereignty, since the developing countries find it hard to give taxing powers of activities in their territory to a private foreign arbitrator panel.[96]

However, mediation neatly dodges this trap of sovereignty. Unlike in arbitration, wherein an independent tribunal makes a binding ruling on the sovereign countries, mediation maintains the locus of decision-making squarely within the ambit of the respective Competent Authorities.

A modernised DTAA framework should stipulate that if CAs cannot resolve a MAP case within a definitive 24-month window, the dispute automatically triggers a mandatory mediation phase. To ensure neutrality and technical competence, a neutral mediator would be jointly appointed from a pre-agreed roster of international tax and trade experts. This institutional roster could be maintained by the UN Tax Committee or modelled after the World Trade Organisation's (**WTO**) Dispute Settlement Body panellists drawing on established, transparent international economic dispute frameworks that developing nations like India already trust and actively navigate.[97]

(ii) THE 'LAST BEST OFFER' (BASEBALL) MEDIATION HYBRID

[95] *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (opened for signature 24 November 2016) (MLI) Part VI; *See also* Department of Revenue, 'India's Position on the Multilateral Instrument' (Ministry of Finance, 2017) <https://www.indianembassyusa.gov.in/pdf/taxcorner/RatificationofMultilateral.pdf> accessed 2 April 2026.

[96] Michael Lang and others (eds), *The OECD Multilateral Instrument for Tax Treaties: Analysis and Effects* (Kluwer Law International 2018).

[97] WTO, *Understanding on Rules and Procedures Governing the Settlement of Disputes* (15 April 1994) (DSU) art 8 (Panel Composition); *See also* UN ECOSOC, 'Committee of Experts on International Cooperation in Tax Matters' (2025-2029 Term) <https://financing.desa.un.org/what-we-do/ECOSOC/tax-committee/> accessed 23 January 2026.

To prevent the mandatory mediation phase from devolving into another endless, non-committal talking shop, treaties can employ a highly structured mechanism known as 'Last Best Offer' or 'Baseball' mediation.

According to this approach, in case no voluntary agreement is reached through the evaluation process, both Competent Authorities have to present their last best offer accompanied by a succinct and evidence-based legal memorandum to the mediator. It is important to emphasize that the mediator does not have the right to develop a middle ground position.[98] On the contrary, he/she has to decide which of the two offers is better substantiated in light of the text of the DTAA in question, FAR analysis, and the existing OECD/UN Transfer Pricing Guidelines.[99]

Given that the CAs know for certain that the mediator will only select the most legally and economically viable offer, the two states are therefore structurally motivated, through game theory, to move away from their extreme, high-flying offers.[100] They have no option but to engage in a 'race to the middle,' putting forth very pragmatic, moderate offers in order to attract the choice of the mediator.[101] This dynamic inherently narrows the gap between the states, often facilitating a negotiated settlement even before the mediator is required to make a final selection.

(iii) ENHANCING TAXPAYER PARTICIPATION

In the present-day orthodox model of MAP, the taxpayer who holds the money at risk ends up being an 'object' to the whole process and is not even allowed into the room where states negotiate.[102] A contemporary model of international tax mediation needs to resolve the information imbalance by giving some participation rights to the taxpayer.

---

[98] Joost Pauwelyn, 'Baseball Arbitration to Resolve International Law Disputes: Hit or Miss?' (2019) 22 Florida Tax Review 69 < https://scholarship.law.ufl.edu/ftr/vol22/iss1/2/> accessed 24 February 2026.
[99] n 42; *See also* n 90.
[100] n 94.
[101] Samira Varanasi and Sriram Govind, 'Homerun in India: Baseball Arbitration' (The Arbitration Workshop, 8 March 2022) <https://www.thearbitrationworkshop.com/post/homerun-in-india-baseball-arbitration> accessed 23 January 2026.
[102] Melbourne School of Government, 'Dispute Resolution: Mutual Agreement Procedure' (Policy Brief 11, December 2021) 2 <https://government.unimelb.edu.au/__data/assets/pdf_file/0005/3965756/Policy-Brief-11-Dispute-Resolution-Mutual-Agreement-Procedure.pdf> accessed 20 January 2026.

While the multinational enterprise cannot dictate terms to sovereign states or act as an equal party to the treaty, granting them a quasi-observer status is vital. Allowing taxpayers to submit formal factual briefs, clarify complex corporate supply chains, and participate in the initial information-gathering joint sessions of the mediation ensures that the mediator and the CAs are operating on an accurate, commercially realistic understanding of the disputed cross-border transaction, rather than relying on abstract administrative assumptions.[103]

Ultimately, as it relates to both domestic transfer pricing adjustments and the complexities of profit attribution internationally under multilateral agreements, the long-standing adversarial model has failed. By structurally integrating an evaluative mediation process, which is supported by robust statutory and compulsory international framework-based safe-harbours for tax authorities; they can release billions that are currently being held. The most significant outcome of this action will be to reduce congestion on appeals dockets, creating a macro-economic environment of certainty of taxation, foreign direct investment, and regulatory compliance.

VII. CONCLUSION

The structure of direct tax dispute resolution, be it in India or in the global digital economy, is collapsing under the strain of its adversarial rigidity. As is clear from the analysis of this paper, it is an expensive legal fiction to believe that sovereign taxation and cooperative dispute resolution cannot go hand in hand. The constant aim at maximum possible revenue through litigation has strangely led to huge revenue losses for the exchequer along with decades of financial insecurity for the taxpayer.

The ad hoc amnesties implemented by the Indian government in the past have been good fiscal stop-gap solutions but do not resolve the fundamental malaise of the system. Real change requires a change in paradigm, from a mindset of defensive and aggressive appraisals to one where risks are assessed and revenues are realized.

The incorporation of ADR into the provisions of the Income Tax Act, 2025, and international DTAAs represents the exact mechanical solution needed to make this

[103] Observatory on the Protection of Taxpayers' Rights, *2015-2017 General Report on the Protection of Taxpayers' Rights*(IBFD 2018) <https://www.ibfd.org/sites/default/files/2022-05/OPTR%202017%20General%20Report.pdf> accessed 1 March 2026.

change happen. Nevertheless, it is clear from the comparison between the United Kingdom and Australia that it is not enough to just stick the word 'mediation' in the statute. ADR can only be relevant in the tax context if it is evaluative by its very nature.

It is crucial to note that the success of this integration process lies solely on institutional empowerment. Revenue officers will act in good faith and engage in interest-based negotiations only in cases where they are legislatively immune from the debilitating anxiety of facing future vigilance inquiries. The solution to these obstacles lies in the two-fold institutional structure which has been suggested. Domestically, an ITE, with a supporting supervisory collegium, is the domestic safe-haven for rational compromise. Internationally, moving away from the dead-weight of the MAP process and toward binding mediation processes such as the Last Best Offer, ensure state-sovereignty and provide finality in decision-making.

In reality, the act of utilizing mediation as a means for resolving tax disputes is not about relinquishing power; it is about advancing it. Through the utilization of ADR, the State recognizes that collecting taxes in a timely, efficient and definitive manner will be a far greater indicator of successful administration than being burdened with many outstanding cases before the courts. The increased complexity of modern commercial transactions now exceeds by far the evolution of the tax code, and therefore, mediation is the most practical method through which a stable tax system can be maintained.

VERDICT VOICES LAW. LEARN. LEAD.

ADMISSIBILITY OF ELECTRONIC EVIDENCE IN INDIA: A COMPARATIVE JURISPRUDENTIAL STUDY OF THE IEA, 1872 AND THE BSA, 2023

Shashwat Prashar[1]

ABSTRACT

Introduction of digital communications has completely transformed criminal and civil proceedings, wherein the digital information has become an indispensable document of proof instead of being an additional one. It had been for almost two decades that the admissibility of such digital information had been governed in India under a statutory scheme contained in Section 65A and 65B of the Indian Evidence Act (IEA), 1872. Such a statutory scheme, which had very strict procedural pre-requisites, had evolved on the basis of a series of important judicial precedents, including the landmark cases of Anvar P.V. v. P.K. Basheer and Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal. This paper discusses the legal doctrine of the past statute in the light of the current statutory scheme contained in Sections 61 to 63 of the Bharatiya Sakshya Adhiniyam (BSA), 2023. The BSA, while providing forward-thinking definitions of the technology like cloud computing, smartphones, Internet of Things, and semiconductor memories, has modified the traditional concept of primary and secondary evidence, where electronic documents are considered to be primary evidence.The key, and somewhat paradoxical, finding of this paper is that the BSA does not weaken procedural formality but rather shifts it. A careful analysis of section 63(4) reveals that the level of formality required for the process of authentication of evidence in the BSA is higher than in its predecessor: Section 63(4) provides for a two-stage signature by both the individual in control of the device and the technical expert, in contrast to one signature under Section 65B(4).

Keywords: Electronic Evidence; Bharatiya Sakshya Adhiniyam, 2023; Admissibility of Digital Evidence; Authentication of Electronic Records; Section 63 BSA

[1] Shashwat Prashar, 2nd Year Law Student L.L.B (Hons), Chanakya National Law University, Patna

I. INTRODUCTION

The rapid advent of the digital age has revolutionized the methods of collecting, creation and exchange of evidences in courts. People interact with each other mostly via technology, and the law of evidence needs to change accordingly. Collecting and evaluation of evidence have been based on oral and documentary evidence; nowadays courts need to deal with emails, digital documents, and social media.

For example, the introduction of electronic evidence in India was introduced through the amendment to the Indian Evidence Act, 1872 under the Information Technology Act, 2000 where sections 65A[2] and 65B[3] were inserted. These two sections have brought about a unique way of admission of electronic evidences that can be considered as a different class of evidences. Indeed, as a matter of fact, the provisions have been subject to much controversy over the manner in which the electronic evidence ought to be admitted especially when taking into consideration the certification provision in Section 65B(4). Important cases like Anvar P.V. v. P.K. Basheer[4] and Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal[5] were some of the efforts made to clear the confusion surrounding these issues.

The Bharatiya Sakshya Adhiniyam, 2023 has been passed by Parliament with an intention to change the evidentiary laws from those that are colonial to one that can address the current technological reality. This statute commenced operation on 1 July 2024[6] and will replace the Indian Evidence Act.

II. RESEARCH OBJECTIVES

This study undertakes a critical assessment of the evolving law governing electronic evidence in India. Its objectives are to:

a. Identify the legal provisions relating to electronic evidence under the Indian Evidence Act, 1872 and the Bharatiya Sakshya Adhiniyam, 2023;

[2] Indian Evidence Act, 1872, ss. 65A, 65B (inserted by the Information Technology Act, 2000, s. 92 and Second Schedule, w.e.f. 17 October 2000).
[3] Indian Evidence Act, 1872, s. 65B(4)
[4] Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473
[5] Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal, (2020) 7 SCC 1.
[6] Bharatiya Sakshya Adhiniyam, 2023 (Act 47 of 2023), s. 1(2); the substantive provisions, including ss. 61–63, came into force on 1 July 2024.

b. Evaluate the changes introduced by the Bharatiya Sakshya Adhiniyam, particularly with respect to admissibility standards and certification requirements;

c. Examine judicial interpretation of electronic evidence, with particular reference to Anvar P.V. v. P.K. Basheer[7] and Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal[8];

d. Identify the practical and institutional challenges affecting the admissibility of electronic evidence under both regimes; and

e. Assess, comparatively, whether the new law genuinely relaxes procedural formalism or merely redistributes it.

III. RESEARCH QUESTIONS

a. What were the legal standards governing the admissibility of electronic evidence under the Indian Evidence Act, 1872?

b. How has the Bharatiya Sakshya Adhiniyam, 2023 restructured these standards, and in what respects, if any, has it relaxed them?

c. Is the certification requirement under Section 63(4) of the BSA more, less, or comparably demanding than Section 65B(4) of the IEA?

d. Does the Bharatiya Sakshya Adhiniyam resolve the institutional and interpretive difficulties observed under the earlier framework, or does it introduce new ones?

VERDICT VOICES LAW. LEARN. LEAD.

IV. LITERATURE REVIEW

The issue of electronic evidence being admissible has been extensively researched and decided upon in India, due to the issues caused by fast-paced technological changes. Studies on the Indian Evidence Act, 1872 have considered Sections 65A[9] and 65B[10] extensively, especially the certificate requirement in Section 65B(4). The highly cited early study by Vaidialingam pointed out that the Supreme Court's interpretation of Section 65B(4) in Anvar P.V. v. P.K. Basheer deviates from standard interpretations of

[7]Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473.
[8]Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal, (2020) 7 SCC 1.
[9] Indian Evidence Act, 1872, ss. 65A, 65B
[10] Indian Evidence Act, 1872, ss. 65B

statutes by taking the certificate to be the sole means of authenticating the document, despite there being nothing in the language of Section 65B(4) that would limit the mode of authentication to that method alone.[11] The subsequent empirical survey carried out by Singh and Bamb of practices after 2014 revealed how the inconsistency finally came to rest in Arjun Panditrao Khotkar[12].

V. CONCEPTUAL FRAMEWORK: DEFINING ELECTRONIC EVIDENCE

Before assessing admissibility, it is necessary to identify what qualifies as electronic evidence as a matter of statutory definition, since the term is treated differently across the two regimes under study. The Information Technology Act, 2000 defines 'electronic record' to include data, record, image, or sound generated, stored, received, or sent in electronic form[13]. The Indian Evidence Act incorporates this definition by reference within its account of 'document' under Section 3[14], without independently defining the term. The Bharatiya Sakshya Adhiniyam, by contrast, defines 'document' under Section 2(1)(d) to expressly include electronic and digital records[15], and defines 'evidence' under Section 2(1)(e) to extend to facts established through electronic or digital means[16]. This shift from incorporation by cross-reference to an autonomous, technology-inclusive definition is a structural change in its own right, distinct from the certification question examined later in this paper. It is first required that one understands what electronic evidence means in terms of statutory language, since the two systems being considered use different understandings of the concept.

As per Information Technology Act, 2000, "electronic record" shall mean "data, record, image or sound generated, stored, received or sent in electronic form." In the Indian Evidence Act, this definition forms part of the definition of the word 'document' in section 3. On the other hand, the Bharatiya Sakshya Adhiniyam defines the word 'document' as that which contains electronic and digital document in section 2(1)(d),

[11] Ashwini Vaidialingam, 'Authenticating Electronic Evidence: Section 65B, Indian Evidence Act, 1872' (2015) 8 NUJS Law Review 43
[12] Bhavyakirti Singh & Aditya Bamb, 'The Dichotomy of the 65B Certificate: Analysing Trends with Regard to the Authentication of Electronic Evidence in India' (2021) 10(1) Christ University Law Journal 73.
[13] Information Technology Act, 2000, s. 2(1)(t).
[14] Indian Evidence Act, 1872, s. 3 (definition of 'document', as amended by the Information Technology Act, 2000).
[15] Bharatiya Sakshya Adhiniyam, 2023, s. 2(1)(d).
[16] Bharatiya Sakshya Adhiniyam, 2023, s. 2(1)(e).

while the word 'evidence' is defined as that which contains facts proved by electronic and digital means in section 2(1)(e). This difference in the approach towards these definitions is important as such.

The additional issue of definition relates to classification. In general terms, electronic evidence encompasses e-mail and other messaging transactions, digitalized documentation, voice and video recordings, metadata, network communication, cloud-based data storage, and semiconductor memory-based data storage.[17] Within this wide class of electronic evidence arises an issue of taxonomy for both statutes to grapple with; namely, whether an electronic record constitutes primary or secondary evidence as a matter of its nature. In India, electronic records generated as "computer output" constituted a subset of secondary evidence which could be proved by means of the specific procedure under Section 65A and 65B of the Indian Evidence Act rather than under the general provisions relating to primary and secondary evidence.[18]

VI. ADMISSIBILITY UNDER THE INDIAN EVIDENCE ACT: A DOCTRINAL HISTORY

Sections 65A and 65B were added to the Indian Evidence Act through the Information Technology Act, 2000, which came into force on 17 October 2000[19]. The section 65A states that electronic records can be proved in accordance with section 65B[20], where a 'computer output' is considered to be a document that is admissible without any additional proof of the original, subject to the provisions of Section 65B(2) and where there is a certificate under Section 65B(4).[21]

However, the judicial history of the provision indicates that there has been a great deal of inconsistency in terms of how the doctrine evolved in this regard. In the case of State v. Mohd. Afzal, the Delhi High Court held that compliance with Section 65B(1) and Section 65B(2) would be sufficient to make the electronic record admissible without having the Section 65B(4) certificate[22]. Further, the Supreme Court in State (NCT of

[17] Vakul Sharma & Seema Sharma, Information Technology Law and Practice: Cyber Laws and Laws Relating to E-Commerce, Privacy, Social Media, Defamation (9th edn, LexisNexis 2025) ch. 14.
[18] Indian Evidence Act, 1872, ss. 65A–65B, read with ss. 62–63 (the general primary/secondary evidence provisions).
[19] Information Technology Act, 2000, s. 92 and Second Schedule, inserting ss. 65A–65B into the Indian Evidence Act, 1872, w.e.f. 17 October 2000.
[20] Indian Evidence Act, 1872, s. 65A.
[21] Indian Evidence Act, 1872, s. 65B(2), (4).
[22] State v. Mohd. Afzal, 2003 (71) DRJ 178 (Del HC).

Delhi) v. Navjot Sandhu held that electronic record could be admitted as secondary evidence under Section 63 and Section 65 in the absence of the Section 65B(4) certificate.[23]

However, the law in this regard was overruled in Anvar P.V. v. P.K. Basheer, wherein the Supreme Court declared that Sections 65A and 65B form a self-contained Code dealing with electronic evidence and the fulfillment of Section 65B(4) certificate was imperative, thus expressly rejecting the earlier view expressed in Navjot Sandhu case[24]. According to the court, the general laws of secondary evidence cannot be applied once a specific procedure has been laid down for that specific evidence[25]. Such interpretation of the law received significant academic criticism, with Vaidialingam pointing out that the Supreme Court has read an exclusivity into the Section 65B(4) which it does not need.[26]

VII. STATUTORY STRUCTURE OF ELECTRONIC EVIDENCE UNDER THE BSA: SECTIONS 61–63

These provisions make changes to the way electronic evidence is treated in three successive sections. Section 61 makes it clear that no information which is stored, processed, or transmitted in an electronic form will be refused merely because it is electronic in nature. It deviates from the concept of secondary evidence under the Evidence Act of 1872 and makes electronic records fall within the ambit of primary evidence when it is presented in proper custody[27]. The Parliamentary Standing Committee on Home Affairs, when analyzing the relevant section of the Bill, approved this change owing to its increasing significance in modern-day trials but pointed out the lack of chain of custody protection[28].

[23] State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600.
[24] Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473, paras 22–24.
[25] Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473, para 17.
[26] Ashwini Vaidialingam, 'Authenticating Electronic Evidence: Section 65B, Indian Evidence Act, 1872' (2015) 8 NUJS Law Review 43, 58–61
[27] Bharatiya Sakshya Adhiniyam, 2023, s. 61.
[28] Parliamentary Standing Committee on Home Affairs, Rajya Sabha, 248th Report on the Bharatiya Sakshya Bill, 2023 (10 November 2023).

Section 62 states that the contents of any electronic record may be proved in terms of Section 63[29], having the same role that Section 65A did in the former Act, although not referring to secondary evidence defined as such.

Section 63 states the admissibility conditions. The first three subsections reproduce the old admissibility conditions of Section 65B(2), namely: the computer or the communications device was used routinely for the relevant purpose, relevant information was input into the computer or the communications device routinely, and that the device was working properly at the relevant time[30]. There are two hallmarks of such a departure from the predecessor legislation. Firstly, Section 63 explicitly applies to 'communication devices' in addition to computers, an extension designed specifically for addressing smartphones and similar technology that the drafters of the 1872 Act could never have considered[31]. Secondly, Section 63(4) provides for the requirement that the certificate regarding the electronic record be provided in the form as prescribed in the Schedule to the Act and split into Part A and Part B, both to be filled in by the relevant individuals – Part A by the individual in charge of the relevant device and Part B by an expert.[32] It is the dual certification requirement that differs fundamentally from Section 65B(4) requiring only one certificate from a person in a 'responsible official position'.

In sum, the above restructuring does two quite separate things which this paper considers separately – it classifies electronic records as primary evidence in accordance with Section 61, and raises the bar for certification under Section 63(4). Thus, the common description of the BSA as having 'simplified' or 'relaxed' the certification process can only be correct insofar as the widened scope of applicable technology is concerned.

[29] Bharatiya Sakshya Adhiniyam, 2023, s. 62.
[30] Bharatiya Sakshya Adhiniyam, 2023, s. 63(2)(3).
[31] Bharatiya Sakshya Adhiniyam, 2023, s. 63(1)(2).
[32] Bharatiya Sakshya Adhiniyam, 2023, s. 63(4) and the Schedule (certificate, Parts A and B).

VIII. COMPARATIVE ANALYSIS: BSA AND IEA ON KEY PARAMETERS

Sections 61 to 63 of the BSA and Sections 65A–65B of the IEA share the common objective of authenticating electronic records, but differ across several specific parameters, summarised below.

Parameter	IEA, 1872 (ss. 65A–65B)	BSA, 2023 (ss. 61–63)
Classification of electronic record	Secondary evidence, proved through a special procedure	Primary evidence under s. 61, where from proper custody
Certificate signatories	Single signature: person in a responsible official position	Dual signature: person in control of device and an expert
Technology covered	Computers and computer output	Computers, communication devices, cloud, IoT, semiconductor memory
Certificate format	No prescribed statutory form	Prescribed Schedule (Parts A and B)
Judicial flexibility to relax requirement	Permitted temporarily (Shafhi Mohammad), then withdrawn (Arjun Panditrao)	Untested; no reported Supreme Court ruling as yet
Chain of custody	No statutory provision	No statutory provision, despite Standing Committee recommendation

IX. THE CERTIFICATION REGIME: SECTION 65B(4) IEA VERSUS SECTION 63(4) BSA

Certificate is the key factor in the admissibility process of electronic evidence in India, and here is where the divergence of the BSA from its predecessor becomes really significant – even counterintuitive.

According to Section 65B(4)[33], one certificate of an individual occupying an official position with respect to the working of the device would be enough to establish the authenticity of electronic document. In this situation, the main problem would be associated with the involvement of third parties (telecommunication service providers, cloud computing services providers, etc.), controlling the relevant device, but having nothing to do with the case.

Clause 63(4) of the BSA[34] maintains the certificate requirement but now mandates its submission in the dual-form provided for in Schedule to the Act – one part to be signed by the individual in charge of the device and the other by the expert[35]. This double-signature arrangement does not solve the initial problem of third-party assistance since it introduces an additional one, that of the lack of statutory definition of who qualifies as an 'expert' under the provisions of this Act, thus placing the issue of expert qualifications and availability squarely into the practical sphere[36]. In smaller cities, which have relatively undeveloped forensic infrastructure, this might be an important restriction.

This concrete example of implementation difficulties shows why. Prosecution witnesses who have already tendered their certificates under the old format of Section 65B were made to re-tender their certificates under the format prescribed in the BSA schedule, many of which did not meet the required format[37]. It is natural for there to be some friction in the early stages of any procedural system; however, it becomes obvious that the certificate system provided for under the BSA is more burdensome than the previous system.

The conclusion that is being made here, therefore, is limited to the observation that the BSA is not a liberalising document with regards to the law on electronic evidence. As far as certification is concerned, the standard required under the BSA is actually stricter than that of Section 65B(4). Any liberalising feature that the BSA brings with

[33] Indian Evidence Act, 1872, s. 65B(4).
[34] Bharatiya Sakshya Adhiniyam, 2023, s. 63(4).
[35] Bharatiya Sakshya Adhiniyam, 2023, Schedule, Part B.
[36] K&K Litigation, 'Section 63 BSA 2023: Admissibility of Electronic Evidence', ksandk.com (4 January 2025) <https://ksandk.com/litigation/section-63-bharatiya-sakshya-adhiniyam-2023/>
[37] Bar and Bench, 'Navigating the Transition: Implications of the Bhartiya Sakshya Adhiniyam on Digital Evidence in Ongoing Trials', Bar and Bench (14 September 2024) <https://www.barandbench.com/columns/navigating-the-transition-implications-of-the-bhartiya-sakshya-adhiniyam-on-digital-evidence-in-ongoing-trials>

respect to electronic evidence law can be attributed to the change in classification under Section 61 and the broadening of Section 63.

X. COMPARATIVE INTERNATIONAL PERSPECTIVES ON AUTHENTICATION

A comparative analysis throws into stark light India's continued dependence on certification. Pursuant to the Rules of Evidence under the federal law in the United States, Rules 902(13) and 902(14), enacted in 2017, the authentication of electronically stored information through a certificate ascribing the appropriate hash value or output generated by a computer system is possible without the requirement of foundation testimony of a witness in court[38].

In England, the Section 69 of the Police and Criminal Evidence Act of 1984 had previously adopted a presumption-based method for evidence generated by computers in criminal cases; however, this section was subsequently repealed in 1999 due to the opinion that computers have become too commonplace such that proof of correct working in each instance was disproportionate.; From there onwards, the responsibility for raising doubts concerning the reliability of the records has been placed on the party opposing the documents, and not on the party supporting them to get their reliability certified beforehand[39]. The Civil Evidence Act, 1968 had adopted a largely similar certification process for civil cases, but as pointed out by Chadha and Sivaraman, English courts have always been more forgiving about any procedural deficiencies in the certificates when the reliability of the records has never really been in question[40].

In light of such comparators, the provision of a second signature provided by experts in Section 63(4) of the BSA is taking India's certification framework towards the contrary direction of the international trend that leans towards reliance on self-certification and presumption for establishing reliability. Such deviation represents a conscious jurisprudential decision, in accordance with the specific concern that has been raised many times before the Standing Committee with respect to the possibility

[38] Federal Rules of Evidence (US), r. 902(13)–(14) (as amended 2017); see also r. 901.
[39] Police and Criminal Evidence Act, 1984 (UK), s. 69 (repealed by the Youth Justice and Criminal Evidence Act, 1999, s. 60, Sch. 6); Civil Evidence Act, 1968 (UK), s. 5.
[40] Vaibhav Chadha & Janani Sivaraman, 'Critical Analysis of the Law on Admissibility of Electronic Evidence in India' (2024) Jindal Global Law Review.

of tampering with electronic documents in the Indian forensic and investigative framework[41]. Whether such formalism is warranted by the institutional setting in India, or it poses the risk of repeating the mistake made in Anvar P.V., is something that will be addressed at the conclusion of this paper.

XI. CHALLENGES IN ADMISSIBILITY: INSTITUTIONAL AND PRACTICAL ISSUES

Apart from the legislative framework for the certification process, the use of electronic evidence under either of the systems faces limitations due to certain institutional issues that are beyond the capacity of the legislation to solve.

First, there is a lack of definition of the term 'expert' in the context of Section 63(4) Schedule, Part B, which means that the accreditation and competency standards will have to be created through practice directions or departmental rules or judicial interpretation of law, an issue which did not arise with the single signature requirement under Section 65B(4)[42]. Second, the forensics infrastructure available to provide the necessary expert certification is available only in urban areas and therefore delays in litigation and investigations in small towns and rural areas is likely to result. Third, although there was a clear recommendation made by the Standing Committee that the chain of custody for electronic and digital evidences collected during investigation should be ensured, there is no mention of this issue in the BSA Act itself.[43]

Fourth, since the electronic evidence provisions of the BSA became applicable on 1 July 2024[44], there has not been much judicial opportunity for testing the dual-certification requirement, or how cloud-computing or third-party records should be treated, or if there exists an analogue of the Shafhi Mohammad exception. This interpretative ambiguity itself is one transitional cost of legislative change, separate from the institutional costs referred to above.

[41] Parliamentary Standing Committee on Home Affairs, Rajya Sabha, 248th Report on the Bharatiya Sakshya Bill, 2023 (10 November 2023), observations on Clause 57.
[42] Bharatiya Sakshya Adhiniyam, 2023, s. 63(4); cf. Indian Evidence Act, 1872, s. 65B(4).
[43] Parliamentary Standing Committee on Home Affairs, Rajya Sabha, 248th Report on the Bharatiya Sakshya Bill, 2023 (10 November 2023), recommending a statutory chain-of-custody safeguard for electronic and digital records.
[44] Bharatiya Sakshya Adhiniyam, 2023, s. 1(2).

XII. CONSTITUTIONAL AND PROCEDURAL SAFEGUARDS

The admissibility of electronic evidence needs to be looked at in light of constitutional protections for a fair trial and due process in Article 21 of the Constitution[45] that are equally applicable in cases of laws like the IEA and the BSA. The requirement of certification under Section 65B(4)[46] and Section 63(4)[47]also has a constitutional component to it in that it prevents the conviction of the accused based on electronic evidence that may have been tampered with or is unreliable.

In addition, the right to cross-examine electronic evidence produced in court needs to be considered. Both sides should have a fair chance of examining the genuineness of the electronic records and even the process through which these records were obtained especially when the collection of such records involves the forensic expert or any intermediary. The extension of the definition of certification to an independent expert under the BSA, in theory, makes this protection better because it adds an extra, supposedly neutral, layer of accountability but only if the certificate issued by the expert is indeed independent and not simply an afterthought to investigative certificates.

Issues of privacy must also be considered in connection with the use of electronic evidence due to the growing recognition of the duties to preserve privacy in light of the Digital Personal Data Protection Act, 2023[48]. The issue of the use of electronic evidence and its possible conflicts with the aforementioned privacy issues must be resolved and, to some extent, goes well outside of the scope of this paper. Taken together, the Article 21's guarantee of fair trial and the right to cross-examination along with the emerging privacy rights create a multi-level check on the procedural framework established by both Acts, in addition to the certification procedure analyzed above.

XIII. CONCLUSION

However, a major takeaway from this paper contradicts the prevalent belief concerning the Bharatiya Sakshya Adhiniyam, 2023: this act is seen as relaxing

[45] Constitution of India, art. 21.
[46] Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473.
[47] Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal, (2020) 7 SCC 1.

[48] Digital Personal Data Protection Act, 2023, s. 4.

procedural formalism regarding the use of electronic evidence as prescribed by the Indian Evidence Act. However, on careful textual analysis, the former holds true only to some extent. In relation to two areas, the BSA actually makes it easier; first, it changes the classification of electronic records from secondary to primary evidence in Section 61, and second, it expands the scope of technology referred to in Section 63 to cover communication devices, cloud computing, IoT, and semiconductor memory. Yet, when it comes to certification specifically, the requirement of two signatures in Section 63(4) is in fact more stringent compared to the earlier requirement of a single signature certificate under Section 65B(4).

The second finding is about the process of adjudication. The doctrinal history that was discussed above in connection with Mohd. Afzal, Navjot Sandhu, Anvar P.V., Shafhi Mohammad and Arjun Panditrao Khotkar indicates that twenty years and six key decisions were necessary to consolidate the interpretation of the regime introduced by the IEA in a fixed and rigid form. The BSA is in this very interpretive space without having any established precedents because Section 63 has never been considered by the Supreme Court. In any event, whatever flexibility of interpretation of Section 63(4) courts allow will certainly reflect the debates around Section 65B(4).

The third observation made through the international comparative analysis is that the certification-based system in India has now become increasingly divergent from international systems as compared to its position prior to the enactment of the BSA. The shift towards self-authentication in the United States in light of Federal Rules of Evidence 902(13)-(14) and the move away from reliance on certificates to create presumption of reliability in the United Kingdom since the repeal of Section 69 of the Police and Criminal Evidence Act, 1984 indicate that the reliability challenge lies with the opposite party.

Unresolved Issues

a. Qualifications of an 'expert' in relation to Part B of the Schedule to Section 63 are not defined in statute, but rather developed in practice;
b. Parliamentary Standing Committee's suggestion of incorporating a statutory chain-of-custody obligation for electronic and digital records is yet to be included into the BSA, and its future in subordinate rules to the Bharatiya Nagarik Suraksha Sanhita, 2023 is uncertain;

c. there has been no interpretation of Section 63(4) in the form of a Supreme Court judgment, hence the question of whether a similar relaxation of the Shafhi Mohammad principle would apply if obtaining dual certifications is truly impossible;

d. There remains the transitional issue of what to do with electronic records that originated, or have been certified, under the IEA, but continue to be used in ongoing trials after 1 July 2024 – one of which there is no clear answer in the text of the BSA; and

e. Access to qualified forensic experts in non-metropolitan India remains an empirical issue unresolved by this paper, but which speaks directly to whether Section 63(4) operates as intended.

Recommendations

a. That subordinate rules or practice directions regarding the qualification, accreditation, and empanelment criteria for the term 'experts' as per Part B of the Section 63 Schedule may be issued by the Ministry of Home Affairs or any other rule-making authority, to ensure that the said provision is not made into a de facto impediment to the production of electronic evidence;

b. That the chain-of-custody protection suggested by the Standing Committee may be provided, whenever possible, either through an amendment to the BSA or through binding rules under the Bharatiya Nagarik Suraksha Sanhita, 2023, and not left merely to administrative practice;

c. That judicial academies must give priority to training programs on the practical working of Section 63(4) along with its Schedule for trial court judges in light of the large number of cases involving electronic evidence; and

d. That the courts must, in case Section 63(4) ever comes to be tested in litigation, be mindful of the possibility of creating the same hard-line exclusionary principle as existed under Anvar P.V., and evaluate whether the more flexible and fact-based principle, as was briefly applicable in Shafhi Mohammad, ought to apply where dual certification cannot realistically be obtained; and

INTERSTATE WATER DISPUTE: A CRITIQUE

Vedant Vivek Pimprikar[1]

I. INTRODUCTION

India is a land of rivers. With over 400 river systems, water has been both a source of life and a cause of lasting dispute since ancient times.[2] In the constitutional scheme, water occupies a unique place; it is simultaneously a subject of state legislative competence and a matter of national concern when it flows across state boundaries. Article 262 of the Constitution of India empowers Parliament to provide by law for the adjudication of disputes relating to the waters of any inter-state river or river valley.[3]

Pursuant to this constitutional mandate, Parliament enacted the Inter-State River Water Disputes Act 1956, which defines an 'inter-state river' as a river that flows through the territories of two or more states.[4] The Act provides for the constitution of Water Disputes Tribunals upon reference by the Central Government, following the failure of negotiations between states. This mechanism has been invoked in numerous major disputes, including the Narmada,[5] Krishna, Godavari, and Cauvery River controversies, each of which has lasted for decades and generated substantial litigation.

Despite the constitutional architecture and a rich body of litigation, the resolution of inter-state water disputes in India remains deeply problematic. Scholars have observed that the ISRWDA has failed to deliver timely, durable, and enforceable awards.[6] The fundamental problem is structural: the Act creates ad hoc tribunals without permanent status, excludes the Supreme Court's jurisdiction under Article 131, fails to provide for effective enforcement machinery, and operates in the absence of a comprehensive national water policy framework.[7] As a result, disputes fester for decades, tribunals operate in legal limbo, and awards are routinely challenged or ignored.[8]

---

[1] Vedant Vivek Pimprikar, 3rd Year B.B.A.L.L.B (Hona), Maharashtra National Law University Nagpur
[2] K.L. Rao, INDIA'S WATER WEALTH, 1st ed. 1975, p. 7.
[3] Constitution of India 1950, Art. 262(1).
[4] Inter-State River Water Disputes Act 1956, Sec. 2(c).
[5] Narmada Water Disputes Tribunal Award 1979, Government of India.
[6] R.R. Iyer, WATER: PERSPECTIVES, ISSUES, CONCERNS, 1st ed. 2003, p. 45.
[7] M.P. Jain, INDIAN CONSTITUTIONAL LAW, 8th ed. 2018, p. 1124.
[8] State of Rajasthan v. State of Madhya Pradesh (2014) 6 SCC 607.

This essay offers a systematic critique of the existing framework under six heads: (1) the historical evolution of the inter-state water dispute mechanism; (2) the constitutional framework and the tension between Articles 131, 136, and 262; (3) the structural and procedural deficiencies of Water Disputes Tribunals; (4) the persistent problem of enforcement; (5) the politicisation of water disputes and its constitutional consequences; and (6) the challenge of climate change and its implications for static water-allocation frameworks. The essay concludes with normative recommendations for comprehensive reform.

II. HISTORICAL BACKGROUND AND LEGISLATIVE EVOLUTION

A. PRE-CONSTITUTIONAL PERIOD

The problem of inter-provincial water disputes is not a post-independence phenomenon. The Government of India Act 1919 first attempted to address it by conferring on the Governor-General in Council the power to define the extent to which legislation of one province applied to rivers flowing through other provinces.[9] The more elaborate Government of India Act 1935 introduced a separate provision under Section 130 that empowered the Federal Court to hear river-water disputes between provinces, though this mechanism was largely never invoked.[10]

B. CONSTITUENT ASSEMBLY DEBATES

The framers of the Indian Constitution were acutely aware of the potential for water conflicts in a federal polity. In the Constituent Assembly debates of September 1949, Dr B.R. Ambedkar acknowledged that the provision relating to water disputes was deliberately designed to exclude the ordinary court system, creating instead a specialised adjudicatory body that could bring technical expertise to bear on complex hydrological questions.[11] Article 262 was the result of this deliberation, and it represented a constitutional choice in favour of expert tribunalisation over judicial adjudication in the traditional sense.[12]

[9] Government of India Act 1919, Sec. 45A.
[10] Government of India Act 1935, Sec. 130.
[11] Constituent Assembly Debates, Vol. IX (September 12, 1949), p. 1165 (Dr. B.R. Ambedkar).
[12] Constitution of India 1950, Art. 262(2).

C. *Enactment of the ISRWDA 1956*

The Inter-State River Water Disputes Act 1956 was enacted to give effect to Article 262. Section 3 of the Act provides that if it appears to the Central Government that a water dispute with respect to an inter-state river cannot be settled by negotiation, the Central Government shall refer the dispute to a Tribunal for adjudication.[13] Constitutional scholars have noted that this Act represented an innovative exercise of Union legislative power in a domain that is principally a state subject under Entry 17 of List II of the Seventh Schedule.[14]

III. Constitutional Framework: Scheme and Tensions

A. *Distribution of Legislative Powers*

The legislative framework governing water is characterised by a deliberate division between state and union competence. Entry 17 of List II (State List) vests states with legislative authority over 'water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of Entry 56 of List I.'[15] Entry 56 of List I (Union List) confers upon Parliament the power to regulate and develop inter-state rivers and river valleys to the extent that such regulation is declared by Parliament by law to be expedient in the public interest.[16] This dual structure, read with Article 246,[17] creates a potential for legislative overlap and jurisdictional uncertainty.

B. *Article 131 and Its Exclusion*

A crucial constitutional tension arises from the relationship between Article 131, which grants original jurisdiction to the Supreme Court over disputes between states and Article 262, which allows Parliament to exclude such jurisdiction in water matters. In *State of Bihar v Union of India*,[18] The Supreme Court recognised the primacy of the tribunal mechanism in water disputes, holding that the ISRWDA constitutionally and validly ousted its jurisdiction in such matters. The *Presidential Reference on the Cauvery River* confirmed that the combined effect of Article 262(2) and Section 11 of

[13] Inter-State River Water Disputes Act 1956, Sec. 3.
[14] H.M. Seervai, CONSTITUTIONAL LAW OF INDIA, Vol. III, 4th ed. 1993, p. 2456.
[15] Constitution of India 1950, Seventh Schedule, Entry 56, List I.
[16] Constitution of India 1950, Seventh Schedule, Entry 17, List II.
[17] Constitution of India 1950, Art. 246.
[18] State of Bihar v. Union of India AIR 1970 SC 1446.

the ISRWDA was to completely bar the Supreme Court from entertaining water disputes.[19]

This position, while constitutionally defensible, produces a significant anomaly: the highest court in the land, which ordinarily adjudicates interstate disputes under Article 131,[20] is rendered functionally helpless when states engage in prolonged non-compliance with tribunal awards. As was demonstrated in *State of Karnataka v Union of India*,[21] and later in *Cauvery River Authority v State of Karnataka*,[22] the exclusion of Supreme Court jurisdiction effectively creates a gap in the constitutional enforcement architecture..

IV. A CRITIQUE OF THE TRIBUNAL SYSTEM

A. CONSTITUTION AND COMPOSITION

Under Section 4 of the ISRWDA, the Central Government is empowered to constitute a Water Disputes Tribunal after receiving a complaint and being satisfied that negotiations have failed.[23] Section 5(2) mandates that the tribunal must consist of a Chairman and two other members, all of whom must be current or former judges of the Supreme Court or of a High Court.[24] This judicial composition, while lending legitimacy, ignores the reality that water disputes require hydrological, ecological, and engineering expertise that jurists ordinarily do not possess. India has historically constituted several such tribunals, the Krishna Water Disputes Tribunal (1969),[25] the Ravi and Beas Waters Tribunal (1986),[26] the Godavari Water Disputes Tribunal (1969),[27] and the Vansadhara Water Disputes Tribunal (2010),[28] each constituted for a single dispute with no institutional continuity.

B. THE PROBLEM OF DELAY

Perhaps the most damaging structural deficiency of the tribunal mechanism is the problem of delay. The ISRWDA initially set a three-year outer limit for tribunals to

[19] In re Presidential Reference (Cauvery River) (1992) Supp 1 SCC 44.
[20] Constitution of India 1950, Art. 131.
[21] State of Karnataka v. Union of India (1977) 4 SCC 608.
[22] Cauvery River Authority v. State of Karnataka AIR 2000 SC 3606.
[23] Inter-State River Water Disputes Act 1956, Sec. 4.
[24] Inter-State River Water Disputes Act 1956, Sec. 5(2).
[25] Krishna Water Disputes Tribunal Award 1976, Government of India.
[26] Ravi and Beas Waters Tribunal (constituted 1986, award 1987), Government of India.
[27] Godavari Water Disputes Tribunal Award 1979, Government of India.
[28] Vansadhara Water Disputes Tribunal (constituted 2010), Government of India.

deliver their reports, extendable by two further years.[29] In practice, this limit has been honoured more in the breach. The Cauvery Water Disputes Tribunal, constituted in 1990, delivered its final award only in February 2007[30] a delay of seventeen years that rendered the award practically irrelevant to a dispute that had, in the meantime, escalated into communal violence and political crisis.[31]

The 2002 Amendment to the ISRWDA sought to introduce stricter time limits, but it failed to address the root cause of delay, the ad hoc character of tribunals, which must be constituted anew for each dispute, build institutional capacity from scratch, and operate without a permanent secretariat or research infrastructure.[32] Even with the amended timelines,[33] tribunals routinely exceed the statutory period because of applications for extensions, interlocutory proceedings, and state-level obstructionism.[34] In *Ranbir Singh Pasricha v Union of India*,[35] The Supreme Court lamented the excessive delay in tribunal proceedings but found itself without effective remedial jurisdiction.

C. Lack of Scientific Infrastructure

The Law Commission of India, in its 247th Report, observed that Water Disputes Tribunals function in the absence of reliable hydrological data, scientific research infrastructure, and institutional memory.[36] Each new tribunal must start from the beginning in assembling data on river flows, water usage, and ecological parameters, resulting in duplication of effort and inconsistent factual findings across tribunals.[37] This problem is compounded by the fact that states routinely contest the data submitted by other states, leading to prolonged evidentiary hearings that further delay final awards.[38]

[29] Inter-State River Water Disputes Act 1956, Sec. 5(3).
[30] Cauvery Water Disputes Tribunal, Final Award, February 2007, Government of India Gazette.
[31] State of Tamil Nadu v. State of Karnataka (2018) 4 SCC 1, ¶ 32 (Misra C.J.).
[32] Inter-State River Water Disputes (Amendment) Act 2002.
[33] Inter-State River Water Disputes Act 1956, Sec. 5(2).
[34] Cauvery Water Disputes Tribunal (1990-2007).
[35] Ranbir Singh Pasricha v. Union of India (1987) 1 SCC 134.
[36] Law Commission of India, Report No. 247, INTER-STATE RIVER WATER DISPUTES ACT 1956, Law Commission of India, 2014, ¶ 2.3.
[37] B.D. Dua, INTER-STATE RIVER WATER DISPUTES IN INDIA, 1st ed. 1984, p. 78.
[38] Amicus Curiae Brief, Cauvery Water Disputes Tribunal, 2003 (on file with Government of India Ministry of Water Resources).

V. THE ENFORCEMENT DEFICIT

A. CONSTITUTIONAL AND STATUTORY FRAMEWORK FOR ENFORCEMENT

Once a Water Disputes Tribunal delivers its award, Article 262(2) and Section 11 of the ISRWDA bar the Supreme Court from reviewing the substantive merits of the award, while Section 6 provides that the award shall be published in the Official Gazette and shall have the force of an order or decree of the Supreme Court.[39] This fictional equivalence between a tribunal award and a Supreme Court decree does not, however, translate into equivalent enforcement machinery. A genuine Supreme Court decree can be enforced by contempt proceedings under Article 129, but no comparable mechanism exists for tribunal awards.

B. NON-COMPLIANCE AND CONTEMPT

The Cauvery crisis provides the most vivid illustration of this enforcement deficit. Despite the interim orders of the Cauvery Water Disputes Tribunal and the subsequent orders of the Supreme Court in contempt proceedings in *State of Tamil Nadu v State of Karnataka (2017)*,[40] The State of Karnataka repeatedly defied orders to release stipulated quantities of water to Tamil Nadu.[41] Section 6 of the ISRWDA, which notionally equates tribunal awards with Supreme Court decrees,[42] proved inadequate because no mechanism existed to compel state compliance, short of Presidential Rule under Article 356, a politically catastrophic option that has never been invoked for water enforcement.[43]

VERDICT VOICES LAW. LEARN. LEAD.

C. THE FEDERAL DIMENSION OF NON-COMPLIANCE

Non-compliance with tribunal awards is not merely a legal problem; it is a manifestation of the deeper tensions within Indian federalism. States are sovereign within their domains under the constitutional scheme, and water is intimately tied to agrarian interests, electoral politics, and regional identity.[44] The Union Government, which bears the constitutional responsibility for enforcing tribunal awards, has

[39] Constitution of India 1950, Art. 262(2); Inter-State River Water Disputes Act 1956, Sec. 11.
[40] State of Tamil Nadu v. State of Karnataka (2017) 3 SCC 362.
[41] Cauvery River Authority v. State of Karnataka (2012) Supp SCC (Cri) 1.
[42] Inter-State River Water Disputes Act 1956, Sec. 6.
[43] R. Ramaswamy Iyer, "Cauvery: A Study in Intractability", ECONOMIC AND POLITICAL WEEKLY, Vol. 37 No. 46, 2002, p. 4572.
[44] Mihir Shah, "Water: Towards a Paradigm Shift in the Twelfth Plan", ECONOMIC AND POLITICAL WEEKLY, Vol. 48 No. 3, 2013, p. 40.

consistently been reluctant to invoke coercive powers against non-compliant states, preferring negotiated settlements that are rarely durable. This political economy of water enforcement remains the most serious structural challenge to the constitutional framework.

VI. THE SUPREME COURT, SPECIAL LEAVE, AND CONSTITUTIONAL COMPLEXITY

A. CIRCUMVENTING ARTICLE 262 VIA ARTICLE 136

Notwithstanding the bar under Article 262(2), the Supreme Court has carved out a limited space for judicial review of tribunal awards through the exercise of special leave jurisdiction under Article 136.[45] In *State of Tamil Nadu v State of Karnataka (2018)*, the Constitution Bench of the Supreme Court confirmed that while the substantive allocation of water by a tribunal is not subject to judicial review, procedural irregularities and questions of jurisdiction may be examined under Article 136.[46] Similarly, in *State of Haryana v State of Punjab*,[47] The Court exercised Article 136 jurisdiction to examine the legality of a tribunal's procedural orders.

B. ARTICLE 142 AND THE SUPERVISORY ROLE

The Supreme Court has also invoked Article 142, which empowers it to pass orders necessary for doing 'complete justice' in water dispute contexts, creating a de facto supervisory jurisdiction that is not expressly contemplated by the constitutional scheme.[48] In the Cauvery case, the Court issued a series of executive directions under Article 142, effectively substituting its own judgment for that of the tribunal on the question of water releases.[49] While this judicial creativity may have served immediate equitable purposes, it created doctrinal uncertainty by blurring the boundary between the tribunal mechanism and ordinary judicial review.[50]

[45] State of Tamil Nadu v. State of Karnataka (2018) 4 SCC 1.
[46] Constitution of India 1950, Art. 136.
[47] State of Haryana v. State of Punjab (2002) 2 SCC 507.
[48] Constitution of India 1950, Art. 142.
[49] Cauvery Water Disputes Tribunal v. Union of India (1992) 1 SCC 44, ¶ 21.
[50] V.P. Sarathi, LAW OF EVIDENCE, 7th ed. 2016, p. 302.

VII. POLITICISATION AND DEMOCRATIC ACCOUNTABILITY

A. *WATER AS A POLITICAL RESOURCE*

Water disputes in India have never been purely legal or hydrological matters. They are embedded within the dynamics of competitive federalism, electoral politics, and regional identity.[51] State governments routinely mobilise water grievances for electoral advantage, and political leaders face intense pressure not to 'concede' water to rival states. This politicisation fundamentally distorts the functioning of the tribunal mechanism, which is premised on the availability of neutral adjudication.[52]

B. *THE ROLE OF THE UNION GOVERNMENT*

The Union Government, which is constitutionally required to play a neutral role in inter-state water disputes, has repeatedly been accused of partisan conduct, delaying the constitution of tribunals, selectively enforcing or ignoring awards, and using water allocations as political bargaining chips.[53] The failure to promptly gazette tribunal awards, the selective invocation of the Cauvery River Authority, and the delay in implementing the Ravi-Beas award are illustrative examples of Union Government partisanship that have undermined the legitimacy of the constitutional mechanism.[54]

VIII. CLIMATE CHANGE AND THE INADEQUACY OF STATIC ALLOCATION FRAMEWORKS

A. *THE HYDRO-CLIMATIC CHALLENGE*

Tribunal awards are static instruments; they allocate water on the basis of historical flow data and projected usage at a particular point in time. The transformative implications of climate change for river flow patterns make such static allocations increasingly problematic.[55] The IPCC has documented that South Asia will experience significant disruptions in the monsoon pattern, accelerated glacial retreat, and

[51] Indira Gandhi, "Speech on Cauvery Water Dispute", Prime Minister's Conference on Water, New Delhi, March 14, 1972.
[52] N.S. Jodha, "Common Property Resources: A Missing Dimension of Development Strategies", World Bank Discussion Papers, No. 169, 1992, p. 12.
[53] Nirmal Sengupta, "The Commons in an Age of Scepticism", ECONOMIC AND POLITICAL WEEKLY, Vol. 37 No. 51, 2002, p. 5141.
[54] Abhijit Bhattacharyya, INTERSTATE WATER DISPUTES IN INDIA: NEGOTIATING THE CAUVERY CONFLICT, 1st ed. 2017, p. 135.
[55] IPCC, CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS, 1st ed. 2021, Chap. 8.

increased variability in river flows, all of which will alter the factual basis of existing tribunal awards.

B. National Water Policy and Adaptive Management

The National Water Policy 2012 acknowledges the need for 'adaptive water management' that can respond to changing climatic conditions.[56] However, the ISRWDA framework contains no mechanism for reviewing or revising tribunal awards in the light of changed hydrological conditions. This rigidity is constitutionally and practically untenable in an era of accelerating climate disruption.[57] Water scarcity, which is already a reality for hundreds of millions of Indians,[58] will intensify the competition for inter-state river resources and expose the structural inadequacy of the existing constitutional framework.

IX. Recommendations for Reform

A. Establishment of a Permanent National Water Disputes Authority

The most urgent reform required is the replacement of the ad hoc tribunal system with a Permanent National Water Disputes Authority (NWDA), as recommended by the Mihir Shah Committee[59] and the 247th Report of the Law Commission.[60] Such a body should be constituted on a permanent basis, equipped with a multidisciplinary secretariat comprising hydrologists, ecologists, economists, and legal experts, and empowered to adjudicate disputes within a defined time frame without the delays endemic to the present mechanism.

B. Strengthening Enforcement Mechanisms

The Inter-State River Water Disputes (Amendment) Bill 2019 proposes the creation of a Disputes Resolution Committee at the preliminary stage,[61] but it does not adequately address the enforcement problem. A constitutional amendment should be considered

[56] Ministry of Water Resources, River Development and Ganga Rejuvenation, National Water Policy 2012, Government of India, 2012, ¶ 6.
[57] Ashok Gulati, et al., "Water, Agriculture and Climate Change", ECONOMIC AND POLITICAL WEEKLY, Vol. 49 No. 52, 2014, p. 63.
[58] Malin Falkenmark, et al., "Water Scarcity: An Ever-Growing Problem", NATURE, Vol. 571, 2019, p. 553.
[59] Mihir Shah Committee Report, RESTRUCTURING CWC AND CGWB, Government of India, 2016, Chap. 5.
[60] Law Commission of India, Report No. 247, supra note 36, ¶ 4.1.
[61] Inter-State River Water Disputes (Amendment) Bill 2019, Cl. 3.

to expressly empower the Supreme Court to enforce tribunal awards through contempt proceedings, eliminating the current anomaly whereby Section 11 of the ISRWDA bars the Court from substantive review but leaves no alternative enforcement mechanism.

C. Integrated River Basin Management

The National Water Policy 2012 calls for the adoption of an integrated river basin management approach.[62] Drawing on comparative models such as the India-Bangladesh Ganges Treaty of 1996[63] and the Helsinki Rules on equitable apportionment,[64] India should move towards a basin-level governance framework that treats rivers as ecological and social commons, rather than resources to be divided among competing state sovereigns. The experience of the Colorado River Compact in the United States[65] and the Murray-Darling Basin Plan in Australia[66] demonstrate the viability of cooperative basin management as an alternative to adversarial dispute resolution.

D. Incorporating Climate Adaptation

Tribunal awards and basin management agreements must include provisions for periodic review and revision in the light of updated hydrological data and climate projections. Static allocation frameworks are constitutionally and ecologically untenable in the current era. A mechanism for adaptive management drawing on the best available scientific evidence must be built into the constitutional and statutory framework.

VERDICT Voices LAW. LEARN. LEAD.

X. Conclusion

The constitutional framework for the resolution of inter-state water disputes in India reflects the wisdom of the founding generation in recognising that water is too important and too technically complex to be left to ordinary adversarial litigation.[67] However, the mechanism created by Article 262 and the ISRWDA 1956 has, over seven

[62] National Water Policy 2012, supra note 56, ¶ 14.
[63] Ganges Treaty 1996 (India-Bangladesh), Art. 2.
[64] Helsinki Rules on the Uses of the Waters of International Rivers 1966, Art. IV.
[65] Colorado River Compact 1922 (United States), Art. III.
[66] Murray-Darling Basin Plan 2012 (Australia).
[67] Granville Austin, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION, 1st ed. 1966, p. 244.

decades, demonstrated profound structural, institutional, and political weaknesses that have prevented it from achieving its constitutional purpose.

The Supreme Court has affirmed, in *State of Tamil Nadu v State of Karnataka (2018)*, the paramount importance of cooperative federalism in water governance.[68] a value that the current framework has conspicuously failed to promote. Water is, at its most fundamental level, a human rights concern: the Supreme Court has recognised the right to water as an integral part of the right to life under Article 21 of the Constitution.[69] From *Subhash Kumar v State of Bihar*[70] to *Narmada Bachao Andolan v Union of India*,[71] The courts have underscored that water governance is ultimately about justice for the most vulnerable.

A comprehensive reform of the inter-state water dispute mechanism, establishing a permanent authority, strengthening enforcement, integrating scientific expertise, building in adaptive capacity, and fostering cooperative basin management is not merely desirable but constitutionally imperative. Without such reform, India's water governance framework will remain a site of protracted litigation, persistent injustice, and mounting ecological crisis.

VERDICT VOICES LAW. LEARN. LEAD.

[68] State of Tamil Nadu v. State of Karnataka (2018) 4 SCC 1, ¶ 65 (Misra C.J.).
[69] Constitution of India 1950, Art. 21.
[70] Subhash Kumar v. State of Bihar AIR 1991 SC 420.
[71] Narmada Bachao Andolan v. Union of India (2000) 10 SCC 664.

PRIOR MEANS PRIOR: MANDATORY CCI CLEARANCE AND THE LIMITS OF THE COMMITTEE OF CREDITORS' COMMERCIAL WISDOM

A CASE COMMENT ON INDEPENDENT SUGAR CORPORATION LTD. V. GIRISH SRIRAM JUNEJA, 2025 INSC 124

Vansh Vyas[1]

ABSTRACT

In Independent Sugar Corporation Ltd. v. Girish Sriram Juneja, a three-judge Bench of the Supreme Court confronted a deceptively narrow question: must the Competition Commission of India clear a combination before the Committee of Creditors votes on a resolution plan, or can that clearance follow afterwards? By a majority of two to one, the Court read the proviso to Section 31(4) of the Insolvency and Bankruptcy Code, 2016 as mandatory, holding that the word "prior" fixes a sequence the Committee cannot rearrange. This comment studies how the ruling resets the relationship between competition regulation and insolvency resolution. It argues that the majority has the better of the textual argument, but that its reasoning leaves the practical friction with the Code's time-bound design largely untouched. The dissent's worry about workability is genuine, yet the cure it proposes would quietly drain a deliberate legislative safeguard. The comment suggests that the durable answer lies in procedural reform rather than in straining statutory language, and reflects on what the decision means for the much-cited commercial wisdom doctrine.

Keywords: Insolvency and Bankruptcy Code; Competition Act; Section 31(4); Committee of Creditors; combinations; statutory interpretation.

I. INTRODUCTION

Two statutes with very different temperaments met in this case. The Insolvency and Bankruptcy Code, 2016 prizes speed; it runs on tight clocks and rewards finality. The Competition Act, 2002 prizes scrutiny; it asks whether a proposed combination will hurt the market before the market feels it. When a resolution plan for a dominant company doubles as a market-altering combination, which clock controls? In

[1] Vansh Vyas, 4th Year Law Student B.B.A.L.L.B (Hons), CHRIST (Deemed to be University) Bengaluru Karnataka

Independent Sugar Corporation Ltd. v. Girish Sriram Juneja,[2] the Supreme Court answered that the competition clock starts first. The proviso to Section 31(4) of the Code,[3] which says that a resolution plan containing a combination shall obtain the approval of the Competition Commission of India prior to the approval of that plan by the Committee of Creditors, means exactly what it says. The holding looks technical, but it carries a larger message about how far the Committee's commercial judgment can reach, and where regulation draws the line.

II. THE DISPUTE IN BRIEF

Hindustan National Glass and Industries Ltd. was once the giant of Indian glass packaging, holding close to sixty percent of the market across several plants. When it entered the corporate insolvency resolution process in 2021, its scale was exactly what made any acquisition sensitive. Two applicants competed for it: the appellant, Independent Sugar Corporation Ltd. (INSCO), and AGI Greenpac Ltd., itself the second largest player in the same industry. A tie-up between AGI Greenpac and the corporate debtor was, on any view, a combination that the Competition Act would want to examine.[4]

The request for resolution plans recorded that approval from the Commission had to be secured before the Committee of Creditors approved any plan. The Committee did not wait. On 28 October 2022 it approved AGI Greenpac's plan with about ninety-eight percent of the vote, while the company's combination application was still to be filed. AGI Greenpac approached the Commission only afterwards, and clearance eventually came, on terms the appellant said rested on an incomplete picture. INSCO challenged the approval before the National Company Law Tribunal, which rejected it in April 2023. The Appellate Tribunal upheld the plan in September 2023, accepting that Commission approval was mandatory but treating its timing as merely directory.[5] That timing question travelled to the Supreme Court.

[2]Independent Sugar Corporation Ltd. v Girish Sriram Juneja, 2025 INSC 124 (Supreme Court of India, decided 29 January 2025), Civil Appeal No. 6071 of 2023.

[3]Insolvency and Bankruptcy Code 2016, s 31(4), proviso.

[4]Competition Act 2002, ss 5 and 6 (regulation of combinations).

[5]Independent Sugar Corporation Ltd. v Girish Sriram Juneja, Company Appeal (AT) (Insolvency) No. 735 of 2023 (NCLAT, order dated 18 September 2023).

III. THE QUESTIONS BEFORE THE COURT

Three questions framed the appeal. First, does the proviso to Section 31(4) require the Commission to clear a combination before the Committee votes, or only at some point before the Tribunal finally approves the plan? Second, was the Appellate Tribunal right to read the timing requirement as directory rather than mandatory? Third, could a plan approved by the Committee without the necessary clearance be saved later, and did an unsuccessful applicant even have the standing to ask these questions?

IV. WHAT THE MAJORITY HELD

Justice Hrishikesh Roy, writing for himself and Justice Sudhanshu Dhulia, took the plain language of the proviso as the starting and almost the finishing point. The phrase "prior to the approval of such resolution plan by the committee of creditors" is not ambiguous. It names the event before which clearance must exist, and that event is the Committee's vote, not the Tribunal's later confirmation. To read "prior" as satisfied by any approval obtained before the very end of the process would empty the words of content and let the Committee decide the sequence Parliament had already decided.

The majority tied this reading to the reason behind the rule. Competition review exists to test a combination before commercial commitments harden around it. If the Committee may lock in its choice first and seek clearance later, the review becomes a formality performed after the decision it was meant to inform. On the facts, the clearance that arrived later, resting on what the appellant showed was a modified and incomplete account of the transaction, could not retroactively cure a plan approved without it. The Court also confirmed that an unsuccessful resolution applicant is not a stranger to the process and may challenge an approval tainted in this way. It set aside the Appellate Tribunal's order, quashed the approval of AGI Greenpac's plan, and directed that the Committee reconsider only those plans that carried the necessary clearance before the original voting date.

V. THE DISSENT'S COUNTERPOINT

Justice S.V.N. Bhatti read the same proviso and reached the opposite end. His method was purposive rather than literal. Borrowing from the Privy Council in

Corporation of the City of Victoria v. Bishop of Vancouver Island,[6] he insisted that words be given the meaning that keeps a statute workable and avoids an absurd result. "Prior to," in his view, could fix the deadline at the Tribunal's approval rather than the Committee's vote, since both are steps before the plan becomes binding.

The practical stakes drove the dissent. Commission review of a combination can take months. If clearance must precede the Committee's vote, a resolution process built to finish quickly may sit frozen while a regulator deliberates, and viable applicants who cannot align the two timelines may be squeezed out. Drawing on *ArcelorMittal India (P) Ltd. v. Satish Kumar Gupta*[7] and the *Essar Steel* decision,[8] Justice Bhatti stressed that the Committee's commercial wisdom should not be hostage to a regulatory condition that can just as easily be tested at the Tribunal stage. Non-compliance, on this view, is a defect to be cured before final approval, not a reason to unwind a completed vote.

VI. COMMENT: TEXT, PURPOSE, AND THE PRICE OF EACH

On the narrow contest between the two opinions, the majority is more convincing. The proviso does not speak loosely. It pins clearance to a named event, and that event is the Committee's approval. A directory reading does not interpret the word "prior"; it deletes it. Once a court accepts that a clear sequencing command can be rearranged because the sequence is inconvenient, very little of the provision survives. Justice Bhatti's workability principle is sound as a canon, but it applies when language is genuinely open. Here the language is not.

Yet the majority's victory is narrower than its confident tone suggests. It settled the grammar without settling the problem the dissent raised. The two statutes still run on clocks that do not match, and nothing in the judgment tells a resolution professional how to keep an insolvency moving while a combination waits in the Commission's queue. The Court answered what the proviso means, not how the system absorbs the answer.

[6]Corporation of the City of Victoria v Bishop of Vancouver Island [1921] 2 AC 384 (PC).

[7]ArcelorMittal India (P) Ltd v Satish Kumar Gupta, (2019) 2 SCC 1.

[8]Committee of Creditors of Essar Steel India Ltd v Satish Kumar Gupta, (2020) 8 SCC 531.

The real significance of the decision lies a level deeper, in what it does to the commercial wisdom doctrine. Since *K. Sashidhar v. Indian Overseas Bank*[9] and the *Essar Steel* ruling, the Committee's commercial wisdom has enjoyed something close to immunity from review. This case marks a quiet but important limit. Commercial wisdom now operates within statutory preconditions, not above them. A plan the creditors overwhelmingly prefer is still void if it jumps the regulatory queue. That is not an attack on the Committee's autonomy; it is a reminder that autonomy is exercised inside a statute, and the statute can set a gate the creditors must pass before their judgment counts.

There is a public-interest logic to that gate. Competition review is not a tax on insolvency. It protects the market that the rescued company will re-enter, and the corporate debtor's near-sixty-percent share made the concern concrete rather than theoretical. Allowing the Committee to bless a combination first and seek clearance later would let commercial expediency overtake a check designed to serve people who are not in the room when creditors vote. The majority's unease with a clearance obtained on a modified set of facts shows that it treated the safeguard as substantive, not as a stamp to be collected on the way out.

None of this makes the dissent's anxiety imaginary. Front-loading clearance can shrink the field of applicants and stretch a process that is already slow in practice. The dissent is right about the consequences. It is wrong about the remedy. Reading the timing requirement out of the proviso to relieve a scheduling problem is an amendment wearing the costume of interpretation, and it is not the judiciary's amendment to make.

There is a broader lesson here about how Indian courts choose between letter and purpose. Purposive interpretation earns its keep when a statute is silent or clumsy and a literal reading would defeat the very object of the law. It is a poor fit when the legislature has spoken precisely and the only discomfort is that the precise rule is hard to live with. The Code is full of hard rules chosen on purpose, because predictability is itself the point of an insolvency regime.[10] Reading down one of those rules to ease its operation trades the certainty creditors and bidders rely on for a

[9]K. Sashidhar v Indian Overseas Bank, (2019) 12 SCC 150.

[10]Swiss Ribbons (P) Ltd v Union of India, (2019) 4 SCC 17.

flexibility that benefits whoever happens to be before the court that day. The majority's refusal to make that trade is, in the end, faithful to the Code's design even where it is inconvenient to it.

VII. IMPLICATIONS AND THE WAY FORWARD

For practice, the message is direct. Where a resolution plan triggers the combination provisions of the Competition Act, the applicant must build the Commission filing into its timeline from the very start, the Committee must sequence its voting around clearance, and the resolution professional can no longer treat the proviso as a soft guideline. The recognition that an unsuccessful applicant may challenge a tainted approval cuts both ways. It improves accountability, but it also opens a door to litigation by disappointed bidders, and tribunals will need to separate genuine illegality from sour grapes.

The clean solution is not judicial at all. If the friction between the two clocks is to be removed, it should be removed by those who set the clocks. A fast-track or green-channel route for insolvency-linked combinations, an express alignment of the Commission's timeline with the resolution period, or a rule that stops the insolvency clock while a combination application is pending, would each honour the statutory text while answering the dissent's practical worry. Any of these respects what the majority did and repairs what it could not. Until the legislature or the Commission acts, this decision is the governing position, and parties must plan around it rather than hope a later Bench softens it.

VIII. CONCLUSION

The Supreme Court's decision in *Independent Sugar Corporation Ltd. v. Girish Sriram Juneja* marks a significant development in the evolving relationship between insolvency law and competition regulation in India. By holding that Competition Commission of India approval must precede the Committee of Creditors' approval of a resolution plan, the Court reaffirmed that statutory requirements cannot be subordinated to commercial convenience or procedural expediency. The judgment underscores that the Committee's commercial wisdom, although accorded considerable judicial deference under the Insolvency and Bankruptcy Code, is not an unfettered power but one that must operate within the statutory framework established by Parliament.

The ruling also reinforces the principle that insolvency resolution serves broader public interests beyond the recovery of creditors. A successful resolution plan must not only maximise the value of the corporate debtor but must also preserve fair competition in the market into which the revived entity will re-enter. In this sense, the judgment appropriately balances the Code's objective of speedy resolution with the Competition Act's mandate of preventing anti-competitive market structures. While the dissent rightly highlights the practical difficulties arising from divergent regulatory timelines, those concerns cannot justify rewriting clear statutory language through judicial interpretation.

Nevertheless, the decision exposes an institutional gap that calls for legislative and regulatory attention. Unless the timelines under the Insolvency and Bankruptcy Code and the Competition Act are better synchronised, stakeholders may continue to face uncertainty, increased transaction costs, and delays in implementing commercially viable resolution plans. A dedicated fast-track mechanism or coordinated review process for insolvency-related combinations would preserve the legislative intent of both statutes without compromising either efficiency or regulatory oversight.

Ultimately, the judgment establishes an important precedent that prioritises statutory fidelity over commercial pragmatism. It clarifies that the doctrine of commercial wisdom derives its legitimacy from the statute itself and therefore cannot override mandatory legal preconditions. In doing so, the Supreme Court has strengthened the rule of law within India's insolvency framework while signalling that any further reconciliation between speed and regulatory scrutiny must come through legislative reform rather than judicial innovation.

VERDICT VOICES LAW. LEARN. LEAD.

POLITICAL DEFECTION AND CONSTITUTIONAL VACUUM IN NIGERIA: A CRITIQUE OF THE UNEQUAL CONSEQUENCES FOR LEGISLATORS AND EXECUTIVE OFFICE HOLDERS

Amatari Penniel[1]

ABSTRACT

Political defection has become one of the most visible symptoms of institutional weakness in Nigeria's Fourth Republic. Because the Constitution of the Federal Republic of Nigeria 1999 (as amended) makes party sponsorship a precondition of contesting any elective office, and because the Supreme Court has repeatedly held that the electoral mandate belongs to the political party rather than to the individual candidate, the question of what happens when an office holder abandons the party that sponsored him ought, in principle, to be governed by a single coherent constitutional logic. It is not. *Sections 68(1)(g) and 109(1)(g)* subject legislators to a rule-and-proviso regime under which defection triggers automatic loss of seat unless it results from a division affecting the national structure of the party. No equivalent provision touches the President, Vice President, Governor, or Deputy Governor; a silence this article terms a constitutional vacuum. This article argues that this vacuum is not a principled design choice but an unaddressed gap in the 1999 Constitution, and that it is being systematically exploited by executive office holders in a manner the framers plainly did not contemplate, producing starkly unequal consequences for legislators and executive office holders who commit what is, in substance, the same constitutional wrong. Drawing on *Amaechi v INEC, Abegunde v Ondo State House of Assembly,* and *AG Federation v Atiku Abubakar, t*he article traces the doctrinal foundations of legislative defection law, exposes the structural flaws in its enforcement, and demonstrates that the same mandate theory which justifies sanctioning legislators for defection applies with at least equal force to the executive. It concludes with proposals for constitutional and statutory reform to close the vacuum and equalize the consequences of defection across both arms of government.

[1] Amatari Penniel, 300 Level Law Student, Faculty of Law, Niger Delta University

Keywords: *political defection, cross carpeting, Section 68(1)(g), Section 109(1)(g), freedom of association, executive immunity, party sponsorship, Nigerian constitutional law*

I. INTRODUCTION

Nigeria does not operate an independent candidacy system. No person may contest any elective office in the Federation except as the nominee of a registered political party.[2] The practical consequence of this design is that the electoral mandate secured at the polls is, as a matter of constitutional structure, a mandate given to a party through a candidate, rather than a personal mandate that travels with the candidate wherever he goes. The Supreme Court confirmed this in *Rt Hon Rotimi Chibuike Amaechi v Independent National Electoral Commission,* holding, in the course of resolving a pre-election dispute over candidate substitution, that it is the party that contests, wins, or loses an election through the candidate it fields, and that the votes cast are votes cast for the party.[2] It is this principle, sometimes summarized in the phrase that "all votes belong to the party," that supplies the doctrinal foundation for treating defection as a matter of constitutional concern rather than mere political color.

Recent years have seen a marked escalation in the frequency of party switching by elected officials, at both the legislative and executive levels, generating what commentators have described as a "defection epidemic."[3] What has attracted comparatively little sustained legal analysis, however, is that the two arms of government most implicated in this phenomenon; the legislature, which makes the law, and the executive, which implements it; are treated by the Constitution in starkly different ways. The framers regulated the defection of legislators with some precision. They said nothing at all about the defection of a sitting President, Vice President, Governor, or Deputy Governor. It is a reasonable inference that the drafters of the 1999 Constitution simply did not anticipate that an executive office holder would wish to

[2] Constitution of the Federal Republic of Nigeria 1999 (as amended), ss 65(2)(b), 106(d), 131, 177. See also s 221, which provides that "no association, other than a political party, shall canvass for votes for any candidate at any election or contribute to the funds of any political party or to the election expenses of any candidate at an election." Rt Hon Rotimi Chibuike Amaechi v Independent National Electoral Commission & Ors (2008) 5 NWLR (Pt 1080)

[3] See, generally, the pattern documented in F O Victor and O O Olaleke, "Political Defections in Nigeria: Undermining Democratic Stability" (2025) 9(3) IRE Journals 215, recording a rise in reported defection events from 15 in 2019 to 180 by September 2025.

abandon the party that sponsored him into office while still holding that office; the reality of Nigerian politics since 1999 has proved that assumption wrong.

This article examines that asymmetry. Part II sets out the constitutional foundation of party sponsorship and the qualified rights of association and non-discrimination in sections *40 and 42 of the Constitution.* Part III analyses the legislative defection regime under sections *68(1)(g) and 109(1)(g),* including the Supreme Court's interpretation of the statutory proviso in Abegunde *v Ondo State House of Assembly*. Part IV turns to the executive anomaly, examining the joint ticket structure of *sections 142 and 187* and the Supreme Court's treatment of vice presidential defection in *AG Federation v Atiku Abubakar*..Part V considers, and answers, the strongest counterarguments for retaining the asymmetry. Part VI proposes reform, and Part VII concludes.

II. THE CONSTITUTIONAL FOUNDATION: PARTY SPONSORSHIP AND QUALIFIED FREEDOM OF ASSOCIATION

A. PARTY SPONSORSHIP AS A PRECONDITION OF OFFICE

Because every candidate for elective office in Nigeria must be sponsored by a political party, and because *section 221* forecloses any rival channel for canvassing votes outside the party structure, the constitutional architecture ties representation to party in a way that has no true independent candidate alternative. This is the premise on which the Supreme Court's holding in *Amaechi* rests, and it is the premise that must inform any analysis of what should happen when an office holder repudiates the party that sponsored him. If the mandate belongs to the party, then a change of party by the office holder is, at least presumptively, a diversion of a mandate that was never personally his to redirect.

B. SECTIONS 40 AND 42: THE QUALIFIED RIGHTS IN PLAY

Any discussion of defection must begin with the constitutional rights that make party switching possible in the first place. Section 40 of the Constitution provides:

> *"Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests: Provided that the provisions of this section shall not derogate from the powers conferred by*

> *this Constitution on the Independent National Electoral Commission with respect to political parties to which that Commission does not accord recognition."*

Section 42(1) supplies the correlative guarantee against discrimination on the ground of political opinion, providing that a citizen shall not, by reason only of his political opinion, be subjected to disabilities or restrictions to which citizens of other political opinions are not made subject, nor be denied privileges accorded to others.[4] Neither right, however, is absolute. *Section 45* permits derogation from *sections 37 to 41* by any law that is "reasonably justifiable in a democratic society" in the interest of, among other things, public order and the protection of the rights of others.[5] *Sections 68(1)(g) and 109(1)(g),* discussed below, are best understood as precisely such a permissible derogation: a legislator's freedom to join another party is not extinguished, but it is made to carry a legal consequence, loss of the seat; designed to protect the electorate's right not to have its mandate silently redirected. The constitutional question that this article pursues is why the same derogation logic has never been extended to the executive.

III. LEGISLATIVE DEFECTION: SECTIONS 68(1)(G) AND 109(1)(G)

C. A. THE RULE AND THE PROVISO

Section 68(1)(g) of the Constitution provides that a member of the Senate or the House of Representatives shall vacate his seat if:

> "...being a person whose election to the House was sponsored by a political party, he becomes a member of another political party before the expiration of the period for which that House was elected: Provided that his membership of the latter political party is not as a result of a division in the political party of which he was previously a member or of a merger of two or more political parties or factions by one of which he was previously sponsored."

[4] Constitution of the Federal Republic of Nigeria 1999 (as amended), s 42(1)(a)-(b).
[5] Constitution of the Federal Republic of Nigeria 1999 (as amended), s 45(1).

An identical provision applies to members of a State House of Assembly under section *109(1)(g)*.[6]On its face, the rule is unambiguous: cross carpeting costs a legislator his seat. The proviso, however, has proved to be the section's Achilles heel. Because "division" and "merger" are undefined, and because internal party discord of one kind or another is endemic in Nigerian political parties, legislators seeking to defect without losing their seats have consistently sought to characterize routine internal disputes as a qualifying "division."

B. ABEGUNDE V ONDO STATE HOUSE OF ASSEMBLY: CONFINING THE PROVISO TO THE NATIONAL LEVEL

The leading authority on the scope of the proviso is *Hon Ifedayo Sunday Abegunde v The Ondo State House of Assembly & Ors*.[7] The appellant had been elected to the House of Representatives on the platform of the Labour Party and later defected to the Action Congress of Nigeria, relying on an alleged factionalization of the Labour Party's Ondo State chapter as the basis for invoking the proviso. The trial court and the Court of Appeal both rejected this argument and declared his seat vacant; the Supreme Court unanimously affirmed.

The ratio of the decision, delivered in the lead judgment of *Muhammad JSC* and concurred in by the rest of the panel, is that the "division" contemplated by the proviso to *section 68(1)(g)* must be one that affects the national structure and corporate existence of the party, not a dispute confined to a ward, local government, or state chapter. Relying on the earlier authorities of *Federal Electoral Commission v Goni and Abubakar v AG Federation*[8], the Court held that only "factionalization, fragmentation, splintering or division that make[s] it impossible or impracticable for a political party to function" at the national level will satisfy the proviso and permit a defecting legislator to keep his seat.[9] Reading *section 68(1)(g)* together with *section 222(a), (e) and (f),* which anchor the constitutional definition of a political party in its national character and organization rather than in its state or local branches, the Court reasoned that a merely local crisis cannot be elevated into the kind of division the

[6] Constitution of the Federal Republic of Nigeria 1999 (as amended), s 109(1)(g): "A member of a House of Assembly shall vacate his seat in the House if... being a person whose election to the House was
[7] Hon Ifedayo Sunday Abegunde v The Ondo State House of Assembly & Ors (2015) 61 (Pt 3) NSCQR 1857;
[8] Federal Electoral Commission v Goni (1983) LPELR-1266(SC), decided on the pari materia provision in s 64(1)(g) of the 1979 Constitution; Abubakar v AG Federation (2007) 10 NWLR (Pt 1041) 1.
[9] Abegunde v Ondo State House of Assembly,per Muhammad JSC.

framers had in mind, for to do so "will lead to confusion in the party and the polity as well."[10]

The wisdom of this restrictive reading is apparent once its alternative is considered. If a state or local chapter crisis were sufficient, any legislator wishing to defect could manufacture the necessary pretext by fomenting or exaggerating discord within his own local branch; precisely the danger the Supreme Court identified. *Abegunde* therefore performs valuable work in closing off the most obvious route by which the proviso might otherwise have swallowed the rule. The Court's more recent decision in *Rivers State House of Assembly v Government of Rivers State*[11], arising from the mass defection of Rivers State lawmakers loyal to Nyesom Wike, has reaffirmed and refined this framework, while also clarifying an important procedural point discussed in the following section.

C. THE ENFORCEMENT GAP: A STRUCTURALLY COMPROMISED GATEKEEPER

Even a well-defined substantive rule is only as effective as its mechanism of enforcement, and it is here that *section 68(1)(g)* shows its greatest weakness. The Constitution does not make forfeiture of a seat automatic upon defection. In *RSHA v Government of Rivers State*, the Supreme Court held that *section 109(1)(g)* "is not self executing": an allegation of defection must first be presented before the House in session, and it is the House itself, on being satisfied that a member has defected, that declares the seat vacant.[12] The same logic applies,, to *section 68(1) (g)* at the federal level, where the Constitution vests the Senate President or the Speaker of the House of Representatives with the practical responsibility of giving effect to a member's disqualification, upon presentation of satisfactory evidence.[13]

This design creates an obvious structural problem. Where a defecting legislator joins the same party as the presiding officer, or where the presiding officer himself owes his position to a coalition sympathetic to the defector, there is little practical incentive for that officer to trigger the House's own machinery against him. Enforcement of *section*

[10] ibid, per Fabiyi JSC. See also Galadima JSC's concurring observation that "[t]he division envisaged by Section

[11] RSHA v Government of Rivers State (2025) 7 NWLR (Pt 1990) 591. The Court there defined defection as synonymous with "abandonment, desertion, apostasy, renunciation and rejection," and held that it "manifests itself" and "cannot be left to conjecture."

[12] RSHA v Government of Rivers State (Supra)

[13] Constitution of the Federal Republic of Nigeria 1999 (as amended), s 68(2).

68(1)(g) thus depends on the willingness of an aggrieved party; typically the party the legislator abandoned; to petition and litigate, a process that is slow, costly, and easily outlasted by the remainder of a legislative term. The result, as commentators have observed, is that the clause is "clear" in principle but "nearly impossible to achieve" in practice, precisely because the persons empowered to enforce it are frequently the political beneficiaries of the very defections it is meant to sanction.

IV. THE EXECUTIVE ANOMALY: THE CONSTITUTIONAL VACUUM AND ITS EXPLOITATION

A. THE JOINT TICKET STRUCTURE OF SECTION 142

Section 142(1) of the Constitution provides that a candidate for President "shall not be deemed to be validly nominated unless he nominates another candidate as his associate from the same political party for his running for the office of President, who is to occupy the office of Vice President," and that the associate is deemed elected Vice President if the presidential candidate who nominated him is duly elected.[14] An equivalent provision, *section 187,* governs the nomination of a Deputy Governor by a gubernatorial candidate..[15] The Constitution thus mandates a joint ticket, drawn from a single party, as the only lawful route into the two highest executive offices at federal and state level. That structural requirement encourages synergy between the President and Vice President (and, at state level, between the Governor and Deputy Governor) for the duration of the election, but it says nothing about what happens to party membership once the ticket has been sworn into office.

B. AG FEDERATION V ATIKU ABUBAKAR: THE VICE PRESIDENT'S RIGHT TO DEFECT

The constitutional silence was tested directly in *Attorney General of the Federation v Atiku Abubakar*[16], arising from President Olusegun Obasanjo's purported declaration, in the run up to the 2007 elections, that the office of Vice President Atiku Abubakar had become vacant because Atiku had abandoned the Peoples Democratic Party, on whose platform the two men had been jointly elected, for another political party. The Supreme Court held that the President's declaration was unconstitutional and of no

[14] Constitution of the Federal Republic of Nigeria 1999 (as amended), s 142(1).
[15] Constitution of the Federal Republic of Nigeria 1999 (as amended), s 187, read with s 186. The structure mirrors s 142 in requiring a joint ticket from the same political party as a precondition of valid nomination for the office of Governor.
[16] AG Federation v Atiku Abubakar (2007) 10 NWLR (Pt 1041)

effect. In the leading judgment, *Akintan JSC* held that the President's action "cannot be justified by the fact that the Vice President had been suspended or expelled from the ruling political party under which he was jointly elected with the President or that he was exercising his fundamental right of association guaranteed by the Constitution."[17] The Court went on to hold that the appropriate mechanism, if the Vice President's conduct were to be treated as objectionable, was not summary removal by the President but impeachment for misconduct under *section 143 of the Constitution;* a route the Court held had not been properly invoked.[18]

Two propositions follow from this decision. First, the Vice President is not the President's subordinate. Once elected, his tenure is his own; he is not analogous to a Minister, who serves at the President's pleasure and may be removed by simple executive fiat. The Constitution does not envisage a master and servant relationship between them. Both are elected on a joint ticket, but once the election is concluded, the Vice President ceases to be merely the party's vice presidential candidate and becomes the Vice President of Nigeria, with an independent constitutional mandate. While the President exercises executive powers and may delegate functions to the Vice President, this does not reduce the Vice President to the status of a Minister. Unlike Ministers, the Vice President derives his office directly from the electorate and cannot be removed by mere executive will. *Section 142* binds both offices together only for nomination and election; it creates no continuing obligation of political subordination or party fidelity during tenure. Second, by virtue of *section 40 of the Constitution,* which guarantees freedom of association, the Vice President is constitutionally free to defect to another political party. There is no equivalent of *section 68(1)(g)* restricting defection at the executive level. This means the President and Vice President may, in law, belong to different political parties. Their membership in the same party is constitutionally required only for the purpose of contesting the election. Once elected, that requirement falls away. Consequently, defection by the Vice President cannot, without more, constitute a ground for removal or impeachment.

[17] AG Federation v Atiku Abubakar (Supra), per Akintan JSC.
[18] ibid. Section 143 of the Constitution prescribes a two thirds majority procedure, initiated by the National Assembly, as the exclusive route for removing a President or Vice President from office for gross misconduct.

The same reasoning extends, by parity, to Governors and Deputy Governors: a 2026 ruling of the Federal High Court, arising from Governor David Umahi's defection from the Peoples Democratic Party to the All Progressives Congress, applied comparable logic in holding that the constitutional immunity conferred on a sitting Governor does not oust the court's jurisdiction to entertain a defection related dispute, though the substantive question of whether a governor may be sanctioned for defection while in office remains, at the time of writing, unresolved by the Supreme Court.[19]

C. The Result: An Unregulated Executive

The practical upshot is a stark doctrinal asymmetry. A backbench legislator who defects without being able to point to a division convulsing his party's national structure loses his seat automatically, on application to a court, notwithstanding the freedom of association guaranteed by *section 40*. A President, Vice President, Governor, or Deputy Governor who defects for no reason at all; not even a fig leaf of internal party crisis; suffers no comparable constitutional consequence, and can be removed, if at all, only through the cumbersome and politically fraught mechanism of impeachment for misconduct, a remedy which *section 143's* own text confines to conduct falling short of ordinary party switching. The executive is, in short, permitted to exercise exactly the freedom of association that the legislature is constitutionally forbidden to exercise without cost. As at least one recent analysis of the gap has observed, this produces "two sets of rules for two categories of elected officials, despite their equal dependence on the people's mandate."[20]

V. Counterarguments

Two objections might be raised against the argument developed above. The first is that the President and Governor, unlike legislators, are elected on a distinct, majoritarian, jurisdiction wide mandate under *sections 132 and 178* respectively, rather than through the kind of constituency based party list logic that undergirds the legislative

[19] See the Federal High Court proceedings summarised in Femi Falana, "All Votes Belong to Political Parties in Nigeria", SaharaReporters (undated) <https://saharareporters.com/2022/03/15/all-votes-belong-political-partiesnigeria-femi-falana> accessed 3 July 2026, discussing Ekwo J's ruling that s 308 immunity did not oust jurisdiction over the defection dispute concerning Governor Umahi. The correctness and finality of that ruling is noted here for context and should not be taken as settled Supreme Court authority.

[20] See the discussion in "Defections without Consequences? Rethinking the Legal Gaps in Nigeria's Executive Political Migration" (2025) European Journal of Law and Political Science, noting that ss 68 and 109 "pointedly omit executive officeholders such as Governors, Deputy Governors, the President, and the Vice President," resulting in a "doctrinal inconsistency and a normative failure."

seat, and that their personal popularity is therefore a more significant component of their electoral success than is true of an individual legislator riding a party's coat tails in a single constituency. On this view, it might be said that the executive's mandate is less purely derivative of the party than the legislator's, and that the asymmetry in treatment is therefore not arbitrary but reflects a genuine difference in the character of the two mandates.

This objection does not survive scrutiny of *Amaechi* itself. The very reasoning that treats a legislative seat as a party mandate ; namely, that *section 221* forecloses any route to office outside party sponsorship, and that the party is therefore the true contestant at every level of election; applies to the presidency and the governorship with, if anything, greater force, since *section 131* and *section 177* impose the identical sponsorship requirement on candidates for those offices as *sections 65 and 106* impose on legislative candidates. If votes belong to the party in a legislative election, there is no principled basis on which they cease to belong to the party in a presidential or gubernatorial election merely because the winning margin happens to be wider. The joint ticket requirement of *section 142* reinforces, rather than undermines, this point: it is a further, explicit textual signal that the framers regarded the presidency (and, by extension under *section 187*, the governorship) as fundamentally party anchored offices.

The second, and more serious, objection is that the impeachment mechanism in *sections 143 and 188* already supplies an accountability route for executive misconduct, and that the absence of an automatic forfeiture clause for the executive was therefore a deliberate design choice rather than an oversight, reflecting the framers' judgment that the security of tenure appropriate to a nationally or state wide elected chief executive is different in kind from that appropriate to a legislator. This objection has more force, but it proves too much. Impeachment requires a supermajority controlled, in practice, by the very political coalition the defecting executive has newly joined or from which he benefits; it is calibrated to address gross misconduct and abuse of office, not simple party switching, as the Supreme Court itself implicitly recognized in AG *Federation v Atiku Abubakar* when it held that the President's summary declaration of vacancy; his attempted shortcut around impeachment; was itself unconstitutional. If impeachment were truly an adequate substitute for a defection specific sanction, one would expect it to have been invoked

in the numerous state level defection controversies of the past decade; it has not been, precisely because the political conditions that make defection attractive to an executive office holder are the same conditions that make an impeachment vote against him practically unobtainable. The better view, and the one this article adopts, is that the omission reflects an unaddressed gap in constitutional design rather than a considered policy of differential accountability.

VI. RECOMMENDATIONS

For the legislature, the substantive test in *Abegunde* is sound and should be retained; but its enforcement architecture requires urgent reform. First, the National Assembly should amend the *Constitution* to codify the "national structure" test directly into statute, so that it no longer depends solely on judicial elaboration and is applied consistently without relitigation in every fresh defection dispute. Second, the power to trigger a *section 68(1)(g)/109(1)(g)* declaration should not rest exclusively with the Senate President, Speaker, or a state Speaker, who may themselves be political beneficiaries of the defection in question; the *Constitution* should instead permit any registered political party with standing, or a fixed proportion of registered voters in the affected constituency, to petition the Independent National Electoral Commission directly, with a statutorily fixed and judicially reviewable timeline for determination. Third, *section 222* should be amended to empower the Independent National Electoral Commission to certify, as a matter of administrative record, whether a bona fide national level division or merger has in fact occurred, reducing the evidentiary burden and delay currently associated with litigating the point afresh in every case.

For the executive, the constitutional gap identified in Part IV should be closed by an amendment introducing provisions analogous to *sections 68(1)(g) and 109(1)(g)* for the President, Vice President, Governor, and Deputy Governor. Given the joint ticket structure of sections *142 and 187*, a forced forfeiture model, modeled precisely on the legislative provision would be constitutionally awkward, since it is not obvious that a Vice President or Deputy Governor can simply "vacate a seat" in the way a legislator can. A more workable model, drawing on the impeachment procedure already in place, would require any President, Vice President, Governor, or Deputy Governor who defects from the sponsoring party; other than pursuant to a national level division or merger meeting the *Abegunde* standard; to resign the office within a fixed period, failing which the defection shall itself constitute a specified ground of misconduct

triggering the impeachment procedure under *sections 143 or 188*, with the ordinary supermajority threshold reduced for this specific ground alone in recognition of the structural difficulty, identified in Part V, of assembling a supermajority against a defector who has just joined the majority coalition.

Finally, legal reform alone will not resolve a problem that is, at its root, as much cultural as constitutional. Civic education on the meaning and consequences of the electoral mandate, sustained by the National Orientation Agency and civil society, remains an indispensable complement to any statutory or constitutional amendment, since the deepest driver of the defection epidemic is not the absence of law but the absence of an electorate willing to treat cross carpeting as a genuine breach of trust rather than routine political maneuvering.

VII. CONCLUSION

Nigeria's constitutional architecture ties every elective office to party sponsorship, and its jurisprudence, from *Amaechi to Wada v Bello,* consistently treats the mandate secured at the polls as belonging to the party rather than the individual. That premise supplies a coherent justification for sanctioning legislative defection under *sections 68(1)(g) and 109(1)(g),* refined by the Supreme Court in *Abegunde* to guard against manufactured local pretexts. But the very same premise condemns as incoherent the Constitution's total silence on executive defection. AG *Federation v Atiku Abubakar* confirms that a Vice President, and by extension a Deputy Governor, is free to defect at will, protected by *section 40* and unreachable by anything short of impeachment; a remedy that political reality renders largely theoretical. Political defection, whether legislative or executive, diverts a mandate the electorate gave to a party, breeds opportunism, and, left unaddressed at either level, corrodes the public's confidence that its vote means what the Constitution says it means. The unequal consequences currently visited on legislators and executive office holders for what is, in substance, the same betrayal of the electorate cannot be justified on principle; they survive only because the constitutional vacuum around executive defection has never been closed. Closing that vacuum, and repairing the enforcement weaknesses.

CASE COMMENT: NAKUL KOHLI v. STATE, 2010 SCC ONLINE DEL 2328.

Gowri Nair [1] & Shruti Shrivastava[2]

I. INTRODUCTION

The case of Nakul Kohli v. State is an important precedent by the Delhi High Court that reformed the statutory understanding of forgery in the digital technology. The major legal argument concerned on the issue whether a photocopy could construe as "making a false document" provided under Section 464 of IPC, or if it was only "secondary evidence" not admissible or sufficient for framing of charges. The word "makes" in the Indian Penal Code is wider to include the photocopies and printings which was ruled by Justice Mukta Gupta.

II. FACTS OF THE CASE

The present case stems from FIR No. 71/2005 registered at Police Station Cell, Lodhi Colony, Delhi. The Case originated from a complaint filed by the victim against a travel agent that he was fraudulently inducing innocent people desirous of going to the United States of America by charging unreasonably large amount of money under the false representation of obtaining visa for them.

The investigation gathered traction when police officers involved the victim named Jigar Modi in investigation to assist in recovery operation. On the day of the occurrence, a trap was laid down, which resulted into arrest of the Petitioner. During conducting personal search, during the search and seizure officer recovered a coloured photocopy of an American visa which was issued in the name of "Upendra Kumar Karsan Bhai" from right pocket of the Petitioner's pant, which was later seized. The photocopied document was seized as adverse evidence.

After the arrest of the accuse, petitioner purportedly confessed that he, in coordination with co-accused individuals, had intentionally Persuaded Jigar Modi and his friends to pay a total amount of Rs. 6,10,000. The Investigation found a specific modus operandi, the petitioner along with co-accused, named Ashish

[1] Gowri Nair, Law Student, Symbiosis Law School, Nagpur
[2] Shruti Shrivastava, Law Student, Symbiosis Law School, Nagpur

Sharma (who operated with the fake names as Rahul or Neeraj), Established and operated an office at Vardhman Tower in Preet Vihar, Delhi. They wrongfully represented to victims that another associate was an official of U.S. Embassy. Under this fraudulent offence, they involved multiple persons to pay huge amount of money to "procure" visas.

Other victim witnesses – Sher Singh, Gurpreet Singh, and Avtar Singh along with his son Kamalpreet Singh participated in the investigation. The witnesses given consistent testimonies, considering each of them handed over Rs. 1 lakh and their original documents along with the passports to the Petitioner and co-accused for visa purpose. Though the accused persons neither arranged the said visa nor returned back the money or passports of the victims to the crime.

The Recovered evidence of coloured photocopy was send to the US Embassy in New Delhi for verification. On 16th May 2005, the U.S. Embassy formally communicated that no visa bearing No. 20056955325107 had ever been issued to Upender Kumar Karsan Bhai and declared the document as fraudulent. Moreover, the Government Examiner of Questioned Documents (GEQD) examined by comparing the seized document with an original one and held that the document marked 'Q1' (recovered from accused Nakul Kohli) was Spurious in Nature."

After the filing of charge sheet and evidence collected, the learned Chief Metropolitan Magistrate (CMM) framed the charges against the Petitioner under Section 419, 420, 471, 474 and 120B IPC. not satisfied by the framing of charges petitioner filed a revision petition before the learned Additional Sessions Judge (ASJ), though the same order was dismissed on dated 12th November, 2009. Therefore, the Petitioner approached the High Court, particularly challenging the charges under Section 471 and 474 IPC, arguing that a photocopy of particular document could not legally considered a "forged document" for the application of these sections.

III. ISSUES

ISSUE 1: Whether the use of photocopy of not genuine document can amount to an act of forgery under Section 464 of the IPC or whether it constitute only to cheating under Section 415 IPC?

ISSUE 2: Whether the photocopy of the document is admissible as evidence under Section 64 and 65 of the Indian Evidence Act, 1872, at the stage of framing of charges and accordingly whether the charges under Section 471 and 474 IPC can be maintained solely on the basis of a photocopy?

ISSUE 3: Whether the term "Marking" a false document under Section 464 of IPC is limited only to the act of signing, sealing and Execution of a document, thus not including photocopying or printing in its scope?

IV. ARGUMENTS IN BRIEF

The counsel on behalf of the petitioner did not challenge the sections 419, 420 and 120B[3] rather challenged the charges under section 471 and 474 of IPC. This led to the emergence of two distinguished arguments. Firstly, the petitioner raised the contention that charge under sec 471of IPC was not applicable as the document in question was a photocopy. To attract the offence under sec 471of IPC, the document must be forged and the forgery under sec 464[4] requires the document to be signed, sealed or executed. The petitioner contended that the document in question was a photocopy which does not constitute a false document under sec 464[5]. The petitioner relied on the case of *Pramatha Nath v State*[6] which stated that printing or writing does not come under the ambit of making false document under sec 464 of IPC. Secondly, the petitioner's counsel, relying on case of *Shashi Lata Khanna v State of Delhi*[7], the incriminating document is not admissible under sec 64 and 65 of Indian Evidence Act[8] as they are secondary evidence thereby forming the inability to form charges based on the evidence.

The counsel on behalf of the state supported the framing of charges. The raised the contention that the photocopy of the visa is primary evidence as it is the instrument of fraud and it came under the ambit of sec 463, 464,471 and 474[9] read with sec 29[10]. These provided a wide range to encompass the contention that forged photocopy was used as a genuine copy. The counsel argued that a reasonable suspicion is only

[3] Indian Penal Code, 1860, §§ 419, 420, 120B.
[4] Indian Penal Code, 1860, § 464.
[5] Supra Note No. 2.
[6] 52 Crl. L.J. 1480.
[7] 2005 (2) JCC 1220.
[8] Indian Evidence Act, 1872, §§ 64–65.
[9] Indian Penal Code, 1860, §§ 463, 464, 471, 474
[10] Indian Penal Code, 1860, § 29.

needed for a prima facie case at the stage of framing charges and not proof beyond reasonable doubt.

V. JUDGMENT

The judgment given by J. Mukta Gupta dismissed the petition and upheld the charges under section 471[11] and 474[12]. The judgment provided a comprehensive and meticulous elucidation of the law, thereby untangling the webs of ambiguity within the law of forgery. The court stated that the term "makes" in sec 464 [13] cannot be narrowly interpreted. The term cannot be aligned with mere signing, sealing and executing rather it provides a full operative meaning. The court disagreed with the judgement of the single judge bench of Calcutta High Court and delivered that restricting false document to signing, sealing and executing would render the term "makes" superfluous[14] that contravene the existing method of interpretation which states that no word in a legislation is added without any aim. The court rendered the Calcutta High Court Judgment ineffective, finding it inconsistent with illustration (c) and (d) under sec 464[15] and also not fitting with the jurisprudence reiterated by Bombay, Patna and Mysore High Courts. The court with help of *Province of Bihar v. Surender Prasad Ojha* [16]and *L.K Sidappa v. Lalithamma*[17] held that broader interpretation of the term "makes" under sec 464 is the correct position of law.

The judgment laid emphasis on the contention that with advancement of colour photocopying and scanning technologies, reproduction of false document and fraudulent activities has become easier and more sophisticated. The subject matter in this case, a colour photocopy of a visa, was used to deceive and extort substantial amounts of money from the victims. This squarely falls within the meaning of false document. This misrepresentation by the accused of the photocopy as a genuine document, constitutes forged document under sec 471[18]. Based on evidentiary argument presented before the court, it was held that the question of whether a photocopy is primary or secondary document is irrelevant at the stage of framing

[11] Indian Penal Code, 1860, § 471.
[12] Indian Penal Code, 1860, § 474.
[13] Supra Note No. 2.
[14] 2010 SCC OnLine Del 2328.
[15] Supra Note No. 2.
[16] AIR (38) 1951 Patna 86.
[17] 1954 Crl. L.J. 1235 (Mysore).
[18] Supra Note No. 9.

charges. The integral requirement is regarding the suspicion of the involvement of the accused in such an offence and how strong the suspicion is. Further, it was held that the instrument of fraud, that is the photocopy, the offending article, is the primary evidence irrespective of the general rules of the Evidence Act on secondary documents. The court backed this contention by holding that the case of *Shashi Lata Khanna*[19] was misconceived which stated that the original forged document was not seized thereby rendering the photocopy inadequate but in the present case the photocopy itself was the instrument of fraud which was recovered from the accused himself.

In the finality of the judgment, the court held that the allegations along with offending article- the photocopy- and its confirmation as false document from the US Embassy and GEQD provides the necessary grounds for application of the charges under sec 471[20] and 474[21]. Therefore, the petition before the court was dismissed holding that modern forms of reproduction of false documents falls within the ambit of Indian laws governing production evidences.

VI. CRITICAL ANALYSIS

The Judgement of *Nakul Kohli v. State*[22] which represents a substantial judicial intervention to reform the application of the Indian Penal Code (IPC) in the light of emerging technology. Although the decision prescribes essential clarification on the status of digital copies, it also preserves certain doctrinal questions subject to further discussion. The finding of the court complies with objective approach to statutory interpretation, providing that legal definitions do not become superseded. The Court rightly identified that the word "makes" in Section 464[23] is not only Antecedent to "sings, seals or executes" but is a separate act. By examining the word "makes" to include photocopying and printing, the affirmed the principle that provisions of the law are always essential.

Justice Mukta Gupta settled the inconsistency between several High Courts by upholding the comprehensive definition of "document" provided under Section 29[24].

[19] Supra Note No. 5.
[20] Supra Note No. 9.
[21] Supra Note No. 10.
[22] Cri LJ 4536.
[23] Supra Note No. 2.
[24] Supra Note No. 8.

The court clearly deviated from the narrow interpretation in *Pramatha Nath v. State*,[25] that "making" a fraudulent document under Section 464 [26] is limited to acts of signing, sealing or executing, thus exclude making entire photocopies. The court decisively and correctly dismissed this view. In the case of *Emperor v. Krishtappa Khandappa*,[27] in which the Chief Justice Macleod stated said that a document under Section 29 of IPC includes any matter stated by letters, figures, or marks meant to be used as evidence, and not necessarily needed to be signed or sealed.

The court moreover strengthened its position by referring to judgments *of Bihar v. Surendra Prasad Ojha, Ranjit Sinha v. The State* and *L.K. Siddappa v. Lalithamma*,[28] showing that its conclusion was not a limited deviation but part of established line of judicial reasoning.

The court made a significant difference regarding the Indian Evidence Act, 1872. It said that when a photocopy of a document or an article is offending which was used to commit the offence of fraud, it is no longer remains a photocopy of a document but the primary evidence to the crime. In the case of *Shashi Lata Khanna v. State of Delhi*,[29] the distinction was mentioned, where the prosecution has used a photocopy as an alternative of an original document that had been shown to the investigation officer but not seized, a paradigmatic instance of secondary evidence.

Regardless of its strengths, the judgment has been censured for excluding certain constituent elements of the law under inadequately analysed. Although the Court confirmed the charges, it did not thoroughly analyse the particular requirements of Section 474 IPC[30] relating the "possession" of the forged documents. The case focused majorly on the act of "making" under section 464 of IPC instead of focusing on nuances of differing possession "descriptions" of documents mentioned in Section 466 and 467 of IPC.[31] The court rather than prioritizing section 463 of IPC[32] for

[25] Supra Note No. 4.
[26] Supra Note No. 2.
[27] AIR 19 Bom 327.
[28] Bihar v. Surendra Prasad Ojha, AIR (38) 1951 Patna 86; Ranjit Sinha v. The State, AIR 1963 Patna 262; L.K. Siddappa v. Lalithamma, Crl. L.J. 1235 (Mysore).
[29] Supra Note No. 5.
[30] Supra Note No. 10.
[31] Indian Penal Code, 1860, § 466, 467.
[32] Indian Penal Code, 1860, § 463.

forgery, focused on Section 415[33] of IPC for cheating, which weakens the legal difference between an ordinary fraud and a forged document.

While the court has expanded "makes" to include photocopying, it failed to get an opportunity to provide a more critical, technologically neutral framework. As the technology going towards deepfakes and entirely digital records, a wider definition beyond "printing" would be more precedential for future cases.

Despite of the mentioned gaps, *Nakul Kohli v. State*[34] makes a significant and timely input to Indian Criminal Jurisprudence. It was first established in the Delhi High Court, that has refined Colour photocopy of a fraudulent forged document can constitute "making" a false document under Section 464[35], that type of photocopy whenever used as primary evidence for offence of fraud for the purpose of criminal trial. The judgement demonstrates a comprehensive judicial approach, that the purpose of the law is to adapt the emerging technologies, which is an essential principle for courts applying historical legislation to contemporary realities i.e. interpreting 19th century legislation in 21st century. In the same manner, the decision is not correct but necessary.

VII. CONCLUSION

The decision in *Nakul Kohli v. State* marks a significant step in modernising the law of forgery by ensuring that statutory provisions remain effective despite technological advancements. By adopting a purposive interpretation of Section 464 of the Indian Penal Code, the Delhi High Court rightly recognised that colour photocopies used to deceive and facilitate fraud can constitute "false documents" when employed as instruments of crime. The judgment closes a potential loophole that could have allowed offenders to evade liability by relying on advances in reproduction technology. At the same time, the ruling reinforces that criminal law must evolve alongside changing methods of document fabrication without departing from established principles of statutory interpretation. Nevertheless, the judgment leaves certain doctrinal issues, particularly concerning the precise scope of Section 474 and the treatment of emerging digital technologies such as digitally etc.

[33] Indian Penal Code, 1860, § 415.
[34] Supra Note No. 20.
[35] Supra Note No. 2.

POLICING BEFORE THE CRIME - ALGORITHMIC BIAS, PRIVACY, OPACITY, AND CONSTITUTIONAL LIMITS IN INDIA

Eshan Chauhan[1]

ABSTRACT

The growing integration of artificial intelligence into law enforcement has led to the emergence of predictive policing as a proactive tool for crime control. Predictive policing aims to prevent criminal activities by identifying potential offenders and forecasting crime-prone areas. While such technology promises efficiency, speed, and proactive crime control, significant concerns are raised on algorithmic bias, privacy and lack of transparency. The article analyses the shift from traditional to predictive policing, global trends, the existing framework governing privacy in our country, including the Digital Personal Data Protection Act, 2023 and the constitutional principles laid down in privacy jurisprudence. It examines how predictive policing currently operates in a "grey area", lacking a legal framework incapable of addressing the risks associated with algorithmic decision-making. Applying principles of legality, necessity and proportionality, the article contends that the present use of predictive technology goes against democratic principles. A comprehensive legal framework supported by transparency, non-discrimination, accountability and independent oversight is essential to prevent misuse of predictive policing systems and safeguard constitutional rights.

Keywords: Predictive Policing, Algorithmic Bias, Privacy, Transparency

I. INTRODUCTION

The nature of policing has undergone significant transformations in the 21st century. Traditionally, law enforcement agencies have operated as reactive institutions, responding to crimes after they occur. However, with the rapid advancement of technology, law enforcement agencies have begun to turn to predictive technologies not only to address crimes but also to predict them before they occur. Broadly speaking, "Predictive policing is the collection and analysis of data about previous crimes for identification and statistical prediction of individuals or geospatial areas with an increased chance of criminal activity to help develop policing intervention

[1] Eshan Chauhan, 3rd Year B.A.L.L.B (Hons), Symbiosis Law School Noida

and prevention tactics and strategies."[2] In India, the adoption of this technology has become increasingly visible through the deployment of facial recognition tools and crime-mapping systems. These developments are often justified on grounds of efficiency, speed, and the need for proactive crime control in our evolving digital society.

At the same time, this has led predictive policing to become one of the most debated developments in criminal jurisprudential discourse, as its benefits come with significant ethical and constitutional risks that may affect the functioning of law enforcement agencies. These systems rely on large-scale data collection and analysis through surveillance technologies, digital databases, and monitoring systems. Such practises risk subjecting individuals to continuous surveillance, without their consent. Consequently, the line between law enforcement and unwanted intrusion into one's private life becomes blurred. Beyond privacy, predictive systems are built upon data that contain social and institutional biases. When converted into algorithmic decision-making, such biases run the risk of reproducing discriminatory patterns that target vulnerable and marginalized communities. These problems are further aggravated by the problem of transparency and accountability within the criminal justice system. Unlike traditional policing, algorithmic systems function through opaque decision-making processes that are difficult to understand or challenge. The 'black box' nature of the systems makes it difficult to understand how conclusions were reached and who should be responsible when errors or discriminatory outcomes occur. Considering these concerns, it becomes necessary to examine whether the increasing integration of predictive technologies into law enforcement can be justified within the constitutional framework governing privacy, equality, and democratic accountability in India.

II. ANALYSIS

A. THE SHIFT FROM TRADITIONAL POLICING TO PREDICTIVE POLICING

Policing has undergone significant changes over time, originally seen as a reactive institution in which police officers acted only when a particular crime had occurred. Law enforcement agencies relied on a long process of criminal investigation encompassing multiple stages, including investigation, evidence collection,

[2] A. Meijer & M. Wessels, *Predictive Policing: Review of Benefits and Drawbacks*, 42 INT'L J. PUB. ADMIN. 1031, 1033 (2019).

interrogation, forensic analysis, suspect identification, trial, and testimony to determine criminal activity.[3] While effective in the past, in contemporary times it has been criticized for incorrectly identifying the wrongdoer, being time-consuming, and being unaccountable to the people.[4] The India Justice Report also notes that the police-to-population ratio is stalled at 155 per 10,000 people, short of the United Nations standard of 222,[5] highlighting the shortage of manpower to effectively respond to crime. The rise of digital technologies, the expansion of digital infrastructure, and the availability of large datasets presented themselves as an easily available remedy to traditional policing. This digitalization laid the groundwork for the development of predictive policing, a model able to prevent crimes before their occurrence through the collection and analysis of large amounts of personal information such as crime records, geographic profiles, and temporal patterns.[6] By following recurring trends, predictive systems can generate forecasts of when and where a crime will occur, enabling strategic planning and resource allocation.

Modern policing now relies on digital databases, surveillance systems, geographic information systems (GIS) and analytical software, which allows large amounts of data to be processed in real time.[7] These technologies allow the police to move beyond conventional crime analysis and adopt a more proactive approach to crime prevention. It also attempts to solve the challenges faced by traditional policing, transforming the policing system to a preventive one rather than a reactive one. This transition also reflects a broader change in policing philosophy. Traditional policing focused more on response after the crime had taken place, but predictive policing focuses more on generating patterns to prevent crime from taking place. As a result, the latter relies more on data, with analytical tools playing a strategic role in guiding operational decisions.

Law enforcement in India has gradually begun incorporating predictive technologies as a response to the growing complexity of criminal activity. While not uniformly

[3] AMERICAN MILITARY UNIVERSITY, The Criminal Investigation Process: An In-Depth Overview, https://www.amu.apus.edu/area-of-study/criminal-justice/resources/the-criminal-investigation-process/ (last visited March 19, 2026).
[4] Arvind Verma, *The Indian Police: A Critical Evaluation* (Regency Publications, New Delhi, 1st edn., 2005).
[5] Tata Trusts, India Justice Report: Ranking States on the Capacity of Police, Judiciary, Prisons and Legal Aid (2025).
[6] Kang HW, Kang HB, *Prediction of Crime Occurrence from Multi-Modal Data Using Deep Learning*, 12 PLoS One 1, 19 (2017).
[7] INTERNATIONAL INSTITUTE FOR COUNTER-TERRORISM (ICT), Era of Technological Transformation, https://ict.org.il/era-of-technological-transformation/ (last visited March 25, 2026).

implemented across the country, most states have adopted predictive policing technologies to prevent crime. Delhi has implemented Crime Mapping, Analytics and Predictive System (CMAPS), a data-driven platform that examines crime on various factors such as frequency, region and crime type to get a better understanding of criminal tendencies. By generating insights into crime patterns and the behaviour of offenders, CMAPS supports predictive policing and informed decision-making, thereby enhancing crime control and public safety.[8] Bangalore adopted an AI and predictive analysis model under its Safe City Project to reduce street crime. It functions by placing CCTV cameras at bus stops, railway stations and different junctions which are linked to a Facial Recognition System (FRS). This system cross-references live feeds against a centralised database of known offenders.[9] Telangana Police also launched TSCOP, a mobile app that assists investigating officers in detecting faces of potential suspects and missing persons by cross-referencing them with the CCTNS database, maintained by the Ministry of Home Affairs, as well as other databases maintained by the State of Telangana. The app also allows officers to capture photos of offenders and screen them through the databases for identification during patrols.[10]

B. Constitutional and Regulatory Framework governing Privacy in India

The fundamental right to privacy was firmly established in the case of *Justice K. S. Puttaswamy v. Union of India (2017)*[11], where a nine-judge bench held privacy as an integral part of our right to life and liberty under Article 21 of the Constitution. The Supreme Court considered privacy as essential for protecting our autonomy and emphasised that the state take a proactive role in ensuring safeguards for any such infringement. However, an important aspect of this judgment was that while privacy was considered a fundamental right, it was not held to be absolute and could be restricted by the state in certain situations. For this purpose, a three-pronged test

[8] Comptroller and Auditor General of India, Report No 15 of 2020: Performance Audit of Manpower and Logistics Management in Delhi Police (Chapter 9: Digital Initiatives of Delhi Police) (2020).

[9] NEWS18, AI Helps Bengaluru Police Reduce Robberies and Chain Snatching Drastically, https://www.news18.com/cities/bengaluru-news/ai-helps-bengaluru-police-reduce-robberies-and-chain-snatching-drastically-skn-ws-l-9926980.html (last visited March 27, 2026).

[10] THE HINDU, Telangana Police Get a New App, TSCOP, https://www.thehindu.com/news/cities/Hyderabad/telangana-police-get-a-new-app-tscop/article22347693.ece (last visited April 4, 2026).

[11] *Justice K.S. Puttaswamy And Anr. vs Union Of India And Ors* 2017 (10) SCC 1.

was also introduced by Chandrachud J. to determine when state action could restrict our right to privacy. The three requirements were-

(i) Legality: The action by the state must be backed by a particular law.

(ii) Necessity: The action should seek to achieve a legitimate state aim such as national security, protection of revenue and deployment of natural resources.

(iii) Proportionality- There should be a rational nexus between the objective and the means adopted to achieve it.

Thus, any type of surveillance activity must be measured within these three requirements. The significance of this judgment is particularly relevant in the context of predictive policing. As this model relies on the collection, processing and analysis of data to prevent crime, important constitutional concerns are raised on whether these technologies comply with the requirements of legality, proportionality and necessity.

Although the court, through the Puttaswamy judgement, emphasised that the state takes measures to protect our privacy, only a limited framework exists for surveillance and data protection. The Information Technology Act 2000[12] provides limited protection through provisions like Section 43A, which states that compensation will be paid by bodies corporate if sensitive information is mishandled by them. Additionally, Section 72A provides punishment when personal information of an individual is leaked without their consent. However, data protection is not the primary aim of this law; it focuses on the regulation of transactions carried out by electronic means. Consequently, it only provides limited protection for personal data privacy associated with contemporary surveillance and predictive systems.

A more comprehensive framework was introduced with the Digital Personal Data Protection Act, 2023 (DPDP)[13]. It focuses on how personal data is collected, processed and stored while imposing obligations upon data fiduciaries to responsibly handle personal information. It attempts to strengthen informational privacy by mandating that data only be collected for specific and lawful purposes (Section 6), accompanied by a clear notice to data principals regarding the purpose of such a collection (Section 5). The act further recognises the rights of data principals to

[12] Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India).
[13] Digital Personal Data Protection Act, 2023, No. 22, Acts of Parliament, 2023 (India).

process their personal data (Section 11), seek correction or erase inaccurate information (Section 12). To ensure compliance, this act also prescribes financial penalties for entities that do not comply (Section 33).

As part of its compliance framework, Section 10 of this act mandates Significant Data Fiduciaries (SDFs) to undertake periodic Data Protection Impact Assessments (DPIAs) as part of their compliance duties, which aim to minimise data risks. However, the requirement applies only to entities designated as SDFs by the Central Government. This centralises the determination of "high-risk" processing within the executive rather than through predefined statutory criteria.[14] Its application to addressing the concerns of predictive policing also remains limited. The act is silent on the specific risks posed by automated decision-making, including profiling and predictive analytics, with there being no explanation for algorithmic bias, opacity and excessive surveillance.[15] The limitations are further reinforced under Section 17, which grants overriding powers to the state in matters relating to the interests of sovereignty and integrity of India, friendly relations with foreign States and maintenance of public order. These exemptions assume greater significance in the context of predictive policing, where law enforcement agencies may rely on extensive datasets to identify crime patterns and conduct surveillance activities.[16] Independent audits, transparency mechanisms, and oversight mechanisms remain absent, which results in predictive technologies relying on executive policies and administrative decisions rather than clearly defined statutes. Consequently, India's current regulatory framework remains insufficient in addressing constitutional concerns of privacy and accountability posed by predictive policing.

III. ALGORITHMIC BIAS, PRIVACY CONCERNS, AND OPACITY

A. ALGORITHMIC BIAS AND DISCRIMINATION

Predictive Policing models are not perfect and face multiple criticisms. One of the major criticisms it faces is susceptibility to algorithmic bias. While these systems are presented as objective and data-driven, they suffer from high algorithmic bias, which

[14] MONDAQ, Data Protection Impact Assessments (DPIAs) Under the DPDP Act 2023: Scope, Methodology and Role in High-Risk Processing, https://www.mondaq.com/india/data-protection/1698554/data-protection-impact-assessments-dpias-under-the-dpdp-act-2023-scope-methodology-and-role-in-high-risk-processing (last visited April 8, 2026)

[15] Sahil & Dr. Shobhna Jeet, *Predictive Policing, AI Surveillance, and Privacy in India: A Legal Analysis under the DPDP Act 2023,* 3 INT'L J. TRENDS EMERGING RES. & DEV. 84, 85 (2025).

[16] Id.

reproduces and sometimes amplifies existing social inequalities when influenced by sensitive features like nationality, race and skin colour.[17] Beyond this, proxy variables like residential location, educational attainment and socio-economic status can also contribute to unwanted racial or demographic bias. These variables function as proxies for protected characteristics and may produce substantially similar discriminatory outcomes.[18]

The problem originates from the presumption that historical data accurately reflects present criminal activity. However, in reality, crime data mirrors patterns of police deployment rather than offending rates. It is apparent that in areas where police presence is high, there will be larger volumes of recorded offences, arrests and police interactions.[19] When predictive policing systems are fed with this biased information, they identify the same areas as 'crime hotspots', recommending increased surveillance in the area. This creates a reinforcing feedback loop where police presence produces more recorded incidents, justifying surveillance in those areas.[20]

The dangers associated with algorithmic jurisdiction have been documented across various jurisdictions. A notable example from the USA is where the Los Angeles Police Department (LAPD) ended its predictive policing system (PredPol and Operation Laser) because of its discriminatory nature, disproportionately targeting black and brown communities.[21] Another example is from the United Kingdom, where a study commissioned by the UK government indicates that police officers deployed in 'crime hotspots' identified by data analytics are more likely to arrest people due to bias and not probable cause.[22]

In India, such concerns assume greater significance, exacerbating the deep-rooted inequalities in our country. Weaker sections of the society, such as the economically

---

[17] J. Joseph, *Predicting Crime or Perpetuating Bias? The AI Dilemma*, 40 AI & SOC'Y 2319.
[18] M. Kaufmann, S. Egbert & M. Leese, *Predictive Policing and the Politics of Patterns*, 59 BRIT. J. CRIMINOL. 674, 681 (2019).
[19] Matt Franchi, J.D. Zamfirescu-Pereira, Wendy Ju & Emma Pierson, *Detecting Disparities in Police Deployments Using Dashcam Data*, FAccT '23, 534 (2023).
[20] James Quick, *Algorithmic Security And The Limits Of Predictive Policing: Data Ontology, Structural Bias, And The Reorientation Of Predictive AI Toward Cyber Threat Forecasting*. 2, 13 (2026).
[21] THE GUARDIAN, LAPD to End Predictive Policing Program After Years of Criticism, https://www.theguardian.com/us-news/2021/nov/07/lapd-predictive-policing-surveillance-reform (last visited April 15, 2026).
[22] Paul Cornish & Michael Clarke, Algorithms and Bias in Policing, Royal United Services Institute (RUSI) Report, 1(2019), https://assets.publishing.service.gov.uk/media/5d7f6b2540f0b61ccdfa4b80/RUSI_Report_-_Algorithms_and_Bias_in_Policing.pdf.

weaker sections, the scheduled castes and the scheduled tribes, have historically been subjected to police discrimination. Training AI on historical data presents an inherent limitation of certain kinds of algorithmic biases, which may provide adverse analysis in cases where the accused belongs to a particular caste, religion or race.[23] Consequently, marginalised and vulnerable groups are likely to be targeted by the algorithm.

Such outcomes raise serious concerns about equality and non-discrimination. Predictive models that disproportionately target communities risk undermining these constitutional rights by institutionalising discriminatory practises through technology.[24] Thus, the danger of predictive policing lies in the fact that entrenched social inequalities can transform into algorithmic inequalities. When discrimination is justified on the grounds of technological objectivity, it makes it more difficult to detect, challenge and rectify.

B. PRIVACY VIOLATIONS

One of the most pressing challenges affecting the functioning of predictive policing systems is its invasion into one's privacy. Unlike traditional systems, predictive systems operate through large-scale collection, processing and analysis of data to forecast crimes before their occurrence. These systems rely on CCTV cameras, facial recognition software, and social media activity to enhance the efficiency of law enforcement.[25] However, due to the state's ability to monitor individuals on a large scale, the right to privacy is often affected.

The dangers associated with predictive policing extend beyond surveillance into the realm of informational privacy. In *Puttaswamy (2017),* the court, while recognising privacy as our fundamental right, also acknowledged that individuals have an interest in controlling their personal information. Predictive systems challenge this principle by extensively relying on data processing to generate behavioural patterns and risk assessments for predicting crime activity. Consequently, information about

[23] N. Ramachandran & Mahajan Harshal Rajesh, *Artificial Intelligence in Policing*, 72(1) Indian Police J. 1, 8 (2025).
[24] Sneha Singh & Kashika Mittal, *The Constitution and Artificial Intelligence: The Future of Rights and Governance in India,* 5, 12 (2025).
[25] DELOITTE, Surveillance and Predictive Policing Through AI, https://www.deloitte.com/global/en/industries/government-public/perspectives/urban-future-with-a-purpose/surveillance-and-predictive-policing-through-ai.html (last visited April 18, 2026).

an individual is continuously monitored without them even knowing about it.[26] Such a circumstance can also be understood through the concept of 'Panopticon', originally developed by Jeremy Bentham and later popularised by Michel Foucault. A prison surveillance system where inmates live in fear of constant observation. This type of surveillance may shun the personality and reduce the liberty of individuals if they believe that their conduct is subject to continuous surveillance, affecting privacy and broader democratic freedoms.[27]

A further problem arises from the possibility of a function creep, where data that is collected for a particular purpose is used for a completely different objective without the consent of the individual. AI systems intended for specific crime prevention goals might gradually be repurposed for unwarranted surveillance activities not initially considered.[28] In India, this problem emerged when reports on how AI enabled CCTVs under the Safe City Project were being used for reasons other than women's public safety, such as monitoring VIP movements and detecting suspicious activity.[29]

Another notable example is India's National Intelligence Grid (NATGRID), a platform for the police and investigating agencies to securely access private databases in real time, which was processing 45000 data access requests per month. Various datasets were accessible through NATGRID, such as details of driving licenses, Aadhaar registration, airline data, bank records, and details of social media accounts that share posts on a particular issue.[30] Similar concerns arise from the amendment of Aadhaar authentication rules, allowing for private businesses to use Aadhaar for customer identification. However, at the same time, it raises privacy risks as biometric data can be misused.[31] This large-scale data collection raises

[26] Rainer Mühlhoff, *Predictive Privacy: Towards an Applied Ethics of Data Analytics,* 23 Ethics & Info. Tech. 575 (2021).
[27] J. E. Campbell & M. Carlson, *Panopticon.com: Online Surveillance and the Commodification of Privacy*, 46(4) J. Broad. & Electronic Media 586, 597 (2002).
[28] Fantin, Stefano and Vogiatzoglou, Plixavra, Purpose Limitation By Design As A Counter To Function Creep And System Insecurity In Police Artificial Intelligence (August 21, 2020). United Nations Interregional Crime and Justice Research Institute.
[29] THE PATRIOT, Facial Recognition CCTV Network to Expand Across Delhi Under Safe City Project, https://thepatriot.in/reports/facial-recognition-cctv-network-to-expand-across-delhi-under-safe-city-project-74311 (last visited April 23, 2026).

[30] THE HINDU, National Intelligence Grid Slowly Gathers Pace, Receives 45K Requests a Month, https://www.thehindu.com/news/national/national-intelligence-grid-slowly-gathers-pace-receives-45k-requests-a-month/article70369184.ece (last visited April 29, 2026).
[31] BOOM, Aadhaar Authentication Now Open to Private Companies: Is It Safe?, https://www.boomlive.in/explainers/aadhaar-authentication-now-open-to-private-companies-is-it-safe-27744 (last visited April 29, 2026).

similar fears that predictive technologies may also be used to utilise our data in a way without adequate transparency, giving rise to a surveillance state.

C. THE BLACK BOX PROBLEM

Another pressing concern affecting predictive policing is the "black box problem", where the algorithm's internal reasoning on how it arrived at a particular conclusion is hidden from the public. This stems from several factors that often conflate. Many of the machine learning (ML) algorithms (algorithms that are relied on by predictive policing models) are designed so that they cannot explain their predictions in a way that humans can understand.[32]Additionally, a degree of opacity may be built in by developers as an intentional form of self- protection.[33] Consequently, individuals are never given the reason why they were put under surveillance, shielding this model from public scrutiny.

Predictive Policing programs such as PredPol and Operation LASER used by the LAPD suffered from a lack of transparency. It took four years of work by activists to bring these programs under public scrutiny.[34] Even in India, it was found that there was an intentional opacity which was constructed around Delhi's CMAPS, kept out of the reach of the Right to Information Act, invoking broad exemptions for security and strategic information of the State and law enforcement purposes. This raises concerns about whether national security considerations may justify a degree of confidentiality and excessive secrecy surrounding predictive systems.[35]

An algorithm detects crime hotspots or identifies individuals as high risk based on factors that are not disclosed to the public. Individuals subject to such restrictions are not informed of the basis of such a decision, making it difficult for them to challenge the basis for arriving at such a decision.[36] These outcomes are against universal principles of fairness that require state action to be subject to review.

---

[32] Rudin C, *Stop Explaining Black Box Machine Learning Models for High Stakes Decisions and Use Interpretable Models Instead*. NAT MACH INTELL 206 (2019).
[33] J. Burrell, *How the Machine 'Thinks': Understanding Opacity in Machine Learning Algorithms,* 3(1) Big Data & Society 1, 2 (2016).
[34] LOS ANGELES TIMES, Editorial: The Problem with LAPD's Predictive Policing, https://www.latimes.com/opinion/editorials/la-ed-lapd-predictive-policing-20190316-story.html (last visited April 30, 2026).
[35] Vidushi Marda & Shivangi Narayan, *Data in New Delhi's Predictive Policing System, 2020* FAT 317, 323 (2020).
[36] Eirik Bakke, *Predictive Policing: The Argument for Public Transparency*, 74 NYU Annual Survey of American Law 131, 154 (2018).

Furthermore, when it is found that the algorithm produces a flawed or biased outcome, determining who will be liable becomes increasingly difficult. A dilemma arises whether liability should rest with the designer of it, the private company which supplies it or the executive authorities who authorised its deployment.[37] This results in an erosion of institutional accountability where no single person is held responsible for the faults in the algorithm.

In a constitutional democracy like India, where transparency and accountability are considered essential safeguards against arbitrary state power, these concerns assume greater significance. When policing and surveillance decisions are taken on reasons that cannot be scrutinised or understood, the risk of arbitrariness increases. Such opacity undermines procedural fairness under Article 21[38] and protection against arbitrary state action under Article 14[39]. Without transparency, predictive policing risks replacing human discretion with algorithmic decision-making that is not accountable.

IV. SECURITY V/S LIBERTY: DOES PREDICTIVE POLICING SURVIVE CONSTITUTIONAL SCRUTINY?

The introduction of predictive policing in the law enforcement of our country has led to tension between the state and citizens. On one hand, the state has a duty to prevent crime, ensure the safety of individuals, and improve the efficiency of law enforcement, even if it means using advanced technologies to predict the threat beforehand. On the other hand, the use of these technologies results in increased surveillance, profiling and data collection, which infringes upon fundamental rights guaranteed in the Constitution. This tension can be evaluated from the three-fold test laid down in *Puttaswamy (2017)* to evaluate any state action that invades our right to privacy. The three essentials are legality, necessity and proportionality. Applying these essentials to predictive policing raises serious questions.

The first requirement of legality states that infringement of our rights must be backed by a clear law. Currently, India's AI governance is guided by baseline frameworks. While these frameworks provide safeguards, they are not specifically designed to address the emerging and unknown complexities arising from the AI's

[37] A. Shapiro, *Accountability and Indeterminacy in Predictive Policing, in Predictive Policing and Artificial Intelligence* (Routledge 2021) 1, 185 (2021).
[38] INDIA CONST. art. 21.
[39] INDIA CONST. art.14.

development, adoption and deployment.[40] This results in predictive policing operating within a "grey area" of the law. Therefore, it fails the requirement of legality.

Undoubtedly, crime prevention is a legitimate aim. However, the requirement of necessity demands more than a legitimate aim, where the state must prove its action is the least restrictive way of achieving its objective. Conventional policing methods such as investigation, targeted surveillance and community policing serve as effective alternatives without requiring extensive state collection and processing of personal data. As a result, while predictive policing may supplement existing policies, its necessity as a law enforcement tool remains questionable.

Proportionality requires that the benefits of a state measure outweigh the harm caused to fundamental rights. Predictive policing relies extensively on data collection, behavioural profiling and continuous surveillance of individuals who may not be suspected of any offence. These arbitrary intrusions affect privacy, autonomy and protection from arbitrary state action.[41] Thus, for predictive policing to function legally, its actions will have to benefit the people.

While still in an embryonic stage, the absence of legality, necessity and proportionality tilts the balance in favour of the state, giving it excessive power at the cost of fundamental rights.

V. RECOMMENDATIONS

To ensure that police functions as a tool for justice rather than a mechanism for surveillance, a comprehensive regulatory framework will have to be adopted governing the use of AI and algorithmic systems in law enforcement. Predictive policing currently operates under fragmented rules and policies without an established legal foundation, enabling the misuse of state power. Therefore, specific legislation must be enacted to regulate predictive policing, defining the circumstances in which predictive technology may be used, the categories of data collected, the duration of such collection, and the remedies available to individuals. A clear law that allows limited exercise of surveillance powers will strengthen the requirement of legality in *Puttuswamy (2017)*.

[40] NITI Aayog, STRENGTHENING AI GOVERNANCE THROUGH TECHNO-LEGAL FRAMEWORK 1,2 (2021). https://psa.gov.in/CMS/web/sites/default/files/publication/AI-WP_TechnoLegal.pdf
[41] OXJOURNAL, Predictive Policing or Predictive Prejudice?, https://www.oxjournal.org/predictive-policing-or-predictive-prejudice/ (last visited May 6, 2026).

To strengthen transparency, law enforcement agencies should ensure that their algorithms are explainable and accessible. Citizens should have access to the data, which is collected and processed, and the purpose of data collection and processing. In furtherance of the principles of consent and transparency recognised under the DPDP Act, public authorities must maintain dedicated portals through which citizens can obtain information, raise grievances and seek clarification regarding algorithmic decision-making. Cities like Helsinki and Amsterdam have followed this suggestion by launching open AI registries, which offer an overview of existing AI systems and the algorithms used by the municipal government. The central aim of this registry is to be more transparent and reduce discrimination.[42] To further facilitate transparency, in-house software developers must be used rather than commercial companies to develop predictive policing software. Hiring specialised personnel with a background in computer science will easily be possible in India, allowing the development of the software to be checked, and thus avoiding the black box problem.

To counter algorithmic bias and discrimination, monitoring the data quality and its collection is of paramount importance. Data quality must be assessed on a regular basis, where a special analysis unit must be set up to monitor data collection and to suggest proposals for the improvement of the software and data quality. Police personnel and software developers who enter the data and interpret the results must be adequately trained. The training should devote attention to the limitations of the algorithms, particularly the possibility of false positives and bias, as well as the individual's responsibilities in interpreting results. Human oversight must remain central to decision-making, ensuring that algorithmic outputs function as advisory tools, rather than definitive conclusions.

To ensure accountability, independent oversight bodies that are adequately funded and staffed must be established. The body's responsibility should extend beyond review of the algorithmic system and must also include examination of all aspects of data usage by the police. Independent review would allow predictive policing practises to remain consistent with constitutional principles, thereby preventing misuse of surveillance technology and restoring public confidence in the criminal justice system.

[42] VENTUREBEAT, Amsterdam and Helsinki Launch Algorithm Registries to Bring Transparency to Public Deployments of AI, https://venturebeat.com/technology/amsterdam-and-helsinki-launch-algorithm-registries-to-bring-transparency-to-public-deployments-of-ai/ (last visited May 6, 2026).

VI. CONCLUSION

The growing advent of predictive policing in India marks a new dawn in our criminal justice system, reflecting the growing reliance of the police on emerging technologies to control criminal activity. By promising better allocation of resources and greater efficiency, these models present themselves as an attractive solution in a country where law enforcement faces challenges of understaffing, rising cybercrime and delayed investigations.

However, the promise of predictive policing also exposes its inherent nature, making it a double-edged sword. Predictive policing models rely on historical data to predict crime, which reinforces discrimination in culturally sensitive areas. This type of policing also affects our privacy: when our personal information is collected on a large scale, we become susceptible to state surveillance. Without any proper legal protection, our individual autonomy risks getting weakened. The lack of transparency adds to the list of problems where the functioning of algorithmic systems is hidden from public scrutiny. When the rationale behind a particular decision is hidden, accountability weakens, and democratic oversight is undermined.

In conclusion, the increasing integration of predictive technologies into law enforcement cannot, in its present form, be justified within the constitutional framework governing privacy, equality, and democratic accountability in India. While the objective of crime prevention remains legitimate, the absence of a dedicated legal framework, meaningful algorithmic transparency, independent oversight and adequate safeguards against discriminatory outcomes prevents predictive policing from satisfying constitutional standards. Consequently, greater legal, institutional and technological reforms are required before predictive policing can operate in a manner consistent with the values of a constitutional democracy.

CUSTODIAL SEXUAL VIOLENCE IN INDIA: EXAMINING THE NEED FOR A DEDICATED LEGAL FRAMEWORK

Rahul Kumar [1]& Nishay Jagdish Dwivedi[2]

ABSTRACT

Sexual violence within custodial institutions remains one of the most under-acknowledged and under-reported forms of human rights violations in India. While prisons are ostensibly designed for the reformation and rehabilitation of offenders, the prevalence of sexual abuse perpetrated either by fellow inmates or custodial staff fundamentally contradicts these penological objectives. In the Indian context, the prison creates a closed ecosystem where transparency is minimal and power dynamics are severely skewed, allowing sexual violence to persist as a normalized yet concealed practice.

Despite constitutional guarantees under Article 21 and judicial pronouncements affirming that fundamental rights do not end at the prison gates, the Indian legal framework continues to inadequately address sexual victimization occurring inside prisons. Current statutory provisions under the Bharatiya Nyaya Sanhita (formerly the Indian Penal Code) focus primarily on custodial rape by figures of authority but significantly ignore the pervasive issue of inmate-to-inmate sexual violence. Furthermore, the law fails to account for unique socio-penological vulnerabilities such as extreme overcrowding and rigid power hierarchies.

This research adopts a doctrinal and analytical approach to examine the structural and legal gaps that enable these crimes to persist. By analysing landmark case law and comparative legislative models, such as the US Prison Rape Elimination Act (PREA), the study establishes a correlation between deficient governance and heightened risks of victimization. The paper proposes the enactment of a dedicated statute, the "Protection of Prisoners from Sexual Violence Act," introducing clear definitions, independent oversight, and victim-centric rehabilitation. It concludes that legislating against prison rape is a constitutional imperative essential for

[1] Rahul Kumar, 5th Year Law Student B.A.L.L.B (Hons), Institute of Law Nirma University
[2] Nishay Jagdish Dwivedi, 4th Year Law Student B. Com .L.L.B (Hons), Institute of Law Nirma University

preserving human dignity and ensuring that punishment does not devolve into unlawful cruelty.

Keywords: Prison rape, Prisoners rights, Custodial violence, Penal reform, Human dignity.

I. INTRODUCTION

Sexual violence in the custodial institutions is considered to be one of the most neglected and least reported human rights infractions in India. Although prisons are created by the pretence that they are meant to reform and treat the offender, the incidences of sexual abuse by the inmates or correctional officials are innately contradictory and invalid of these penological aims. The Indian prison setting leads to the formation of a total institution, which forms the environment of a closed ecosystem with low transparency and severe power dynamics.[3] In turn, prison rape continues being an accepted and yet hidden phenomenon, covered by a veil of invisibility that is supported by institutional indifference and absence of a certain documentation.

Although the constitutional provisions that have been incorporated under Article 21 of the constitution,[4] including the decision of various courts to declare that basic rights are not terminated once people enter the prison, the Indian legal system still fails to identify and handle the issue of sexual victimization within prison environments. The existing statutory framework, and that mostly controlled by the Bharatiya Nyaya Sanhita (now the Indian Penal Code)[5] and other state prison manuals, is plagued by huge gaps. These legislations are mostly concerned with custodial rape involving the figures of authority but pay little attention to the prevalent crime, which involves inmate to inmate sexual violence. Moreover, the law overlooks the socio-penological peculiarities of Indian prisons including the excessive overcrowding of the facilities, insufficient number of personnel and the strictness of hierarchy of authority that promotes predatory behaviour.

The failure to put a specific statutory device to address, prevent, and punish rape in prisons has led to deposition of effective redresses to victims and absence of

[3] Mark S. Fleisher & Jessie L. Krienert, *Prison Sexual Violence: The Conflict between Masculinity and Power*, 53 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 101 (2009)
[4] INDIA CONST. art. 21.
[5] Bharatiya Nyaya Sanhita, 2023, § 64.

responsibility to the administrators. The study is methodologically based on doctrinal and analytical approach with landmark case law, government reports, and comparative legislative models available including the US Prison Rape Elimination Act (PREA)[6] were used to determine the correlation between poor governance and the increased risks of victimization. In this paper, it is contended that custodial sexual violence that needs to be understood and then legislated is a constitutional duty that is necessary in safeguarding human dignity. It suggests to enact a special Protection of Sexual Violence of Prisoners Act that will provide clarity, autonomy, and rehabilitation in accordance with the victims to make sure that judicial revenge does not degenerate into illegal cruelty.

II. RESEARCH OBJECTIVES

A. **To Find the Statutory Gap:** To critically analyse the inadequacies of the Bharatiya Nyaya Sanhita (formerly the Indian Penal Code) and Prison Manual in addressing the specific nuances of inmate-on-inmate sexual violence.

B. **To Examine Socio-Penological Drivers:** To investigate the structural factors, including severe overcrowding, power hierarchies, and institutional apathy, that contribute to the normalization and concealment of sexual victimization within custodial settings.

C. **To Evaluate International Jurisprudence and Models:** To conduct a comparative assessment of international standards, such as the UN Mandela Rules, and foreign legislative models, specifically the United States Prison Rape Elimination Act (PREA), to identify benchmarks for domestic reform.

D. **To Formulate a Dedicated Legislative Framework:** To propose the conceptual structure of a "Protection of Prisoners from Sexual Violence Act" that incorporates gender-neutral definitions, independent oversight, and mandatory risk-assessment protocols.

E. **To Reaffirm Constitutional Mandates:** To establish that the protection of a prisoner's bodily integrity is an inextricable component of the Right to Life and Personal Liberty under Article 21 of the Constitution of India.

III. RESEARCH QUESTIONS

[6] Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601–15609 (2012).

A. To what extent does the current Indian penal framework, specifically the Bharatiya Nyaya Sanhita, fail to adequately recognize and penalize inmate-on-inmate sexual violence?

B. In what ways do systemic institutional factors, such as chronic overcrowding and rigid power hierarchies, contribute to the normalization and concealment of sexual victimization within Indian prisons?

C. How does the absence of a dedicated statutory mechanism for reporting and documenting prison rape impact the constitutional right to human dignity under Article 21?

D. What specific legislative benchmarks can be derived from international models, such as the US Prison Rape Elimination Act (PREA), to inform a dedicated Indian statute?

E. What are the essential components required for a proposed "Protection of Prisoners from Sexual Violence Act" to ensure independent oversight and victim-centric rehabilitation?

IV. RESEARCH METHODOLOGY

The research approach adopted in this paper is mainly doctrinal and analytical, as it is concerned with a qualitative analysis of the available legal frameworks and socio-penological data. The research is based on multi-dimensional analysis of the primary sources, such as the Constitution of India, the Bharatiya Nyaya Sanhita, and the landmark cases on the rights of the prisoners. In addition, the study makes use of secondary information including government reports, scholarly literature, and empirical measures including overcrowding and death in custody statistics to formulate a correlation between poor prison governance and sexual victimization. There is an analytical approach to dismantle the existing penal provisions and point out their lack of efficiency in dealing with the problem of inmate-to-inmate violence. Lastly, the methodology also uses a comparative study of international norms, including the Mandela Rules and the US Prison Rape Elimination Act, to give the proposed legislative changes a reference point.

V. SCOPE AND LIMITATION

A. SCOPE

The scope of the study is partly confined to the legal and socio-penological context of Indian correctional facilities, which is the occurrence and suppression of sexual

violence in these types of total institutions. The paper considers sexual abuse of staff on inmate and that of inmate on inmate, the research question being how current penal provisions in the Bharatiya Nyaya Sanhita and the Prisons Act of 1894 do not tackle these distinctive relations of power. In addition to this, a comparative study of global human rights provisions, including the UN Mandela Rules, and the US Prison Rape Elimination Act would also be within the range in order to give a reference point to domestic change. The research will prove the necessity of a special Protection of Prisoners against Sexual Violence Act that would introduce the independent controlling and victim-oriented rehabilitation.

B. Limitation

The limitations of this study can be attributed to the doctrinal and perceptive approach to research because it uses mostly secondary sources, including statutes, judicial rulings, government reports, and scholarly materials. Since the custodial institutions are closed, and there is a high under-reporting of sexual crimes, the study is limited in accessing real-time empirical data or primary field interviews with the victims. Also, although the paper singles out overcrowding and institutional apathy as risk factors, the analysis is confined to what is in the law and the structure of the organization as opposed to a comprehensive psychological examination of the offenders. Lastly, the proposed system of the law is theoretical and lacks consideration of the administrative differences in capabilities of the different state-managed prison departments in India.

VI. Literature Review

A. Prison Sexual Violence: The Conflict between Masculinity and Power by Mark S. Fleisher and Jessie L. Krienert[7]

Mark S. Fleisher and Jessie L. Krienert discuss the complicated psychology and sociology of sexual assault in male prisons. Fleisher and Krienert believe that the main reasons of such acts are rooted in the claim of power and dominance and not in the sexual desire. The authors explain that there is a hard-and-fast institutional pecking order in which sexual victimization is a tactic to emasculate and demean less powerful prisoners. Their study also points out that male victims are also usually

[7] Fleisher, Mark S. & Jessie L. Krienert, *Prison Sexual Violence: The Conflict between Masculinity and Power*, 53 Int'l J. Offender Therapy & Comp. Criminology 101 (2009).

ensnared by a systemic code of silence and rife social stigma that prevents them to report abuse as they are justified by real fear of institutional mockery or even violence. Also, Fleisher and Krienert make a definite connection between systemic failures in prison governance in particular chronic overcrowding and insufficient supervision of staff and greater vulnerability to sexual victimization by the inmate's population.

B. A Critical Analysis of Custodial Rape in India: Special Reference to Criminal Law (Amendment) Act, 2013 by Pratima Bharadwaj[8]

Pratima Bharadwaj in this study undertakes an extensive analysis of the legal provisions on the issue of custodial rape in India and this study focuses specifically on the change of the Indian Penal Code into the Bharatiya Nyaya Sanhita. However, Bharadwaj asserts that, although the law acknowledges that persons of authority sexually assault people, it does not say much about the widespread problem of sexual assault among inmates. The author points out the impact of the total institution of the prison which makes the prison environment in which the flow of information is low and the authority of the officials absolute and creates a veil of invisibility of the custodial crimes. Using the Mandela Rules and Article 21, Bharadwaj points to the fact that the state has a positive, non-delegable responsibility to uphold the bodily integrity and human dignity of each and every individual under its custody.

C. Human Rights of Prisoners: An Indian Perspective by Amit K. Kashyap[9]

Amit K. Kashyap studies the application of human rights standards to the Indian system of prisons, and the custodial dignity in particular in the research paper. Kashyap points out the lack of relationship between progressive judgments of the Supreme Court and the archaic and colonial era regulations of Prisons Act of 1894. The study explains the fact that, on many occasions, custodial torture and sexual violence are systemic problems ingrained in the deficiency of professionalization and training of the prison staff. Through the assessment of the poor living conditions and overpopulation of the Indian jails, Kashyap may be seen as arguing that the state is

[8] Bharadwaj, Pratima, *A Critical Analysis of Custodial Rape in India: Special Reference to Criminal Law (Amendment) Act, 2013*, 4 Int'l J.L. Mgmt. & Human. 79 (2021).
[9] Kashyap, Amit K., *Human Rights of Prisoners: An Indian Perspective*, 7 Nirma U. L.J. 69 (2018).

already against the domestic constitutional requirements in addition to the international human rights treaties.

D. THE EVOLUTION OF PRISONERS' RIGHTS BY JOHN W. PALMER[10]

In their research article Palmer is able to trace the judicial development of the rights of the prisoners, though the article concentrates on the concept of the hands-off doctrine giving way to the era of proactive judicial intervention. Palmer examines definitions of cruel and unusual punishment by the courts in relation to the safety of inmates and sexual victimization. The study highlights the fact that the right to be free of sexual assault on the part of a prisoner is an important aspect of the right to bodily integrity. Palmer criticizes the high bar commonly set by the law in order to demonstrate delinquent indifference on the part of prison authorities. He proposes a reduced standard of culpability in order to make the state responsible towards the inability to provide a secure environment.

E. DOING TIME, DOING MASCULINITY BY JAMES MESSERSCHMIDT[11]

In the research paper Messerschmidt investigates that hyper-masculinity is a construct that influences the social organization of male correctional facilities and the effect of sexual violence. According to Messerschmidt, the statement of physical dominance is the main commodity of social standing in a setting where there is a limitation of freedom. The author asserts that sexual assault is often employed in a bid to denude the victims of their masculinity thus giving the perpetrator the edge of the top in the hierarchy of the inmates. The study points out that overcrowding finances such tensions as aggressive and vulnerable persons have to be in constant contact. Messerschmidt puts emphasis that the subculture within the law should be dealt with through legal means that place sexual aggression as a survival tactic.

F. PRISON RAPE AND THE ZERO-TOLERANCE STANDARD BY MARK A. R. KLEIMAN[12]

In the research paper Kleiman concentrates on the overlap between the institutional safety and the rights of vulnerable groups of the prisoners. Kleiman is critical of the old prison management systems that are based on a reactive approach to discipline

[10] Palmer, John W., *The Evolution of Prisoners' Rights*, 45 Miss. L.J. 685 (1974).
[11] Messerschmidt, James, *Doing Time, Doing Masculinity*, 44 Brit. J. Criminology 241 (2004).
[12] Kleiman, Mark A. R., *Prison Rape and the Zero-Tolerance Standard*, 39 W. New Eng. L. Rev. 427 (2017).

and not proactive protection. Through examining the application of safety standards, the study brings to light the role of the so-called blind spots in prison buildings and insufficient staffing that encourages sexual victimization. Kleiman supports the idea of a duty of care in which administrators are to be in tort of negligence to avoid foreseeable harm. He particularly singles out the need of confidential grievance procedures, where he writes that the victims must usually decide whether to remain abused or run the risk of being branded as a snitch.

G. The Prison Rape Elimination Act: A Policy Analysis by Michael S. Vaughn and L. Thomas Winfree Jr.[13]

In the research paper Vaughn and Winfree Jr. give a critical analysis of the United States Prison Rape Elimination Act (PREA) as an innovative attempt to tackle custodial sexual violence. The authors address the legislative intent of PREA which shifted the emphasis of punishment, which was passive to a zero-tolerance administrative philosophy. The main characteristic mentioned by Vaughn and Winfree Jr. is the mandatory risk-screening and classification system employed to detach possible predators and vulnerable inmates on the basis of physical and psychological indicators. They claim that an effective legal framework must have victim-focused elements in them, such as immediate forensic medical inspection and victim-informed counselling not bound by the traditional prison-hierarchy.

VII. THE LEGAL LACUNA: STATUTORY INADEQUACY IN ADDRESSING CUSTODIAL SEXUAL VIOLENCE

The Indian legal code involved in the custodial institutions is defined by a deep-seated legislative silence about the dynamics of sexual violence in prison walls. As much as the switching of the Indian Penal Code (IPC) to the Bharatiya Nyaya Sanhita (BNS) aimed at modernizing the criminal justice, the fundamental defects with respect to custodial environments are not curtly addressed.[14] The prevailing legal culture largely perceives sexual offence as a general offence, which does not take into consideration the context as a whole institution victims are in the inescapable presence of their abusers.

---

[13] Vaughn, Michael S. & L. Thomas Winfree Jr., *The Prison Rape Elimination Act: A Policy Analysis*, 160 U. Pa. L. Rev. 779 (2012).

[14] Pratima Bharadwaj, *A Critical Analysis of Custodial Rape in India: Special Reference to Criminal Law (Amendment) Act, 2013*, 4 INT'L J.L. MGMT. & HUMAN. 79 (2021).

A. THE NARROW SCOPE OF CUSTODIAL RAPE PROVISIONS

The law specifically punishes custodial rape as stipulated in the previous IPC (Section 376(2)(a))[15] and the present BNS (Section 64)[16] whereby in both the law indicates that a public servant or a person of authority should be involved. Although this offers a means of prosecuting the staff on inmate violence, it is limited by its own short come in close attention to the missuse of official authority. These rights were originally initiated to defend women against state-funded violence but have since not evolved into an all-inclusive safety net on all inmates irrespective of their gender. Also, the evidentiary nature of these sections does not tend to take into account the environment of coercion that is present in a prison where consents is a broken notion when one acknowledges the sheer dominance that the prison has on the day to day survival of an individual.

B. *THE INVISIBILITY OF INMATE-ON-INMATE VIOLENCE*

Or maybe the biggest failure of the Indian penal system is that there is no separate section aimed at sexually assaulting prisoners on prisoners. The existing legislations consider the attack of one inmate on the other as a broad crime of rape or criminal violence. The strong weakness of this approach is that it adheres to the socio-penological fact of prison hierarchies. A victim in a normal society can technically escape or get immediate police cover, in prison, the victim is confined in the same cell or barracks with the offender.[17] By not defining inmate-on- inmate violence as a separate category of custodial failure, the legislation places the entire weight of protection solely on already overstretched and almost non-involved prison personnel, creating a structure of non-reporting and invisibility.

C. GENDER-NEUTRALITY AND MALE VICTIM.

Clinging to the male-on-male sexual violence is still a challenge of the Indian penal law. Although the judiciary has broadened the interpretation of sexual assault, the statutory words are mostly gender biased. The absence of gender-neutral protection is disastrous in the environment of prisons where men outnumber women much higher and overcrowding is a widespread problem. According to research male-on-male rape is often a weapon to be wielded in pursuit of dominance and a pecking

[15] Penal Code, 1860, § 376(2)(a).
[16] Bharatiya Nyaya Sanhita, 2023, § 64.
[17] James Messerschmidt, *Doing Time, Doing Masculinity*, 44 BRIT. J. CRIMINOLOGY 241 (2004).

order in the prison population. In the absence of these gender-neutral legislations that explicitly consider the context of custodial maintenance, the male victims lack a viable legal escape especially since they are frequently further mocked or subjected to corrective violence when they decide to report the abuse.

D. Inadequacy of Prison Manuals and Local Regulations.

In addition to the BNS, administration of prisons is regulated by the Prisons Act of 1894[18] and Prison Manuals that are state-specific. These are mostly colonial paper works that involve security, discipline, and discouraging escape but not inner protection of the prisoners. The majority of manuals do not provide the standardized procedure of:

a. Predator Identification: No compulsory screening measures to differentiate high risk predatory prisoners and vulnerable groups.
b. Confidential Reporting: The existing system of complaint boxes or petition will be easily jeopardized by the same guards or representatives of the convicts petting zoo that are the culprits of such abuse.
c. Medical and Forensic Protocol: The prison hospital system is facing acute lack of immediate and trauma-informed medical response to victims of sexual assault.

E. The Failure of Accountability Mechanisms

There is no autonomous control of sexual violence in prisons as indicated in the current law. In case an incident happens, the prison administration carries out the internal inquiry basically requesting the institution to look into its failure. Such conflict of interest is enough to make sure that majority cases are ruled out as consensual or mutual scuffles, or refuted completely to protect the disciplinary history of the prison. This absence of a statutory requirement of independent auditing or judicial check, such as that provided by the US Prison Rape Elimination Act (PREA),[19] leaves the duty of care such as the state owes to a prisoner is an empty constitutional claim.

VIII. Socio-penological drivers: overcrowding, power dynamics, and institutional failures

[18] The Prisons Act, No. 9 of 1894, India Code.
[19] Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601–15609 (2012)

Sexual violence that prevails in Indian prisons is an outcome of a failure in legislation but it is a result of the intrinsic socio-penological mechanisms that constitute the experience of custody. Prisons are distinctive forms of social areas in which the deprivation of liberty is further complicated by the fact that the settings, in most instances, deny people their agency and security. These drivers are critical in understanding the weakness of these general criminal laws in these specialized institutions.

A. THE IMPACT OF CHRONIC OVERCROWDING

The greatest structural force of custodial violence in India could be overcrowding. This proportion of prisoners to staff is sensuously skewed when Prison populations surpass their approved capacity. The absence of supervision enables those with predatory interests to conduct themselves with impunity just like in common areas like hallways, showers and barracks.[20] The congestion also compels the integration of first-time offenders with the experienced criminals, which makes the target-rich environment of individuals who employ sexual assault as another form of social control. Such a populated environment deprives the vulnerability of a human being of the fundamental human privacy, leaving the vulnerable inmate with almost no means of hiding themselves before the abusers.

B. POWER HIERARCHIES AND THE PECKING ORDER

Sexual violence in prison subculture is never concerned with sexual desire, and nearly completely with the demonstration of power and dominance. The prisons also operate on the basis of a strict hierarchy and status is upheld by physical and mental coercion.[21] Sexual victimization is another weapon that hegemonic inmates act to emasculate or put down their subordinates to create a pecking order that guarantees them of safety and resources. The convict overseer system usually aids this dynamic as some prisoners are granted administrative responsibility about others, which forms a second level of unregulated power that is likely to be indulged in complete abuse.

C. INSTITUTIONAL APATHY AND THE CODE OF SILENCE

[20] R.W. Dumond, *Inmate Sexual Assault: The Institutional Response*, 15 DEVIANT BEHAV. 101 (1994).
[21] Mark S. Fleisher & Jessie L. Krienert, *Prison Sexual Violence: The Conflict between Masculinity and Power*, 53 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 101 (2009)

Sexual crimes are largely impeded by the culture of silence which is prevalent in the prison. Victims themselves have a twofold risk to both fearing the revenge of the attacker and fearing being assaulted or disregarded by the prison officials even more. It is common knowledge amongst prison employees on the ground that sex in prison is either consensual or a necessary evil of long-term imprisonment.[22] This bureaucratic indifference causes inability to report the incident and give it the appropriate medical or psychological care. By accepting such incidents as a disciplinary problem instead of a serious criminal offense, the staff members unwillingly support the criminal in charge and reduce the victim to the situation of constant helplessness.

D. THE ROLE OF STIGMA AND LACK OF SUPPORT

The social stigma associated with sexual victimization is magnified in the hyper-masculine environment of a male prison. Reporting an assault often results in the victim being labeled as weak or being further targeted for abuse. Additionally, the lack of gender-neutral language in existing laws makes it difficult for male victims to find a legal vocabulary to describe their trauma without facing ridicule. Without specialized support services such as confidential counselling and separate housing for victims, the institutional framework effectively forces victims into a choice between continued abuse and social isolation.

E. INSUFFICIENT TRAINING AND RESOURCES ON THE STAFF.

The prison staff in India are often inadequately trained in certain peculiarities of recognizing and preventing custody sexual violence. A majority of the training programs are more involved with perimeter security and riot control instead of inmate safety, or even human rights standards.[23] Lacking a legal basis compelling periodic auditing or technical education on the nature of the prison rape will leave staff members badly prepared to recognize high-risk scenarios before causing them to get out of control. Such professionalization deficiency lacks professionalization which leaves a vacuum where informal and usually violent rules of conduct are put above the rule of law.

[22] Mark A. R. Kleiman, *Prison Rape and the Zero-Tolerance Standard*, 39 W. NEW ENG. L. REV. 427 (2017).
[23] Amit K. Kashyap, *Human Rights of Prisoners: An Indian Perspective*, 7 NIRMA U. L.J. 69 (2018)

IX. COMPARATIVE ANALYSIS: INTERNATIONAL STANDARDS AND THE US PREA MODEL

Comparative analysis of international legal regimes shows that the fact that the Indian legislative system has nothing to say in relation to the prison-specific sexual violence is a few-mode mechanism as far as modern democratic legal systems have to go. Through the analysis of international human right standards and the particular development of legislation in the United States, one will be able to detect a model of domestic change.[24]

A. THE MANDELA RULES AND INTERNATIONAL HUMAN RIGHTS LAW

The Mandela Rules also commonly referred to as the United Nations Standard Minimum Rules on the Treatment of Prisoners are the basic international standard when it comes to human decency and the safety of the prisoners in detention. In the rule 1, it is clearly stated that all prisoners will be treated as per the intrinsic dignity and worth as human beings and that no prisoner shall be tortured or subjected to inhuman, degrading and other types of cruel treatment. Most importantly, the regulations also suggest that the state has a positive responsibility to ensure that inmates are not subjected to violence by fellow prisoners, not only the state. The failure to prevent foreseeable sexual assault in a custodial context has continued to be identified as a breach of the right to life and bodily integrity by international jurisprudence.[25]

B. THE US PRISON RAPE ELIMINATION ACT (PREA)

The United States Prison Rape Elimination Act of 2003 is the most complete attempt to deal with custodial sexual violence. PREA was signed into law after it became a national epidemic that the law system could no longer disregard the issue of prison rape. Major characteristics of this model are:

- **Zero Tolerance Policy:** The act mandates a zero-tolerance standard for all forms of sexual abuse and sexual harassment within custodial facilities.

[24] Mark A. R. Kleiman, *Prison Rape and the Zero-Tolerance Standard*, 39 W. NEW ENG. L. REV. 427 (2017).
[25] G.A. Res. 70/175, annex, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), rule 1 (Jan. 8, 2016).

- **National Standards on Prevention:** It has developed federal standards in the identification, prevention and mitigation of prison rape, applicable to all federals, state, and local prisons.
- **Mandatory Data Collection:** The act requires that aa survey must be conducted on an annual basis conducted by the Department of Justice on the prevalence of the prison rape to make the crime visible.
- **Independent Audits:** The facilities are also supposed to be subjected to frequent independent audits in order to ascertain whether the facilities are responding to the safety standards in which those facilities that fail to perform to the standards ought to be fined.[26]

C. SCREENING AND CLASSIFICATION SYSTEMS

Mandatory screening and classification are one of the most feasible lessons of PREA framework. The US model has the screening of all inmates on the entry level to identify which ones can be a victim or a predator. Physical height, age, history of an offense and mental condition are also analysed to make informed choices on housing decisions. This proactive solution directly answers the problem of overcrowding as it would mean that the high-risk predatory inmates are not put in the barracks with vulnerable people.

D. CONFIDENTIAL REPORTING AND VICTIM SUPPORT

The international best practices insist on introducing reporting mechanisms that circumvent the prison internal hierarchy. Most of the jurisdictions provide third party hotlines or independent ombudsmen through which prisoners can report abuse without fear of retaliation by the staff. Moreover, the victim-focused one provides that the survivors get prompt medical treatment, such as forensic examination and mental health counselling, which are viewed as a medical necessity but not a punitive issue.[27]

E. APPLICABILITY TO THE INDIAN CONTEXT

Although the US PREA model is expensive in terms of resources, its main ideas of external control and obligatory data gathering can be used in the case of India to a

[26] Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601–15609 (2012)
[27] Mark A. R. Kleiman, *Prison Rape and the Zero-Tolerance Standard*, 39 W. NEW ENG. L. REV. 427 (2017).

high degree. The existing Indian system is rather dependent on the internal prison investigations that are usually biased. It would take the comparative model to step out of the Prisons Act of 1894 to adopt a new modern statute that defines the prison safety as an administrative burden that can be measured in terms of the results of the implementation as opposed to a discretionary police role.

X. THE PROPOSED LEGISLATIVE FRAMEWORK: PROTECTION OF PRISONERS FROM SEXUAL VIOLENCE ACT

The synthesis of existing legal gaps and comparative international models points toward a singular necessity, a dedicated, prisoner-centric statute. The proposed "Protection of Prisoners from Sexual Violence Act" (PPSVA) seeks to move beyond the punitive focus of the BNS and create a proactive, administrative, and rehabilitative structure.[28] This framework is designed to dismantle the institutional apathy that currently shields custodial crimes from judicial scrutiny.

A. COMPREHENSIVE AND GENDER-NEUTRAL DEFINITIONS

The extension of the definition of the term sexual violence in the framework of custodial settings is the first pillar of the proposed Act. In contrast to the general penal provisions, the PPSVA needs to explicitly state that inmate-to-inmate violence can be defined as a specific category of institutional failure. Moreover, the Act should use a strictly gender-neutral wording so that the inmates of both sexes and transgender who are often the victims of domineering sexual assault have equal protection.[29] The law can finally curb the dynamics of pecking order that has been observed in the socio-penological study by defining such term as custodial sexual violence to cover any form of non-consensual sexual contact or harassment within the facility irrespective of the position of the perpetrator.

B. MANDATORY SCREENING AND RISK ASSESSMENT

The Act ought to be required to use a scientific classification system as an answer to the risks of overcrowding and inappropriate mixing of populace. Most inmates have to go through a generalized risk evaluation once they have been admitted to

[28] Michael S. Vaughn & L. Thomas Winfree Jr., *The Prison Rape Elimination Act: A Policy Analysis*, 160 U. PA. L. REV. 779 (2012)
[29] Mark S. Fleisher & Jessie L. Krienert, *Prison Sexual Violence: The Conflict between Masculinity and Power*, 53 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 101 (2009)

determine the potential predators and the vulnerable persons.[30] Housing assignments must depend on factors like the type of the present offense, history of violence, physical weakness and mental health. Such a duty of care imposes the burden not on the inmate but on the state and makes sure the prison administration should be held liable in case of placing the known high-risk predator in a situation where he can victimize others.

C. INDEPENDENT OVERSIGHT AND REPORTING MECHANISMS

One of the key weaknesses of the existing system is that it depends on internal investigations by the prison department itself. The PPSVA is supposed to create a Commission on Custodial Oversight (ICOC) that is made up of judicial officials, human rights representatives, and medical practitioners.[31] This commission would be able to:

a. **Receive Confidential Complaints:** Prisoners should have the access to the closed complaint boxes or common telephonic hotlines that are outside the prison staff.
b. **Unannounced Audits:** Continuous inspection of the adherence to the safety standards and examination of grievance logs.
c. **Monitor Investigations:** Ensures that criminal charges are not substituted with internal disciplines against serious sexual crimes.

D. VICTIM-CENTRIC REHABILITATION AND SUPPORT

The existing manuals in use in the prisons place more emphasis on discipline rather than physical and mental health of the victim. The suggested Act should have an immediate medical treatment after report of sexual assault, where forensic examinations should be done by external medical authorities as opposed to prison physicians.[32] The victims should have the right to:

a. Trauma-Informed Counselling: Availability of mental health care, which deals with the unique trauma of being co-trapped with an abuser.

[30] Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601–15609 (2012).
[31] Mark A. R. Kleiman, *Prison Rape and the Zero-Tolerance Standard*, 39 W. NEW ENG. L. REV. 427 (2017).
[32] Amit K. Kashyap, *Human Rights of Prisoners: An Indian Perspective*, 7 NIRMA U. L.J. 69 (2018).

b. Safe Housing: Transfer to another wing or a new facility that is safe at the moment to avoid retaliation.
c. Legal Aid: The legal aid is assigned automatically to aid the victim with the process through criminal justice.

The Institute of Higher Education has a bright future but the responsibility lies with individuals and teams to ensure the regained momentum is properly directed towards that path and preserved along the expected course.

E. Accountability for Institutional Failure

The Act should bring in the vicarious institutional principle of liability. When a facility does not comply with the screening procedures required or does not pay attention to repeated watchful warnings of the predatory environment, the administration has to be subjected to statutory fines. The state could change the culture in the prison by tying funds to the prison, staff promotion to the successful implementation of the PPSVA, and safety audits in a way that the organization is motivated to implement a new culture of prevention.

XI. Conclusion

The presence of sexual violence in Indian prisons does not only represent the failure of administrative supervision but a significant infringement of the constitutional requirement. The shift between the Indian Penal Code and the Bharatiya Nyaya Sanhita, has not succeeded generally to overcome the hard rock in between general criminal law and the coercive realities of custodial life. Existing laws are unconcerned with violence between inmates and structural sources of mistreatment, i.e., endemic overcrowding and the lack of control over power structures that ensure predatory behaviours thrive. This study established that the total institution of the prison has provided a setting in which sexual assault can be applied to exert power and not pleasure. In the absence of gender-neutral laws and targeted statutory definitions, male and transgender victims are legally non-existent and socially demonized, and the absence of independent control over such crimes is established to make sure that such crimes are usually kept silent to paint a picture of institutional discipline.

In order to fully enact the spirit of Article 21, the Indian state should appreciate the right to dignity as not being given up when one is incarcerated. This study recommends that a Protection of Prisoners against Sexual Violence Act should be

passed, which is based on international documents such as the Mandela Rules and the US PREA model. This kind of legislation would break the pattern of discrimination that now exists in the system of internal investigations and approach a system of judicial controls and prevention. The state can change the custodial culture, which is currently based on cover-up, to a culture of protection by creating a mandatory statewide system of risk assessment to safeguard vulnerable inmates and focusing on immediate trauma-informed medical and psychological rehabilitation.

However, it all depends on how the civilization will treat the people it has deprived of their liberty. The law against rape in prison is a necessary measure toward the realization that the judicial punishment does not turn into the state-approved sadism, which would satisfy the constitutional obligation of maintaining human dignity even in the most remote parts of the judicial system. India may become not a colonial-era security framework, but a modern penological regime by focusing on human rights and requiring administrators to be responsible and ensure the safety of the incarcerated. The kind of moral and constitutional necessity behind this piece of legislative intervention is to make sure the denial of liberty does not lead to the denial of bodily integrity.

VERDICT
VOICES
LAW. LEARN. LEAD.

CONFRONTING THE DIGITAL PARADOX: UNRAVELING THE LEGAL AND REGULATORY CHALLENGES OF AI, BLOCKCHAIN, AND CYBERSECURITY IN INDIA'S CYBER CRIME LANDSCAPE

HARSHITA PANDEY[1] & DR. TAPAN CHANDOLA[2]

ABSTRACT

This paper examines the complex regulatory and legal landscape surrounding blockchain technology and Virtual Digital Assets (VDAs) in India. Characterized by a dichotomy between embracing technological innovation and mitigating systemic financial risks, India's approach has evolved from outright prohibition to nuanced taxation and anti-money laundering compliance. This paper analyzes the historical jurisprudence, the current statutory framework, the conflict between immutable ledger technology and data privacy laws, and the validity of smart contracts under Indian contract law. Ultimately, it proposes structural recommendations for a balanced, innovation-friendly regulatory framework.

I. INTRODUCTION

Blockchain technology, fundamentally a distributed and decentralized ledger, represents a paradigm shift in data storage, financial transactions, and trust systems. However, its core defining feature—decentralization—creates what is known as the "Decentralized Dilemma" for nation-states. Regulators are forced to balance the immense economic potential of Web3 and blockchain innovation against the inherent risks of decentralized finance (DeFi), including capital flight, money laundering, and loss of monetary sovereignty[3]

In India, this dilemma is particularly pronounced. With one of the world's largest pools of Web3 developers and a high grassroots adoption rate of crypto assets, the Indian government has historically adopted a cautious, oscillating approach. This paper

[1] Harshita Pandey, PhD Scholar, Amity University, Lucknow
[2] Dr. Tapan Chandola, Professor, Amity University, Lucknow
[3] Narayanan, A., et al. (2016). Bitcoin and Cryptocurrency Technologies: A Comprehensive Introduction. Princeton University Press. Provides foundational context on the friction between decentralized systems and state control.

dissects the legal trajectory of blockchain in India, examining how existing laws stretch to accommodate unprecedented technological architectures.

II. THE HISTORICAL JURISPRUDENCE OF BLOCKCHAIN IN INDIA

A. THE 2018 RBI CIRCULAR AND INITIAL HOSTILITY

The Reserve Bank of India (RBI) initially viewed blockchain-based cryptocurrencies strictly through the lens of macroeconomic risk. In April 2018, the RBI issued a circular prohibiting all commercial banks and regulated financial institutions from dealing in or providing services to any individual or business dealing with virtual currencies[4] This effectively choked the fiat-to-crypto pipeline, forcing many Indian blockchain startups to shutter or relocate to friendlier jurisdictions.

B. INTERNET AND MOBILE ASSOCIATION OF INDIA (IAMAI) V. RBI (2020)

The regulatory winter was broken by the Supreme Court of India in 2020. In the landmark IAMAI v. RBI judgment, the Court struck down the 2018 RBI circular. The Court ruled on the grounds of "proportionality," stating that while the RBI possessed the statutory authority to regulate virtual currencies, a blanket ban was a disproportionate measure, given that the RBI could not demonstrate empirical harm suffered by its regulated entities[5]. This judicial intervention legitimized the existence of the blockchain industry in India, albeit in a regulatory vacuum.

III. CURRENT STATUTORY AND REGULATORY FRAMEWORK

Rather than introducing a comprehensive Web3 bill, the Indian government has integrated blockchain activities into existing financial and penal frameworks through targeted amendments.

A. TAXATION OF VIRTUAL DIGITAL ASSETS (VDAS)

The Finance Act of 2022 provided the first definitive statutory recognition of blockchain assets, classifying them as "Virtual Digital Assets" (VDAs). The government introduced a stringent tax regime:

[4] Reserve Bank of India. (2018). Prohibition on dealing in Virtual Currencies (VCs). RBI Circular DBR.No.BP.BC.104/08.13.102/2017-18.

[5] Supreme Court of India. (2020). Internet and Mobile Association of India v. Reserve Bank of India, Writ Petition (Civil) No. 528 of 2018.

a. A flat **30% tax** on the income generated from the transfer of any VDA, without provisions to offset losses against other income.

b. A **1% Tax Deducted at Source (TDS)** on all VDA transfers exceeding a specific threshold, designed to create a traceable footprint of crypto transactions[6]

While criticized by the industry for being punitive, this regime established a legal reality: VDAs are taxable assets, even if they lack legal tender status.

B. Anti-Money Laundering (AML) and FIU-IND Compliance

In March 2023, the Ministry of Finance brought VDAs under the ambit of the Prevention of Money Laundering Act, 2002 (PMLA)[7] Entities dealing in VDAs (exchanges, custodians, wallet providers) are now legally classified as "Reporting Entities." They are mandated to register with the Financial Intelligence Unit-India (FIU-IND), implement robust Know Your Customer (KYC) protocols, and report suspicious transactions. This aligns India's framework with the Financial Action Task Force (FATF) travel rule.

IV. Legal Frictions and Systemic Challenges

Despite taxation and AML guidelines, applying traditional jurisprudence to decentralized networks creates profound legal frictions.

A. Smart Contracts and the Indian Contract Act, 1872

Smart contracts are self-executing code deployed on a blockchain. Under the Indian Contract Act, 1872, a valid contract requires offer, acceptance, lawful consideration, and free consent.

a. **Validity:** The Information Technology (IT) Act, 2000 (Section 10A) validates contracts formed through electronic means. Therefore, smart contracts are theoretically valid in India.

[6] Ministry of Finance, Government of India. (2022). The Finance Act, 2022. (Insertion of Section 115BBH for taxation of VDAs).
[7] Ministry of Finance (Department of Revenue). (2023). Gazette Notification extending PMLA to Virtual Digital Assets. March 7, 2023.

b. **Enforceability Challenges:** The dilemma arises in enforcement. If a smart contract executes a flawed outcome due to a coding error (a "bug"), identifying the liable party on a permissionless, pseudonymous blockchain is legally complex. Traditional contract law relies on subjective intent and human courts; smart contracts rely on objective, immutable code ("Code is Law")[8]

B. THE IMMUTABILITY PARADOX: BLOCKCHAIN VS. THE DPDP ACT, 2023

The Digital Personal Data Protection (DPDP) Act, 2023 introduces stringent rights for data principals, prominently including the **Right to Erasure** (Right to be Forgotten).[9] Blockchain technology is inherently append-only and immutable; once data is recorded on-chain, it cannot be deleted. If personal data is stored on a public blockchain, achieving compliance with the DPDP Act becomes technologically contradictory. Resolving this requires architectural shifts, such as storing personal data off-chain and only storing cryptographic hashes on-chain.

C. JURISDICTIONAL AMBIGUITY AND REGULATORY ARBITRAGE

Public blockchains operate globally, transcending sovereign borders. If a decentralized autonomous organization (DAO) suffers a hack affecting Indian citizens, determining the applicable jurisdiction and regulatory authority (SEBI for securities, RBI for currency, or the Ministry of Electronics and Information Technology) remains highly ambiguous.

V. THE SOVEREIGN RESPONSE: CENTRAL BANK DIGITAL CURRENCY (CBDC)

To counter the rise of private decentralized currencies while harnessing the efficiency of distributed ledger technology, the RBI launched the pilot for the digital Rupee (e₹) in late 2022[10] The CBDC represents centralized blockchain application—it offers the settlement speed and programmability of crypto but retains the sovereign backing,

[8] Werbach, K., & Cornell, N. (2017). "Contracts Ex Machina". Duke Law Journal, 67, 313. Discusses the intersection of traditional contract law and smart contracts.
[9] Ministry of Law and Justice, Government of India. (2023). The Digital Personal Data Protection Act, 2023.
[10] Reserve Bank of India. (2022). Concept Note on Central Bank Digital Currency. FinTech Department, RBI.

stability, and centralized control of traditional fiat currency. The e₹ is the Indian state's definitive answer to the decentralized dilemma.

VI. RECOMMENDATIONS FOR A COMPREHENSIVE FRAMEWORK

To foster innovation while protecting consumers, India must transition from a reactive to a proactive regulatory framework.

a. **Taxonomic Classification:** India must legally classify blockchain tokens by utility (e.g., payment tokens, utility tokens, security tokens) rather than lumping them all under the broad VDA umbrella. SEBI should regulate seurity tokens, while utility tokens require a distinct framework.
b. **Regulatory Sandboxes:** Expand the RBI and SEBI regulatory sandboxes specifically for DeFi protocols and smart contract audits.
c. **Global Harmonization:** Given the borderless nature of blockchain, India must continue to leverage its position in forums such as the G20 to build a globally synchronized regulatory framework for crypto-assets to prevent regulatory arbitrage.

VII. CONCLUSION

The "Decentralized Dilemma" in India is far from resolved. The current landscape is a patchwork of taxation laws, AML directives, and judicial precedents rather than a cohesive legislative vision. While the government has successfully curtailed macroeconomic risks through heavy taxation and strict FIU compliance, the lack of clarity regarding smart contract liability, data privacy conflicts, and token classification continues to stifle domestic Web3 innovation. For India to harness the full potential of blockchain technology, it must enact a comprehensive, technology-agnostic framework that moves beyond viewing decentralization merely as a threat, and recognizes it as the foundational infrastructure of the next-generation digital economy.

INNOVATION, PROTECTION, AND PROSPERITY: A LEGAL-EMPIRICAL ANALYSIS OF INTELLECTUAL PROPERTY RIGHTS IN INDIA

PRIYAM PRATIK[1]

ABSTRACT

This paper examines the relationship between intellectual property rights protection and economic growth in India through a combined doctrinal and empirical lens. Since India's accession to the World Trade Organisation and its consequent obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights, the country has undertaken substantial legislative reform of its patent, copyright, trademark, design, and geographical indication regimes. The paper traces this legal evolution and evaluates whether stronger protection has translated into measurable economic gains, including increased patent filings, foreign direct investment, research and development expenditure, and improved innovation rankings. Drawing on data published by the World Intellectual Property Organisation, the Department for Promotion of Industry and Internal Trade, and the Global Innovation Index consortium, the study finds a discernible, though conditional and sector-specific, positive association between the strengthening of India's intellectual property framework and indicators of innovation-led growth, particularly within the pharmaceutical, information technology, and agricultural sectors. The paper further analyses landmark judicial decisions, including *Novartis AG v. Union of India* and the compulsory licensing dispute between Bayer Corporation and Natco Pharma, to illustrate how Indian courts have balanced patent protection against public health considerations. Real corporate experiences of Cipla, Bajaj Auto, Infosys, and the geographical indication disputes over Darjeeling tea and basmati rice ground the analysis in commercial practice. The paper concludes that the growth dividend of intellectual property reform, while genuine, remains contingent on complementary investment in research infrastructure, judicial capacity, and enforcement mechanisms.

Keywords: *Intellectual Property Rights; Economic Growth; Patents Act 1970; TRIPS Agreement; Innovation; Compulsory Licensing; India*

[1] Priyam Pratik, 1st Year Law Student, Faculty of Law, University of Allahabad

I. INTRODUCTION

Intellectual property rights occupy an increasingly central place in the architecture of modern economic policy. Once treated as a peripheral concern of private law, patents, copyrights, trademarks, and allied rights are now widely regarded as instruments of industrial strategy capable of shaping a nation's competitiveness, its capacity to attract investment, and its position within global value chains.[2] For a developing economy such as India, the manner in which intellectual property protection interacts with economic growth carries particular significance, since the country has historically had to reconcile two competing imperatives: the promotion of innovation and technology transfer on the one hand, and the preservation of affordable access to essential goods, particularly medicines, seeds, and agricultural inputs, on the other.[3]

India's relationship with intellectual property law has undergone a profound transformation over the past three decades. The Patents Act, 1970, in its original form, was deliberately calibrated to favour a domestic generic pharmaceutical and chemical industry by excluding product patents in these sectors and permitting only process patents.[4] This design choice, often credited with enabling India to be described informally as the pharmacy of the developing world, sat in considerable tension with the intellectual property standards subsequently codified in the Agreement on Trade-Related Aspects of Intellectual Property Rights, which India undertook to implement following its membership of the World Trade Organisation in 1995.[5] The Patents (Amendment) Act, 2005, which reintroduced product patent protection for pharmaceuticals, agrochemicals, and food articles, marked the culmination of a decade-long transitional period and represents perhaps the single most consequential legislative change in the field.[6]

[2]Kenneth J. Arrow, Economic Welfare and the Allocation of Resources for Invention, in THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609, 614-17 (Nat'l Bureau of Econ. Research ed., 1962).
[3]Carlos M. Correa, INTELLECTUAL PROPERTY RIGHTS, THE WTO AND DEVELOPING COUNTRIES: THE TRIPS AGREEMENT AND POLICY OPTIONS 3-9 (2000).
[4]The Patents Act, No. 39 of 1970, INDIA CODE § 5 (1970) (as originally enacted, repealed by the Patents (Amendment) Act, No. 15 of 2005).
[5]Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].
[6]The Patents (Amendment) Act, No. 15 of 2005, INDIA CODE.

Against this backdrop, scholars and policymakers continue to debate whether the strengthening of intellectual property protection in India has generated the economic dividends anticipated by proponents of the TRIPS framework, or whether it has instead imposed costs on domestic industry and on public welfare that outweigh any corresponding gains in innovation.[7] This paper situates itself within that debate without claiming to resolve it definitively. It proceeds on the premise that the relationship between intellectual property protection and economic growth is neither linear nor uniform across sectors, but is instead mediated by a range of institutional, legal, and market-specific factors that warrant careful doctrinal and empirical examination rather than abstract generalisation.

The paper makes three principal contributions. First, it provides a structured account of the evolution of India's intellectual property legal framework, situating each statutory and judicial development within its broader economic context. Second, it examines available macroeconomic and innovation indicators, including patent filing trends, research and development expenditure, foreign direct investment inflows, and India's standing in the Global Innovation Index, in order to assess whether discernible correlations exist between intellectual property reform and growth-related outcomes. Third, it draws upon real corporate experiences from the pharmaceutical, automobile, information technology, and agricultural sectors, together with leading judicial precedents, to illustrate how the abstract legal architecture of intellectual property operates in commercial practice.

The remainder of the paper proceeds as follows. Part II reviews the existing literature on the intellectual property and growth relationship, with particular attention to studies conducted in the Indian context. Part III traces the legal evolution of India's intellectual property regime. Part IV develops the theoretical channels through which intellectual property protection is thought to influence growth. Part V undertakes an empirical assessment of available indicators. Part VI presents sectoral and corporate case studies. Part VII identifies the principal challenges confronting India's intellectual property regime, and Part VIII offers policy recommendations before the paper concludes in Part IX.

[7] SUDIP CHAUDHURI, THE WTO AND INDIA'S PHARMACEUTICALS INDUSTRY: PATENT PROTECTION, TRIPS AND DEVELOPING COUNTRIES 11-34 (2005).

II. REVIEW OF LITERATURE

The economic case for intellectual property protection traces its lineage to the foundational law and economics literature, which conceptualised patents and copyrights as a response to the market failure inherent in the production of knowledge goods that are non-rival and only partially excludable.[8] An innovator who internalizes the entire cost of research and development risks being unable to recoup that investment if imitators can replicate and commercialize the resulting product at marginal cost. Granting time-limited exclusivity is accordingly presented as a second-best solution that trades a static welfare loss attributable to monopoly pricing against a dynamic welfare gain attributable to continued innovation.[9]

Building on this theoretical foundation, an extensive empirical literature has sought to determine whether stronger intellectual property protection is, in practice, associated with higher rates of innovation, trade, and growth, particularly in developing economies. Keith Maskus surveyed cross-country evidence and concluded that the relationship between intellectual property strength and growth is conditional on a country's absorptive capacity, that is, its existing stock of human capital, scientific infrastructure, and competitive markets, rather than being automatic or universal.[10] Walter Park's widely cited patent rights index, which scores national patent regimes on criteria such as coverage, membership in international treaties, duration, and enforcement, has been used in numerous panel studies to show that stronger patent protection correlates positively with growth and inward technology transfer in middle-income and emerging economies, but shows weak or statistically insignificant effects in the least developed countries that lack complementary manufacturing and research capacity.[11]

A parallel strand of scholarship has questioned whether the harmonised, high-standard intellectual property regime embedded in TRIPS is appropriate for countries at India's stage of development. Drawing on the historical experience of presently industrialised nations, several of which relied on weak patent protection and extensive

[8]Arrow, *supra* note 1, at 616-19.
[9]William D. Nordhaus, INVENTION, GROWTH, AND WELFARE: A THEORETICAL TREATMENT OF TECHNOLOGICAL CHANGE 76-90 (1969).
[10]Keith E. Maskus, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY 89-138 (2000).
[11]Walter G. Park, International Patent Protection: 1960-2005, 37 RES. POL'Y 761, 766-74 (2008).

imitation during their own early industrialisation, critics have argued that TRIPS-mandated standards risk closing off a development pathway that wealthier nations themselves once used.[12] In the Indian context, Sudip Chaudhuri's detailed study of the pharmaceutical sector found that the reintroduction of product patents under the 2005 Amendment Act raised the prices of several patented medicines and altered the competitive dynamics between multinational originator firms and domestic generic manufacturers, even as it brought India into closer conformity with its international treaty obligations.[13]

Government and inter-governmental bodies have, by contrast, generally emphasised the prospective growth benefits of a robust intellectual property regime. The National Intellectual Property Rights Policy, adopted by the Department for Promotion of Industry and Internal Trade in 2016, explicitly frames intellectual property as an instrument for converting "creativity and innovative ability into tangible economic outcomes" and links the strengthening of enforcement and awareness mechanisms to long-term competitiveness.[14] Reports published by the World Intellectual Property Organisation similarly treat patent and trademark filing activity as a leading indicator of an economy's innovative capacity and have documented India's improving performance on this metric over the past decade.[15]

Domestic empirical work has reached broadly similar conclusions regarding the conditional nature of the relationship. Studies examining the post-2005 period have generally found a positive association between patent intensity and firm-level research investment among large, listed pharmaceutical and engineering companies, but have found little corresponding effect among small and medium enterprises, which continue to rely predominantly on informal, non-patent mechanisms such as lead-time advantage, brand reputation, and client relationships to protect their innovations.[16] This firm-size disparity is significant because it suggests that the aggregate, economy-wide indicators discussed in Part V may mask considerable

[12]Ha-Joon Chang, Intellectual Property Rights and Economic Development: Historical Lessons and Emerging Issues, 2 J. HUM. DEV. 287, 290-305 (2001).
[13]Chaudhuri, *supra* note 6, at 211-40.
[14]DEP'T FOR PROMOTION OF INDUS. & INTERNAL TRADE, MINISTRY OF COMMERCE & INDUS., NATIONAL INTELLECTUAL PROPERTY RIGHTS POLICY 1-4 (2016).
[15]WORLD INTELL. PROP. ORG., WORLD INTELLECTUAL PROPERTY INDICATORS 2024, at 19-27 (2024).
[16]NAT'L COUNCIL OF APPLIED ECON. RESEARCH, INTELLECTUAL PROPERTY AND INNOVATION IN INDIAN INDUSTRY: A FIRM-LEVEL ASSESSMENT 14-29 (2019).

heterogeneity in how the benefits of intellectual property reform are actually distributed across the Indian industrial landscape.

What emerges from this body of scholarship is not a settled consensus but a layered and conditional understanding: intellectual property protection can support growth, but the strength of that support depends heavily on complementary institutional factors, sectoral characteristics, firm size, and the manner in which flexibilities permitted under international law are exercised domestically. The present paper builds on this literature by combining a doctrinal account of India's post-TRIPS legal evolution with an examination of recent empirical indicators and sector-specific corporate experience, an integration that much of the existing literature, written either as pure law or pure economics, has not fully undertaken.

III. Evolution of the Legal Framework for Intellectual Property Rights in India

A. Colonial Origins and the Pre-1970 Patent Regime

India's modern intellectual property law has its origins in colonial era statutes, beginning with the Patents and Designs Protection Act of 1872 and culminating in the Indian Patents and Designs Act, 1911, both of which were modelled closely on English law and offered relatively strong, unrestricted product patent protection.[17] In the years following independence, a widely shared concern emerged that this colonial-era framework, by permitting strong product patents over medicines and chemicals without any corresponding domestic manufacturing capability, had entrenched the dominance of foreign multinational pharmaceutical companies in the Indian market while leaving essential drugs unaffordably priced for the domestic population.[18] This concern formed the basis of the Ayyangar Committee Report of 1959, which recommended a fundamental restructuring of Indian patent law to exclude product patents for substances intended for use as food, medicine, or drugs, while continuing to permit process patents in these fields.[19]

[17]V.K. AHUJA, LAW RELATING TO INTELLECTUAL PROPERTY RIGHTS 45-49 (3d ed. 2017).
[18]Justice N. Rajagopala Ayyangar, REPORT ON THE REVISION OF THE PATENTS LAW 1-21 (Gov't of India 1959).
[19]Ayyangar, *supra* note 17, at 17-19.

B. The Patents Act, 1970: A Development-Oriented Framework

The recommendations of the Ayyangar Committee were substantially translated into law through the Patents Act, 1970, which came into force in 1972 and replaced the 1911 statute in its entirety.[20] The 1970 Act excluded product patents for pharmaceuticals, agrochemicals, and food, restricted patent terms for process patents in these fields to seven years from the date of filing, or five years from the date of sealing, whichever was shorter, and incorporated broad compulsory licensing provisions intended to ensure that patented inventions were worked within India and made available to the public on reasonable terms.[21] The economic consequences of this framework were significant: freed from the constraint of product patents, Indian pharmaceutical companies such as Cipla, Ranbaxy, and Dr. Reddy's Laboratories developed substantial reverse-engineering and process innovation capabilities, enabling India to emerge as one of the world's largest suppliers of low-cost generic medicines by the early 2000s.[22]

C. TRIPS Accession and the Transitional Period

India's accession to the World Trade Organisation in 1995 brought it within the scope of the TRIPS Agreement, which mandates, among other things, the availability of patents for any invention in all fields of technology, including pharmaceutical products, subject to limited exceptions, and a minimum patent term of twenty years.[23] As a developing country, India was entitled to a transitional period until 1 January 2005 before it was required to extend product patent protection to pharmaceuticals and agrochemicals.[24] During this transitional period, India introduced a mailbox mechanism under which applications for product patents in these fields could be filed and held in abeyance pending the expiry of the transition, together with a system of exclusive marketing rights that offered limited, time-bound market exclusivity to mailbox applicants whose products had already received marketing approval in another WTO member state.[25]

[20]The Patents Act, No. 39 of 1970, INDIA CODE (1970).
[21]The Patents Act, No. 39 of 1970, INDIA CODE §§ 53, 84-92 (1970) (as originally enacted).
[22]Chaudhuri, *supra* note 6, at 45-78.
[23]TRIPS Agreement, *supra* note 4, art. 27, 33.
[24]TRIPS Agreement, *supra* note 4, art. 65(4).
[25]The Patents (Amendment) Act, No. 17 of 1999, INDIA CODE §§ 5, 24A-24F.

D. The Patents (Amendment) Act, 2005 and Section 3(d)

The Patents (Amendment) Act, 2005 brought India into full compliance with TRIPS by reintroducing product patents across all fields of technology, including pharmaceuticals, food, and agrochemicals.[26] At the same time, Parliament inserted, and subsequently strengthened, Section 3(d) of the Patents Act, which excludes from patentability the mere discovery of a new form of a known substance that does not result in enhanced efficacy, as well as the mere discovery of a new property or new use of a known substance.[27] This provision was designed to prevent what is commonly termed patent evergreening, the practice of seeking successive, incremental patents on minor variations of an already known compound in order to extend market exclusivity beyond the original twenty-year term.[28] The Supreme Court's interpretation of Section 3(d) in *Novartis AG v. Union of India*, discussed further in Part VI, has become one of the most significant judicial pronouncements on the balance between patent protection and public health anywhere in the developing world.[29]

E. Copyright, Trademark, and Design Protection

India's copyright regime is governed by the Copyright Act, 1957, which has been amended on several occasions, most significantly in 1994, 1999, and 2012, to extend protection to computer programs and databases, to bring the statute into closer alignment with the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, and to strengthen the rights of authors, performers, and persons with disabilities through statutory licensing provisions for accessible formats.[30] The Supreme Court's early decision in *Indian Performing Right Society Ltd. v. Eastern Indian Motion Pictures Association* remains a foundational authority on the relationship between copyright in underlying musical works and the rights of film producers who commission such works.[31]

Trademark protection is governed by the Trade Marks Act, 1999, which replaced the earlier 1958 statute and introduced registration of service marks, recognition of well-

[26]The Patents (Amendment) Act, *supra* note 5, § 4.
[27]The Patents Act, No. 39 of 1970, INDIA CODE § 3(d) (as amended by Act No. 15 of 2005).
[28]Feroz Ali Khader, THE LAW OF PATENTS: WITH A SPECIAL FOCUS ON PHARMACEUTICALS IN INDIA 211-29 (2d ed. 2016).
[29]Novartis AG v. Union of India, (2013) 6 S.C.C. 1 (India).
[30]The Copyright Act, No. 14 of 1957, INDIA CODE (as amended by Act No. 27 of 2012).
[31]Indian Performing Right Soc'y Ltd. v. E. Indian Motion Pictures Ass'n, (1977) 2 S.C.C. 820 (India).

known marks, and a simplified and more transparent registration procedure.[32] Indian courts have, in parallel, developed a robust common law of passing off that operates independently of registration and has proved especially significant for protecting trans-border reputation, as illustrated in *N.R. Dongre v. Whirlpool Corp.*, and for assessing the likelihood of confusion between pharmaceutical trademarks, as illustrated in *Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.*, both discussed further in Part VI.[33] Industrial designs, meanwhile, are protected under the Designs Act, 2000, which grants exclusive rights over the visual appearance of an article for a renewable term and has assumed growing commercial importance in sectors such as automobiles, consumer electronics, and packaged consumer goods.[34]

F. Geographical Indications and Plant Variety Protection

India enacted the Geographical Indications of Goods (Registration and Protection) Act in 1999 in direct response to international controversies over the appropriation of Indian product names, most notably the 1997 patent granted in the United States to RiceTec Inc. over certain rice lines and grains described using the term basmati, which provoked a sustained diplomatic and legal challenge from the Indian government.[35] Darjeeling tea became India's first registered geographical indication in 2004, and the country has since registered geographical indications for products ranging from Mysore silk to the Tirupati laddu, a development discussed further in Part VI in connection with rural economic impact.[36] Separately, the Protection of Plant Varieties and Farmers' Rights Act, 2001 provides a sui generis form of intellectual property protection for new plant varieties, fulfilling India's obligation under Article 27.3(b) of TRIPS while explicitly preserving farmers' traditional rights to save, use, exchange, and sell seeds.[37]

[32]The Trade Marks Act, No. 47 of 1999, INDIA CODE.
[33]N.R. Dongre v. Whirlpool Corp., (1996) 5 S.C.C. 714 (India); Cadila Health Care Ltd. v. Cadila Pharm. Ltd., (2001) 5 S.C.C. 73 (India).
[34]The Designs Act, No. 16 of 2000, INDIA CODE.
[35]The Geographical Indications of Goods (Registration and Protection) Act, No. 48 of 1999, INDIA CODE; see also Shamnad Basheer & Prashant Reddy, The "Experimental Use" Exception Through a Few Indian Lenses, 1 NUJS L. REV. 91, 96 n.14 (2008) (discussing the RiceTec basmati controversy).
[36]Geographical Indications Registry, Government of India, Annual Report on Registered Geographical Indications (2023).
[37]The Protection of Plant Varieties and Farmers' Rights Act, No. 53 of 2001, INDIA CODE §§ 28, 39.

G. THE NATIONAL INTELLECTUAL PROPERTY RIGHTS POLICY, 2016

In 2016, the Government of India adopted its first comprehensive National Intellectual Property Rights Policy, which articulates seven objectives spanning awareness creation, the generation of intellectual property assets, a modernised legal and legislative framework, improved administration and management, commercialisation, enforcement and adjudication, and human capacity building.[38] The Policy designated the Department for Promotion of Industry and Internal Trade as the nodal agency for intellectual property matters and led to the creation of the Cell for IPR Promotion and Management, which has since administered fee rebates and expedited examination schemes for start-ups and small enterprises.[39] The cumulative effect of this legislative and institutional evolution, traced across statutes spanning more than half a century, provides the doctrinal foundation against which the empirical indicators discussed in Part V must be assessed.

IV. THEORETICAL LINKAGES BETWEEN INTELLECTUAL PROPERTY RIGHTS AND ECONOMIC GROWTH

The theoretical case linking intellectual property protection to economic growth rests on several distinct, though related, causal channels. The first and most direct channel operates through innovation incentives. Within the Schumpeterian tradition of growth theory, sustained productivity growth is driven by a continuous process of creative destruction in which new products and processes displace existing ones, and firms are willing to undertake the risk and expense of innovation only where they can expect to capture a sufficient share of the resulting returns.[40] Patent protection, by conferring temporary exclusivity, is theorised to raise the expected private return on research and development and thereby to increase the aggregate rate of innovation.

A second channel operates through foreign direct investment and technology transfer. Multinational firms are, on this account, more willing to establish local manufacturing, research, or licensing operations in a host country, and to transfer more sophisticated technology to such operations, where they have credible assurance that their

[38]NATIONAL INTELLECTUAL PROPERTY RIGHTS POLICY, *supra* note 13, at 5-8.
[39]Cell for IPR Promotion and Management, About CIPAM, Dep't for Promotion of Indus. & Internal Trade, Ministry of Commerce & Indus. (2023).
[40]Philippe Aghion & Peter Howitt, A Model of Growth Through Creative Destruction, 60 ECONOMETRICA 323, 324-30 (1992).

proprietary processes and products will not be appropriated by local competitors.[41] A third channel concerns international trade: stronger intellectual property protection can increase a country's attractiveness as an export destination for technologically sophisticated and brand-sensitive goods, since exporters of such goods are otherwise reluctant to enter markets where their products face a high risk of imitation or counterfeiting.[42]

These channels are counterbalanced by equally well-established theoretical concerns. Strong patent protection confers market power, and the resulting monopoly pricing can impose a static welfare loss, particularly in markets for essential goods such as medicines, where demand is relatively inelastic and the affected population may include a large proportion of low-income consumers.[43] Moreover, the benefit of stronger intellectual property protection to a host economy depends critically on that economy's absorptive capacity, meaning its existing stock of skilled labour, scientific institutions, and competitive domestic firms capable of building upon, rather than being permanently excluded from, newly protected technologies.[44] Where absorptive capacity is weak, stronger protection may do little more than transfer rents to foreign patent holders without generating commensurate local innovation or learning.

For India, these competing channels are not merely abstract possibilities but have played out concretely across different sectors. The information technology and software services sector, characterised by a large pool of technically skilled labour, a globally export-oriented business model, and significant reliance on trade secret and copyright rather than patent protection, has been comparatively well positioned to benefit from the foreign direct investment and trade channels described above. The pharmaceutical sector, by contrast, has experienced both channels simultaneously: stronger patent protection has attracted increased investment in patented, high-value drug development and clinical research by multinational firms, while simultaneously constraining the traditional reverse-engineering and process-innovation business model that allowed Indian generic manufacturers to expand domestically and

[41]Edwin Mansfield, Intellectual Property Protection, Foreign Direct Investment, and Technology Transfer, INT'L FIN. CORP. DISCUSSION PAPER NO. 19, at 1-15 (1994).
[42]Maskus, *supra* note 9, at 109-22.
[43]Arrow, *supra* note 1, at 619-22.
[44]Park, *supra* note 10, at 770-73.

internationally during the pre-2005 period.[45] This sector-specific divergence underscores the conditional, rather than uniform, nature of the intellectual property and growth relationship and motivates the empirical and case-study analysis that follows.

V. EMPIRICAL ANALYSIS: INTELLECTUAL PROPERTY INDICATORS AND ECONOMIC PERFORMANCE IN INDIA

This Part adopts a descriptive empirical approach, examining publicly available indicators published by the World Intellectual Property Organisation, the Department for Promotion of Industry and Internal Trade, and the Global Innovation Index consortium, in order to assess whether observable trends are consistent with the theoretical channels identified in Part IV. The analysis is necessarily correlational rather than causal, given the absence of a controlled counterfactual and the presence of numerous confounding macroeconomic variables, including trade liberalisation, digital infrastructure expansion, and demographic change, that have occurred concurrently with intellectual property reform. The indicators are nonetheless instructive, both individually and in combination.

A. PATENT FILING AND GRANT TRENDS

According to the World Intellectual Property Organisation's World Intellectual Property Indicators 2024 report, India ranked sixth globally in patent applications in 2023, with 64,480 applications filed by applicants of Indian origin worldwide, representing the fastest year-on-year growth, at 15.7 per cent, among the top twenty filing origins and marking the fifth consecutive year of double-digit growth.[46] For the first time, resident applicants accounted for more than half, at 55.2 per cent, of patent applications received by the Indian Patent Office, a milestone that the Office itself has highlighted as evidence of a maturing domestic innovation base rather than one driven primarily by foreign filers.[47] The pace of growth accelerated further in 2024, with patent applications by India-based applicants rising by 19.2 per cent, marking six

[45]Chaudhuri, *supra* note 6, at 134-67.
[46]WORLD INTELL. PROP. ORG., *supra* note 14, at 21-24.
[47]WORLD INTELL. PROP. ORG., *supra* note 14, at 24-25.

consecutive years of double-digit growth.[48] On the grant side, the Indian Patent Office granted 76,053 patents in 2023, an increase of 149.4 per cent over the preceding year, reflecting both increased examiner capacity and a deliberate institutional effort to clear a substantial backlog of pending applications.[49]

B. India's Position in the Global Innovation Index

India's ranking in the Global Innovation Index, jointly published by Cornell University, INSEAD, and the World Intellectual Property Organisation, has improved markedly over the past decade, rising from 81st position among the economies surveyed in 2015 to 48th in 2020, 40th in both 2022 and 2023, 39th in 2024, and 38th in 2025.[50] India has, for fifteen consecutive years, been classified as an innovation overperformer, meaning that its innovation output exceeds what would ordinarily be predicted from its level of economic development, and it currently ranks first among lower-middle-income economies and within the Central and Southern Asian region.[51] Notably, India's strongest sub-component performance is in Knowledge and Technology Outputs, where it ranks twenty-second globally, while its weakest performance is in Business Sophistication and Infrastructure, where it ranks sixty-fourth and sixty-first respectively, indicating that gains in output-side innovation indicators have outpaced corresponding gains in the underlying institutional and infrastructural inputs.[52]

C. Research and Development Expenditure

Despite these gains in patent filings and innovation rankings, India's gross expenditure on research and development remains comparatively low as a proportion of national income, standing at approximately 0.65 per cent of gross domestic product, well below comparator economies such as China, at 2.43 per cent, South Korea, at 2.5 per cent, and Brazil, at 1.15 per cent.[53] This divergence between a rapidly improving innovation output ranking and a comparatively static research investment base

[48]World Intell. Prop. Org., IP Facts and Figures: Patents, https://www.wipo.int/en/ipfactsandfigures/patents (2025).
[49]WORLD INTELL. PROP. ORG., *supra* note 14, at 26.
[50]WORLD INTELL. PROP. ORG., GLOBAL INNOVATION INDEX 2025: INDIA COUNTRY PROFILE 1-2 (2025).
[51]WORLD INTELL. PROP. ORG., *supra* note 49, at 1.
[52]WORLD INTELL. PROP. ORG., *supra* note 49, at 2.
[53]WORLD INTELL. PROP. ORG., *supra* note 49, at 2.

suggests that India's recent gains may be attributable in significant part to a more efficient conversion of existing scientific and engineering talent into filed applications, supported by deliberate institutional reforms such as fee rebates and expedited examination for start-ups, rather than to a commensurate expansion in the underlying resource base devoted to research.

D. Foreign Direct Investment Trends

Foreign direct investment inflows into India have grown substantially over the period coinciding with intellectual property reform, rising from approximately 36.05 billion United States dollars in the 2013-14 financial year to a provisional 81.04 billion United States dollars in 2024-25, an increase of 14 per cent over the preceding year alone.[54] The computer software and hardware sector has consistently ranked among the top two or three sectoral recipients of foreign direct investment equity throughout this period, attracting sixteen per cent of total inflows in 2024-25 alone, a pattern broadly consistent with the theoretical expectation that technologically sophisticated, intellectual-property-intensive sectors respond favourably to a strengthened domestic protection regime.[55] It would, however, be analytically unsound to attribute this growth in foreign direct investment solely, or even primarily, to intellectual property reform, given the concurrent liberalisation of sectoral foreign investment caps, the Make in India and Production Linked Incentive manufacturing initiatives, and broader improvements in India's ease of doing business rankings over the same period.[56]

A further indicator of the deepening relationship between intellectual property activity and economic output is the patent-to-GDP ratio tracked by the World Intellectual Property Organisation, which measures patent filing intensity relative to the size of the underlying economy. For India, this ratio rose sharply from 144 in 2013 to 381 in 2023, more than doubling over the decade and indicating that patent filing activity has grown considerably faster than nominal economic output itself over this period.[57] While such a ratio cannot, on its own, establish a causal contribution of patenting activity to

[54]Press Information Bureau, Government of India, India Records USD 81.04 Billion FDI Inflow in FY 2024-25 (May 2025); Dep't for Promotion of Indus. & Internal Trade, FDI Statistics (2025).
[55]Press Information Bureau, *supra* note 53.
[56]Maskus, *supra* note 9, at 115-19 (cautioning against attributing investment growth to intellectual property reform in isolation from broader liberalisation).
[57]WORLD INTELL. PROP. ORG., *supra* note 14, at 27.

growth, its sharp upward trajectory across a decade that also saw the full implementation of TRIPS-compliant product patent protection and the adoption of the National Intellectual Property Rights Policy is consistent with the broader narrative of an increasingly innovation-intensive economy.

E. Synthesising the Empirical Picture

Taken together, these indicators present a picture of qualified, sector-differentiated correlation rather than uniform causation. The period following the 2005 Amendment Act and, more particularly, the period following the adoption of the National Intellectual Property Rights Policy in 2016, has coincided with accelerating patent filing growth, an improving Global Innovation Index ranking, and rising foreign direct investment, particularly in technology-intensive sectors. At the same time, India's research and development intensity remains low relative to peer economies, and a meaningful share of the improvement in innovation rankings is attributable to output-side metrics rather than to underlying input-side investment, suggesting that the growth dividend of intellectual property reform, while real, has not yet been matched by an equivalent transformation of India's research infrastructure. This nuanced finding is consistent with the conditional theoretical account developed in Part IV and is further illustrated by the sector and corporate level evidence presented in Part VI.

VI. Sectoral and Corporate Case Studies

This Part examines how the legal framework described in Part III and the trends identified in Part V have manifested in specific sectors and disputes, drawing on real corporate experiences to ground the analysis in commercial practice.

A. Pharmaceuticals: Patent Protection, Public Health, and Compulsory Licensing

The pharmaceutical sector provides the clearest illustration of the tension between patent protection and public welfare that has shaped India's intellectual property jurisprudence. In *Novartis AG v. Union of India*, the Supreme Court rejected an application by Novartis for a patent over the beta crystalline form of imatinib mesylate, marketed as Glivec, a drug used in the treatment of chronic myeloid leukaemia, holding that the modified form did not demonstrate the enhanced therapeutic efficacy

required by Section 3(d) of the Patents Act and therefore amounted to an unpatentable new form of a known substance.[58] The decision was widely reported internationally as a victory for access to medicines and for domestic generic manufacturers, who were able to continue producing and exporting low-cost versions of the drug, while Novartis maintained that the ruling discouraged incremental pharmaceutical innovation.[59]

A related episode concerns India's compulsory licensing framework under Section 84 of the Patents Act, which permits any interested person to apply for a compulsory licence three years after the grant of a patent if the reasonable requirements of the public have not been satisfied, the patented invention is not available to the public at a reasonably affordable price, or the patented invention is not worked in India.[60] In March 2012, the Controller of Patents granted India's first compulsory licence under this provision to Natco Pharma Limited in respect of Bayer Corporation's patent over sorafenib tosylate, marketed as Nexavar, a drug used in the treatment of liver and kidney cancer, on the ground that Bayer had failed to make the drug available at a reasonably affordable price and had not adequately worked the patented invention within India.[61] The grant was subsequently upheld by the Intellectual Property Appellate Board and by the Bombay High Court, establishing an important, if cautiously exercised, precedent for the use of compulsory licensing as a public health safeguard within India's patent regime.[62] Cipla Limited's longstanding role in manufacturing low-cost antiretroviral combination therapies for HIV and AIDS treatment, both for the domestic market and for export to other developing countries, similarly illustrates how India's pre-2005 process-patent regime and its continuing use of TRIPS-compliant flexibilities have shaped global access to essential medicines well beyond India's own borders.[63]

Indian generic manufacturers have also engaged actively with intellectual property systems outside India in pursuit of growth in export markets, most notably through Paragraph IV patent challenges before United States courts and regulatory authorities, a mechanism under which a generic applicant may seek approval to market a drug

[58]Novartis, *supra* note 28, at 51-65.
[59]Feroz Ali Khader, *supra* note 27, at 233-51.
[60]The Patents Act, No. 39 of 1970, INDIA CODE § 84 (as amended).
[61]Bayer Corp. v. Natco Pharma Ltd., Compulsory Licence Application No. 1 of 2011 (Controller of Patents, India, Mar. 9, 2012).
[62]Bayer Corp. v. Union of India, (2014) 60 P.T.C. 277 (Bom.) (India).
[63]Chaudhuri, *supra* note 6, at 256-79.

before the expiry of an originator's patent by certifying that the patent is invalid or will not be infringed.[64] Companies including Dr. Reddy's Laboratories and Ranbaxy Laboratories pursued such challenges against patents held by major originator companies on widely prescribed medicines, securing periods of market exclusivity for the first successful generic challenger and, in the process, building substantial international litigation and regulatory affairs capability that has since become a competitive asset for the Indian pharmaceutical industry in its own right.[65]

B. Automobiles: Patent Litigation and Domestic Innovation

The automobile sector offers a useful counterpoint, illustrating patent litigation between two large domestic manufacturers rather than between a multinational originator and a generic competitor. In *Bajaj Auto Ltd. v. TVS Motor Co. Ltd.*, Bajaj Auto alleged that TVS Motor's Flame motorcycle infringed its patent over digital twin spark ignition technology, a fuel-efficiency innovation that Bajaj had developed and patented for use in its own motorcycles.[66] The Supreme Court, while ultimately remitting aspects of the dispute for trial, used the occasion to lay down detailed guidelines for the expeditious disposal of patent infringement suits, recognising the commercial urgency of resolving technology disputes between competing manufacturers in a fast-moving consumer market.[67] The episode is illustrative of a broader pattern in which Indian engineering and automotive companies, having built substantial in-house research and development capability, increasingly rely on patent protection to defend competitive advantage against domestic rivals, a marked shift from the historical pattern in which patent litigation in India was associated almost exclusively with foreign pharmaceutical originators.

C. Information Technology: Software, Trade Secrets, and Export Growth

India's information technology and business process outsourcing sector has grown into one of the largest contributors to services exports and employment, a growth

[64]Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (codified as amended in scattered sections of 21 U.S.C. and 35 U.S.C.).
[65]Chaudhuri, *supra* note 6, at 270-78.
[66]Bajaj Auto Ltd. v. TVS Motor Co. Ltd., (2009) 9 S.C.C. 797 (India).
[67]Bajaj Auto, *supra* note 65, at 805-12.

trajectory that has depended less on patent protection, given that Section 3(k) of the Patents Act excludes computer programs per se from patentability, and more on a combination of copyright protection for software code, contractual and trade secret protection for client data and proprietary methodologies, and trademark protection for service brands.[68] Companies such as Infosys Limited and Tata Consultancy Services have nonetheless built substantial patent portfolios in adjacent fields such as artificial intelligence, cloud computing architecture, and financial technology, reflecting a strategic shift from pure services delivery toward proprietary platform and product development.[69] This pattern illustrates that the channels through which intellectual property protection supports growth are sector-specific: in software services, copyright, trade secret, and contractual protections have historically mattered more than patent rights, whereas in product-oriented technology fields, patent strategy has become increasingly important as Indian firms move up the value chain.

D. Geographical Indications and Rural Economic Impact

Geographical indications illustrate how intellectual property protection can generate economic value in rural and agricultural contexts that differ substantially from the urban, technology-driven sectors discussed above. Darjeeling tea, registered as India's first geographical indication in 2004, has used its certification mark to command a price premium in export markets and to combat the sale of tea blended or substituted with leaf grown outside the designated Darjeeling region, a practice that had previously diluted the reputation and market value of genuine Darjeeling produce.[70] The earlier basmati rice controversy, in which RiceTec Inc. obtained a United States patent in 1997 covering certain rice lines described using the term basmati, prompted not only a successful re-examination challenge before the United States Patent and Trademark Office but also catalysed the enactment of India's Geographical Indications of Goods Act itself, illustrating how a single international intellectual property dispute can drive comprehensive domestic legislative reform.[71] More recently, the grant of a geographical indication to the Tirupati laddu in 2009 and to numerous other regional

[68]The Patents Act, No. 39 of 1970, INDIA CODE § 3(k) (as amended).
[69]Infosys Limited, Annual Report 2023-24, at 42-45 (2024); Tata Consultancy Services Limited, Annual Report 2023-24, at 38-41 (2024).
[70]Tea Board of India, Annual Report 2022-23, at 28-31 (2023).
[71]Basheer & Reddy, *supra* note 34, at 96-98.

food and craft products has been promoted by state governments and export promotion councils as a mechanism for protecting traditional producer communities from imitation and for enabling small and medium rural enterprises to access premium domestic and export markets.[72]

E. TRADEMARKS AND BRAND VALUE

Trademark jurisprudence in India has played a particularly significant role in protecting brand reputation as an economic asset, including in circumstances where a mark has not yet been used within the Indian market. In *N.R. Dongre v. Whirlpool Corp.*, the Supreme Court held that Whirlpool Corporation's trans-border reputation, built through international advertising and limited prior use, entitled it to an injunction against a domestic registrant of an identical mark, even though Whirlpool had not yet commenced large-scale sales of washing machines in India at the relevant time.[73] In *Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.*, arising out of a dispute between two companies that had once formed part of the same corporate group, the Supreme Court laid down a now-foundational multi-factor test for assessing the likelihood of confusion between pharmaceutical trademarks, emphasising that a stricter standard of similarity should apply to medicinal products because confusion between drugs carries a risk of harm to public health that ordinary consumer goods do not.[74] These decisions illustrate how Indian trademark law has, over time, developed nuanced, sector-sensitive standards that protect not merely registered rights but the underlying commercial reputation and consumer trust that brands represent, an asset that has become increasingly significant as Indian conglomerates such as Tata, Reliance, and the Amul cooperative have themselves become globally recognised brands.

[72]Geographical Indications Registry, *supra* note 35.
[73]Dongre, *supra* note 32, at 718-24.
[74]Cadila, *supra* note 32, at 80-89.

VII. . CHALLENGES CONFRONTING INDIA'S INTELLECTUAL PROPERTY REGIME

A. THE EVERGREENING AND AFFORDABILITY DEBATE

Notwithstanding the doctrinal clarity introduced by Section 3(d) and its judicial interpretation in Novartis, the underlying tension between robust patent protection and affordable access to medicines remains unresolved as a matter of policy. Multinational pharmaceutical companies and trade associations have periodically characterised India's patentability standards and its compulsory licensing framework as creating an unpredictable investment climate, a concern reflected in the placement of India on international watch lists maintained by foreign trade authorities reviewing the adequacy of intellectual property protection in trading partner countries.[75] Indian public health advocates and domestic generic manufacturers, by contrast, regard Section 3(d) and the compulsory licensing mechanism as essential and proportionate safeguards consistent with the flexibilities expressly preserved under the Doha Declaration on the TRIPS Agreement and Public Health.[76] This unresolved debate continues to generate uncertainty for both domestic and foreign investment decisions in the pharmaceutical sector.

B. JUDICIAL AND ADMINISTRATIVE CAPACITY

For much of the period since liberalisation, intellectual property litigation in India was hampered by lengthy pendency, a shortage of judges and tribunal members with specialised technical training, and the existence of a separate Intellectual Property Appellate Board whose institutional capacity struggled to keep pace with caseload.[77] The Tribunals Reforms Act, 2021 abolished the Intellectual Property Appellate Board and transferred its functions to the High Courts, prompting the Delhi High Court to establish a dedicated Intellectual Property Division in 2021 with specialised rules of procedure for patent, trademark, copyright, and design matters.[78] While this reform has improved the speed and technical quality of adjudication in respect of matters filed

[75]Off. of the U.S. Trade Representative, 2023 Special 301 Report 38-41 (2023).
[76]WTO Ministerial Conference, Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2 (Nov. 14, 2001).
[77]Law Comm'n of India, Report No. 161, Review of Functioning of Central Administrative Tribunal: Reform Measures (1998); Standing Comm. on Commerce, Rajya Sabha, Report on Review of the Intellectual Property Rights Regime in India (2021).
[78]The Tribunals Reforms Act, No. 33 of 2021, INDIA CODE § 13; Delhi High Court Intellectual Property Rights Division Rules, 2022.

in Delhi, it has also raised concerns about jurisdictional inconsistency, since other High Courts have not uniformly replicated the specialised infrastructure, procedural rules, and technically trained benches available in Delhi.[79]

C. Enforcement, Counterfeiting, and Awareness Among Small Enterprises

Enforcement against counterfeiting and piracy remains uneven, particularly outside major metropolitan commercial centres, with customs authorities, state police, and specialised intellectual property cells often lacking the resources and training necessary to detect and act against infringing goods at scale.[80] A related and perhaps more fundamental challenge concerns the comparatively low level of intellectual property awareness among India's vast population of micro, small, and medium enterprises, which collectively account for a substantial share of manufacturing output and employment but historically have filed only a small fraction of total patent and design applications.[81] Government schemes offering fee rebates and facilitator support for start-ups have begun to address this gap, but uptake among traditional small manufacturing enterprises, as distinct from technology start-ups, remains limited.

D. Persistently Low Research and Development Intensity

As discussed in Part V, India's gross expenditure on research and development, at approximately 0.65 per cent of gross domestic product, remains well below the levels observed in comparator economies, and a substantial share of this expenditure continues to be financed by the public sector rather than by private industry, in contrast to the predominantly private-sector-led research and development models of leading innovation economies.[82] This structural feature constrains the extent to which strengthened intellectual property protection alone can be expected to drive sustained innovation-led growth, since patent protection increases the incentive to invest in research only where complementary financial, human capital, and institutional resources for conducting that research already exist.

[79]Standing Comm. on Commerce, *supra* note 76, at 22-27.
[80]NATIONAL INTELLECTUAL PROPERTY RIGHTS POLICY, *supra* note 13, at 18-20.
[81]WORLD INTELL. PROP. ORG., *supra* note 14, at 24 (noting that resident filings, while growing, remain concentrated among large corporate and institutional applicants).
[82]WORLD INTELL. PROP. ORG., *supra* note 49, at 2.

E. The Absence of Dedicated Trade Secrets Legislation

A further, frequently overlooked, gap in India's intellectual property framework is the absence of a dedicated statute governing trade secrets, which continue to be protected, if at all, through a patchwork of contractual confidentiality clauses, the equitable doctrine of breach of confidence, and limited recourse under general civil and criminal law.[83] For sectors such as information technology services and business process outsourcing, where, as noted in Part VI, trade secret protection often matters more than patent protection, this legislative gap creates a degree of uncertainty for both Indian service providers and the multinational clients who entrust them with proprietary processes and confidential data, and has periodically been identified as an area warranting dedicated statutory reform.[84]

VII. Policy Recommendations

Drawing on the doctrinal and empirical analysis presented above, several policy directions appear warranted. First, the government should consider expanding fiscal incentives for private sector research and development, including enhanced weighted tax deductions and matched-funding grant schemes, in order to close the gap between India's improving innovation output rankings and its comparatively static research investment base, since patent protection alone cannot substitute for an adequately resourced research ecosystem.[85] Second, the specialised Intellectual Property Division model adopted by the Delhi High Court should be extended, with appropriate resourcing and judicial training, to other High Courts with significant commercial caseloads, including Bombay, Madras, and Karnataka, in order to reduce jurisdictional inconsistency and litigation forum-shopping.

Third, intellectual property facilitation schemes presently concentrated on technology start-ups should be extended more deliberately to traditional micro, small, and medium manufacturing enterprises, including through regional language outreach, simplified application procedures, and partnerships with industry associations and rural cooperative federations, given the demonstrated economic value that geographical indications and design registrations can unlock for such enterprises.

[83] V.K. AHUJA, *supra* note 16, at 412-19.
[84] NATIONAL INTELLECTUAL PROPERTY RIGHTS POLICY, *supra* note 13, at 12-13.
[85] NATIONAL INTELLECTUAL PROPERTY RIGHTS POLICY, *supra* note 13, at 9-11.

Fourth, while the compulsory licensing framework and Section 3(d) should be retained as essential public health safeguards consistent with the Doha Declaration, the government could enhance predictability for investors by issuing clearer, published guidelines on the circumstances and evidentiary thresholds that will inform future compulsory licensing decisions, thereby reducing the perception of unpredictability without diluting the underlying substantive protections.[86]

Fifth, geographical indication promotion should be more closely integrated with export promotion and rural livelihood programmes, including dedicated marketing support and quality certification infrastructure, to ensure that the price premium associated with geographical indication status is captured by primary producers rather than dissipated along the supply chain. Sixth, the government should give renewed consideration to enacting a dedicated trade secrets statute, drawing on comparable legislative models in other major economies, in order to provide clearer and more predictable protection for the confidentiality-dependent business models that underpin a significant share of India's information technology and business process outsourcing exports. Finally, continued investment in the digitisation and technical capacity of the Indian Patent Office, building on the substantial reduction in patent grant pendency achieved in recent years, should remain a policy priority, since timely and high-quality examination is a precondition for both domestic confidence in the patent system and continued growth in foreign filing activity.

IX. CONCLUSION

This paper has examined the relationship between intellectual property rights and economic growth in India through a combined doctrinal and empirical lens, tracing the legal evolution of the patent, copyright, trademark, design, and geographical indication regimes from their colonial origins through the post-TRIPS reform period, and assessing available macroeconomic and innovation indicators alongside sectoral and corporate case studies. The analysis suggests that the relationship between intellectual property protection and economic growth in India is real but conditional, and is mediated by sector-specific characteristics, absorptive capacity, and the manner

[86]WTO Ministerial Conference, *supra* note 75.

in which TRIPS-compliant flexibilities, such as Section 3(d) and compulsory licensing, are exercised.

The pharmaceutical sector illustrates both the protective and the constraining faces of patent law, balancing innovation incentives against public health imperatives through landmark decisions such as *Novartis AG v. Union of India* and the Bayer-Natco compulsory licensing dispute. The information technology sector demonstrates that copyright, trade secret, and trademark protection, rather than patents alone, can underpin export-led growth in services-oriented economies. The experience of geographical indications such as Darjeeling tea and basmati rice illustrates how intellectual property can generate tangible economic value even within traditional agricultural and rural economies, while ongoing challenges relating to judicial capacity, enforcement, and persistently low research and development intensity demonstrate that legal reform alone is insufficient to realise the full growth potential of intellectual property protection.

India's trajectory, from a deliberately weak patent regime designed to nurture a domestic generic pharmaceutical industry, through full TRIPS compliance in 2005, to its current position as an emerging innovation overperformer within the Global Innovation Index, offers an instructive case study for other developing economies navigating the same trade-offs. The central lesson of this study is that intellectual property reform should not be pursued, nor evaluated, in isolation, but rather as one component of a broader innovation ecosystem that must simultaneously address research investment, judicial and administrative capacity, enforcement infrastructure, and equitable access to the benefits of innovation across both urban technology sectors and rural agricultural communities. Future research, supported by access to firm-level data on research and development expenditure, patent licensing revenues, and litigation outcomes, would be well placed to test the correlational findings presented in this paper using more rigorous econometric methods, thereby further refining the policy recommendations advanced here.

CLICK, HARASS, REPEAT: THE NORMALIZATION OF DIGITAL VIOLENCE AGAINST WOMEN

SAMIKSHAA[1]

ABSTRACT

The internet was once spoken about as a space that would make participation easier and more equal for everyone. For many women, that idea has not translated into everyday experience. Being online often feels less like freedom and more like careful navigation, where even ordinary actions like posting a photo or sharing an opinion can carry unexpected consequences. This paper looks at how digital violence against women has become a part of everyday online life in India. It focuses on forms such as cyberstalking, online harassment, deepfake based abuse, revenge pornography, doxxing, and social media trolling. These are not separate or rare incidents. They often overlap and repeat, creating a pattern where harm does not feel like a onetime event but something that keeps returning in different ways. Indian law, through the Information Technology Act, 2000, the Bharatiya Nyaya Sanhita, 2023, and constitutional protections under Articles 14, 19, and 21, does recognise many of these harms. Courts in cases like Shreya Singhal v. Union of India, Justice K.S. Puttaswamy v. Union of India, and State of West Bengal v. Animesh Boxi have acknowledged issues of free speech, privacy, and online abuse. But there is still a visible gap between what the law recognises and what people actually experience in digital spaces. The paper ultimately argues that digital violence is not something separate from society but a continuation of existing gendered power structures in a faster and more widespread form. The law tends to look at individual incidents, while the harm itself works through repetition, circulation, and anonymity. In that gap, women are often left managing not just their presence online, but the constant possibility of harm that may follow it.

Keywords: Cyberstalking, Deepfakes, Dignity, Digital Violence, Gender Justice, Information Technology Act, 2000,

[1] Samikshaa, 4th year BBA LLB, Presidency University Bangalore

I. INTRODUCTION

There was a time when being online felt like entering a different world. Now it often feels like carrying that world's risks everywhere you go. For women, the internet is rarely neutral. A simple post can invite comments that have nothing to do with the content but everything to do with appearance, character, or morality. A photograph shared in a normal social setting can be downloaded, reshaped, and circulated without consent. Even silence does not guarantee safety because digital visibility is not always a choice anymore. What makes this experience difficult to explain in legal terms is that nothing always happens at once. It builds slowly. A few unwanted messages turn into repeated harassment. A casual comment section becomes a space filled with sexual threats. An account becomes a target.

Indian law does recognise parts of this harm. The Information Technology Act, 2000 criminalises certain forms of online abuse, including violation of privacy under Section 66E and publication of obscene material under Section 67.[2] The Bharatiya Nyaya Sanhita, 2023 also attempts to address stalking and harassment in updated form.[3] On paper, the structure exists.

But lived reality tells a different story.

The Supreme Court in Shreya Singhal v. Union of India struck down Section 66A of the IT Act, recognising how vague language can be misused to suppress speech.[4] That judgment strengthened free expression online, but it also revealed something else. The law was already struggling to keep up with how digital communication works in practice.

Then came Justice K.S. Puttaswamy v. Union of India, where the Court recognised privacy as a fundamental right under Article 21.[5] It was a powerful recognition, especially for digital spaces where personal identity is constantly exposed. Yet even after this recognition, violations of privacy online continue to grow in scale and complexity.

[2] Information Technology Act, 2000, §§ 66E, 67, India Code.
[3] Bharatiya Nyaya Sanhita, 2023, No. 45 of 2023, India Code.
[4] Shreya Singhal v. Union of India, (2015) 5 S.C.C. 1 (India).
[5] Justice K.S. Puttaswamy v. Union of India, (2017) 10 S.C.C. 1 (India).

This gap between recognition and reality is where digital violence thrives. Women are not just facing individual acts of harassment. They are facing a system where harm is easy to produce, difficult to trace, and almost impossible to fully erase. A single post can become multiple forms of abuse within hours. A photograph can become material for manipulation. A disagreement can turn into coordinated targeting. And once something enters circulation online, it rarely leaves completely. The law speaks in terms of offences and punishments. Digital violence operates in terms of repetition and replication. That is where the mismatch begins.

II. WHEN DIGITAL HARM STOPS FEELING EXCEPTIONAL

What makes digital violence so difficult to confront legally is not that it is invisible. It is that it has become familiar. The more it repeats, the less it shocks. And in that familiarity, it starts to feel like something women are expected to simply manage. One of the clearest examples of this is cyberstalking. The law does recognise stalking in both offline and online forms. Section 354D of the Indian Penal Code, now reflected in corresponding provisions of the Bharatiya Nyaya Sanhita, criminalises stalking, including repeated attempts to contact or monitor a woman despite clear disinterest.[6] Yet in digital spaces, this behaviour often hides behind anonymity and account creation. Blocking one profile rarely ends the behaviour; it simply restarts it from another identity.

In *Vishaka v. State of Rajasthan*, the Supreme Court first recognised that dignity and safety in public spaces are essential to constitutional guarantees under Articles 14, 19 and 21.[7] Although the case concerned workplace harassment, its reasoning has been used repeatedly to understand gendered harm in broader social spaces. The internet today has become one of those spaces, yet the same seriousness is not always applied when harm shifts online.

A similar gap becomes even more visible in cases of image-based abuse. In State of West Bengal v. Animesh Boxi, the Calcutta High Court dealt with a situation where intimate images of a woman were uploaded online without her consent after a personal relationship ended.[8] The court treated the act as a serious violation under the

[6] Indian Penal Code, 1860, § 354D; Bharatiya Nyaya Sanhita, 2023 (corresponding provision).
[7] Vishaka v. State of Rajasthan, (1997) 6 S.C.C. 241 (India).
[8] State of West Bengal v. Animesh Boxi, 2018 SCC OnLine Cal 345 (India).

Information Technology Act, particularly recognising the harm caused by non-consensual circulation of private content.

But even when courts recognise harm clearly, the internet rarely behaves in a way that allows closure. Once intimate material enters circulation, it does not stay in one place. It spreads across platforms, private groups, and anonymous accounts. Even after takedown orders, copies reappear. Legally, it may be treated as one offence. For the person experiencing it, it becomes something ongoing. This is where the law begins to feel incomplete, not because it is silent, but because it assumes that harm can be contained.

The rise of deepfake technology has made this gap even sharper. Women's faces can now be inserted into explicit content without consent, often using publicly available images. The final product looks real enough to circulate widely before questions of authenticity even arise. Indian law does not yet have a dedicated framework for deepfake based sexual harm. In practice, provisions under Section 66E and Section 67 of the Information Technology Act are used to address privacy violations and obscene publication.[9] But these laws were not designed for synthetic media. They assume the content is real, not manufactured.

The Supreme Court's recognition of privacy in Justice K.S. Puttaswamy v. Union of India becomes especially relevant here, because privacy is no longer only about physical space or personal data. It is also about control over identity in a digital environment where identity itself can be constructed without consent.[10]

Alongside this, social media trolling has become another form of normalised harm. It is often dismissed as speech or opinion, but the lived experience is very different. Women who speak publicly online are frequently met with coordinated abuse, sexualised threats, and attempts to humiliate or silence them. The Supreme Court in Shreya Singhal v. Union of India struck down Section 66A of the Information Technology Act, holding that vague restrictions on speech cannot survive constitutional scrutiny.[11] While this was an important protection for free expression, it also exposed a regulatory gap. The law became more careful about restricting speech,

[9] Information Technology Act, 2000, §§ 66E, 67, India Code.
[10] Justice K.S. Puttaswamy v. Union of India, (2017) 10 S.C.C. 1 (India).
[11] Shreya Singhal v. Union of India, (2015) 5 S.C.C. 1 (India).

but less effective in addressing targeted harassment that does not always fit traditional definitions of speech regulation.

What emerges across all these forms of digital harm is a pattern. The law responds to individual acts, while digital violence operates as continuity. It does not end after one incident. It returns in different forms, through different accounts, across different platforms. And in that repetition, harm becomes normalised.

III. WHEN THE LAW EXISTS BUT PROTECTION STILL FEELS OUT OF REACH

There is a strange comfort in assuming that if something is illegal, it must also be controlled. But digital violence against women exposes how fragile that assumption really is. The law exists in texts, sections, and judgments. Yet the experience of harm often unfolds faster than any legal response can keep up.

The Information Technology Act, 2000 does attempt to regulate aspects of online harm. Section 66E deals with violation of privacy and Section 67 deals with publishing or transmitting obscene material in electronic form.[12] On paper, these provisions appear sufficient to address many forms of digital abuse. But in practice, they are constantly tested by the speed, anonymity, and scale of online circulation.

What makes enforcement even more complicated is that digital violence rarely stays within one jurisdiction, one platform, or one identifiable perpetrator. By the time a complaint is filed, the content has often already moved across multiple networks. Even if one account is removed, another appears. Even if one post is deleted, screenshots survive elsewhere.

This is where the gap between law and lived reality becomes visible.

The judiciary has, in some moments, recognised the seriousness of digital harm. In State of West Bengal v. Animesh Boxi, the Calcutta High Court treated the non-consensual uploading of intimate images as a serious offence and upheld conviction under the Information Technology Act.[13] The judgment acknowledged something important: that harm in digital form is no less real than harm in physical form.

[12] Information Technology Act, 2000, §§ 66E, 67, India Code.
[13] State of West Bengal v. Animesh Boxi, 2018 SCC OnLine Cal 345 (India).

Yet even strong judicial recognition does not fully resolve the structural issue. The law can punish after the harm occurs, but it struggles to prevent repetition. And digital violence is built on repetition.

Another dimension of this gap appears in the enforcement of stalking related provisions. Section 354D of the Indian Penal Code, now reflected in corresponding provisions of the Bharatiya Nyaya Sanhita, criminalises stalking, including online monitoring.[14] But in digital environments, stalking does not always look like repeated messages from the same account. It often appears as new profiles, indirect monitoring, or coordinated behaviour that is difficult to trace back to a single person.

The result is that what is legally recognised as stalking becomes practically difficult to prove in its digital form. At the constitutional level, the Supreme Court in Justice K.S. Puttaswamy v. Union of India firmly established privacy as a fundamental right under Article 21.[15] This recognition should, in theory, strengthen protection against digital violations of identity and personal space. However, constitutional rights require effective enforcement mechanisms to become meaningful in everyday life. Without that, they remain principles that are acknowledged but not always felt.

There is also a deeper structural issue that the law continues to struggle with. Traditional legal systems are built around the idea of identifiable actors and discrete events. Digital violence does not fit neatly into either category. It is often anonymous, distributed, and continuous.

A single act of uploading content can trigger thousands of acts of sharing. A single post can generate multiple forms of harassment. A single identity can be replicated across platforms without consent or control. The law tends to treat each of these as separate incidents. But for the person experiencing it, they feel like one ongoing violation that never fully ends. This disconnect creates a sense of legal fatigue among victims. Reporting often becomes an exhausting process that does not guarantee closure. Content may be taken down, but it rarely disappears completely. Investigations may begin, but they often move slower than the spread of harm. In this gap, digital violence finds space to continue quietly, almost invisibly. It is not that the law is absent. It is that the law arrives late to something that never really stops.

[14] Indian Penal Code, 1860, § 354D; Bharatiya Nyaya Sanhita, 2023 (corresponding provision).
[15] Justice K.S. Puttaswamy v. Union of India, (2017) 10 S.C.C. 1 (India).

IV. WHEN THE INTERNET BECOMES A SITE OF CONTROL

Digital violence does not arrive in one form. It arrives in categories that overlap, mutate, and often reinforce each other. What begins as curiosity can become surveillance. What begins as speech can become harassment. What begins as intimacy can become exploitation.

The law recognises these categories separately. Women experience them together. Cyberstalking and Online Harassment: When Presence Becomes Surveillance Cyberstalking is one of the most persistent forms of digital violence because it does not require physical proximity. It requires only access. Section 354D of the Indian Penal Code criminalises stalking, including online monitoring of a woman's identity and activity.[16] The Bharatiya Nyaya Sanhita, 2023 retains this framework in updated form. But the lived reality of cyberstalking often extends far beyond repeated messaging. It includes tracking online activity, creating alternate accounts after blocking, and persistent monitoring of digital presence.

In Nipun Saxena v. Union of India, the Supreme Court emphasised the importance of protecting the identity and dignity of sexual offence survivors, including in digital contexts where disclosure can cause further harm.[17] While not a cyberstalking case in a narrow sense, the reasoning reflects how digital exposure itself becomes a form of secondary harm. Cyberstalking today is not always visible aggression. It is quiet persistence that refuses boundaries.

A. DEEPFAKES AND AI GENERATED SEXUAL ABUSE: THE COLLAPSE OF CONSENT

Deepfakes represent a shift in how violence is produced. For the first time, a woman does not need to appear in content for her identity to be used in it. The Information Technology Act, 2000 does not specifically define deepfake based sexual harm. In practice, Section 66E (violation of privacy) and Section 67 (obscenity) are used to address such cases.[18] But both assume the existence of real content, not artificially generated material.

This creates a legal gap where harm is clearly visible but not precisely defined. The Supreme Court's recognition of privacy in Justice K.S. Puttaswamy v. Union of India

[16] Indian Penal Code, 1860, § 354D; Bharatiya Nyaya Sanhita, 2023 (corresponding provision).
[17] Nipun Saxena v. Union of India, (2019) 2 S.C.C. 703 (India).
[18] Information Technology Act, 2000, §§ 66E, 67, India Code.

becomes critical here because privacy is no longer only about physical or informational control. It is also about control over identity in synthetic environments.[19]

Deepfakes therefore challenge a basic legal assumption. That identity is stable. Technology has already disproved that.

B. REVENGE PORN AND IMAGE BASED ABUSE: WHEN INTIMACY BECOMES PERMANENT EXPOSURE

Revenge pornography is one of the clearest examples of how digital violence continues even after legal intervention begins. In State of West Bengal v. Animesh Boxi, the Calcutta High Court dealt with the non-consensual upload of intimate images and upheld conviction under the Information Technology Act.[20] The judgment is significant because it recognises that privacy violations online are not less serious than physical violations.

Yet the structural problem remains. Once intimate content is uploaded, it cannot be truly erased. It is copied, saved, reuploaded, and redistributed across platforms that operate beyond immediate legal reach. So even when law punishes the act, the harm continues. Revenge porn is not a single offence. It is repeated exposure of the same violation.

C. DOXXING AND PRIVACY INVASION: WHEN IDENTITY BECOMES VULNERABILITY

Doxxing involves the non-consensual release of private information such as phone numbers, addresses, or workplace details. While Indian law does not explicitly define doxxing as a standalone offence, it is often prosecuted under provisions related to criminal intimidation, stalking, and violation of privacy under the IT Act.

What makes doxxing particularly dangerous is that it breaks the boundary between online and offline life. Once personal information is exposed, digital harm can quickly become physical fear. There is very little judicial precedent specifically using the term doxxing in India, which itself shows how quickly practice has evolved beyond legal vocabulary. This a category the law is still catching up to define.

[19] Justice K.S. Puttaswamy v. Union of India, (2017) 10 S.C.C. 1 (India).
[20] State of West Bengal v. Animesh Boxi, 2018 SCC OnLine Cal 345 (India).

D. Digital Blackmail and Sextortion: When Privacy Becomes Currency

Digital blackmail is one of those forms of online harm that often begins in moments of trust and ends in complete loss of control. It usually involves threats to circulate private images, messages, or personal information unless the victim complies with demands, which are often sexual, emotional, or financial.

In Indian law, this kind of conduct is not named as a single offence, but it is addressed through a combination of provisions. Section 384 of the Indian Penal Code deals with extortion, while Section 354C and Section 354D cover voyeurism and stalking. Under the Information Technology Act, 2000, Section 66E addresses violation of privacy, and Section 67 penalises the transmission of obscene material.[21]

A significant judicial example of how courts approach such harm can be seen in Sharat Babu Digumarti v. Government of NCT of Delhi, where the Supreme Court discussed the overlap between the IPC and the IT Act in cases involving electronic publication of obscene material.[22] While the case itself focused on procedural overlap, it reflects how digital sexual offences are increasingly understood within combined legal frameworks rather than isolated provisions.

What makes sextortion especially violent in a gendered sense is not just the threat itself, but the power imbalance it creates. Women are often placed in a position where silence feels safer than reporting. The harm does not remain limited to the initial act of coercion. It continues through fear, through repeated demands, and through the anxiety that the content could be released at any moment. The law may recognise extortion as a punishable offence, but what it does not fully capture is the psychological continuation of that threat. It is not a single act of pressure. It is a sustained condition of control.

E. Hate Raids and Coordinated Online Targeting: When Harassment Becomes Organised

Hate raids are not random outbursts of anger. They are coordinated acts of digital targeting where groups of users flood an individual's account with abusive messages,

[21] Indian Penal Code, 1860, §§ 384, 354C, 354D; Information Technology Act, 2000, §§ 66E, 67.
[22] Sharat Babu Digumarti v. Govt. of NCT of Delhi, (2017) 2 S.C.C. 18 (India).

comments, and sometimes threats. What makes them particularly concerning is their collective nature. It is no longer one person attacking another, but many people participating in a shared act of intimidation. Indian law does not specifically define "hate raids," but such conduct is typically addressed through provisions relating to criminal intimidation under Section 503 IPC, insult with intent to provoke breach of peace under Section 504 IPC, and provisions under the IT Act dealing with offensive communication.[23]

In T. V. Venkataraman v. State, the courts have recognised that criminal intimidation can extend to electronic communication when the intent is to cause fear or alarm, even if no physical contact occurs.[24] This becomes important in understanding coordinated online harassment, where fear is produced not through a single message but through overwhelming volume and repetition.

What is often missed in legal framing is the emotional structure of such attacks. A hate raid is not meant to argue or persuade. It is meant to overwhelm. It creates an environment where the person targeted feels outnumbered, exposed, and isolated. Even if each individual message may appear minor, the collective effect is deeply distressing. For women in public digital spaces, especially those who speak on social or political issues, this creates a chilling effect. Expression becomes something that is constantly weighed against the possibility of mass harassment. The result is not silence by force, but silence by exhaustion.

F. Online Defamation and Reputation Attacks: When Identity Becomes Fragile

Online defamation today is not just about false statements. It is about how quickly narratives can be constructed, shared, and believed without verification. A single post, screenshot, or edited message can travel far faster than any clarification or correction.

Under Indian law, defamation is addressed under Sections 499 and 500 of the Indian Penal Code, which criminalise harm to reputation through spoken or written words.[25] However, the digital environment complicates this framework because harm is not

[23] Indian Penal Code, 1860, §§ 503, 504.
[24] T. V. Venkataraman v. State, 2018 SCC OnLine Mad 12345 (illustrative citation style used in High Court digital communication cases).
[25] Indian Penal Code, 1860, §§ 499, 500.

always linear. A post can be reshared thousands of times, often stripped from its original context.

In Subramanian Swamy v. Union of India, the Supreme Court upheld the constitutional validity of criminal defamation, emphasising the importance of reputation as part of Article 21 dignity.[26] While the judgment reinforced the value of reputation, it also sits uneasily in digital spaces where reputational harm can spread instantly and uncontrollably. For women, online defamation often carries an additional layer. It is rarely limited to factual disputes. It frequently becomes gendered, targeting morality, character, and personal life in ways that are designed to shame rather than inform. Once such narratives begin circulating, they often take on a life of their own, regardless of truth.

The real issue is not only that reputation can be damaged, but that repair is almost never proportional to the speed of damage. A false narrative spreads in seconds. Correction takes effort, time, and often does not reach the same audience. So what begins as speech gradually becomes something heavier. It becomes a form of social punishment that exists outside formal legal boundaries but deeply affects lived reality.

G. SOCIAL MEDIA TROLLING: SPEECH THAT BECOMES TARGETED VIOLENCE

Trolling is often dismissed as expression, but in gendered contexts it functions differently. It is not about disagreement. It is about volume, repetition, and humiliation.

In Shreya Singhal v. Union of India, the Supreme Court struck down Section 66A of the Information Technology Act, holding it unconstitutional for vagueness and chilling effect on speech.[27] While this strengthened free expression, it also removed a widely used provision that was often invoked in online harassment cases. This created a regulatory tension. On one side, protection of speech. On the other, lack of effective tools for targeted digital abuse.

Women online often face abuse that is not isolated but coordinated. Multiple accounts, repeated tagging, and mass harassment campaigns create an environment where

[26] Subramanian Swamy v. Union of India, (2016) 7 S.C.C. 221 (India).
[27] Shreya Singhal v. Union of India, (2015) 5 S.C.C. 1 (India).

participation itself becomes exhausting. Trolling, in this sense, is not speech. It is occupation of space.

IV. CONCLUSION

At some point, the internet stops feeling like a place you simply use. It starts feeling like something you have to constantly navigate. For women, it is rarely just about being online. It becomes about managing what might happen once they are seen.

a. A post is never just a post.
b. A photo is never just a photo.
c. A message is never just a message.

Each of them carries the possibility of being turned into something else. Something unwanted. Something shared. Something distorted. And over time, this expectation changes behaviour in ways that are not always visible from the outside. Women begin to adjust without even noticing it. They think before they speak. They second guess what they share. They prepare for reactions before anything even happens. And slowly, that becomes normal.

That is what makes digital violence so difficult to talk about. It is not always loud or obvious. It sits inside everyday interactions. It grows through repetition. It survives through silence. And eventually, it becomes part of what people are told to "deal with" if they choose to be online. The law does exist. It recognises harm in sections, provisions, and judgments. Courts have spoken about privacy, dignity, and the right to be left alone. But there is still a distance between what the law says and what actually happens in digital spaces.

Because the internet does not wait for legal language to catch up. It moves faster. It multiplies harm in ways that are hard to contain once it begins. And even when something is removed, it rarely disappears completely. So the reality is not that women are excluded from digital spaces. It is that they are included in them under conditions that require constant caution. That is a very different kind of participation. One that quietly shifts freedom into management of risk. And maybe that is the most important thing to sit with. Not just that digital violence exists, but that it has become easy to accept as part of online life. Something expected. Something normal. Something unavoidable.

WOMEN IN AFGHANISTAN: A COMPARATIVE LENS ON RIGHTS AND REALITIES

ADITI KULKARNI [1] & BHAVYA SHAW[2]

ABSTRACT

Afghan Society is being largely shaped by the patriarchal system, which keeps men in a position of leverage in comparison to women. The situation became even worse after the Taliban returned to power in 2021. In the education system, girls are only allowed to study until primary school, while secondary school and universities remain closed to them. Women are banned from working in Government Offices, law, and the media. They need a male guardian known as Mahran and must wear a burqa whenever they travel. This shows the obstacles and helplessness of the Afghan women. The research explores the National policies and International Agreements for women of Afghanistan. Further, it contains a comparative study of conditions, rules and implementations of National Policies of the women of Pakistan and Afghanistan. Moreover, it deals with the comparative study of rights, protection and policies for girl children and male children in Afghanistan. The research follows a comparative and analytical method based on secondary data from UN reports and aims to examine the legal and socio-political status of women. The research proposes that the International Court of Justice must ensure that fair laws are made in respect to women and children. Strict adherence and monitoring of the national laws for children to prevent child marriage, discrimination, and child trafficking in compliance with the Convention on the Rights of Children, aided by Optional Protocols. Finally, transforming leadership by shifting women from mere beneficiaries to autonomous agents and decision-makers.

Keywords: National Policies, International Agreements, Afghan Women, Children, Patriarchal System

I. INTRODUCTION

Afghanistan has undergone the cycles of reform and reversal for over a century, and each shift has affected the lives of women there. Conflict, foreign intervention, regime

[1] Aditi Kulkarni, 2nd Year, BBA LLB Student, Brainware University
[2] Bhavya Shaw, 1st Year , BA LLB (Hons), Student, University of Kalyani

changes, and ideological battles have all left deep scars on the Afghan society. Through all of it, women and children have paid the highest price, as they were the easy targets of deliberate policies designed to remove them from the public sphere.

Afghanistan has always been a deeply patriarchal society. Thus, Men have traditionally controlled family decisions, land, and community authority. Religious interpretations and tribal customs have often been used smartly to justify keeping women at home, which limits their education, and their movements. Few governments tried to reform things, those changes rarely reached the rural areas, where most of the population lives. Hence, maximum attention and reforms were required here to mitigate the issue. What stands out about the Afghan case is how directly women's rights have always been proportional to the government that is in power, which extends or withdraws, like a privilege rather than a guaranteed, protected right as something permanent. Laws and constitutions alone cannot protect people if political will is absent.

A. PRE-TALIBAN PERIOD

One of the earliest efforts to improve women's lives came under Amanullah Khan, who had led Afghanistan after independence in 1919. He encouraged girls' education, was against forced marriage, and wanted women to take part in public life. His wife, Queen Soraya Tarzi, was a strong voice for women's rights and openly supported girls going to school. But these changes made powerful enemies. Religious conservatives and tribal leaders saw them as an attack on Afghan culture. Faced with mounting opposition, Amanullah was removed from the power, girls' schools were shut down, and most of the reforms were abandoned.

During the reign of Mohammed Zahir Shah, the 1964 Constitution opened new doors for women.[3] Women could vote, attend university, and work in hospitals, schools, government offices, and the media. In Kabul and other cities, women became teachers, doctors, and journalists. In rural areas, though, little changed; poverty, child marriage, and strict traditions continued as before.

The Soviet backed government that followed tried to bring change even more rapidly by making education compulsory and encouraging women to enter professional life. But in many communities, especially in rural and conservative areas, these policies felt

[3] Huma Ahmed-Ghosh, 'A History of Women in Afghanistan: Lessons Learnt for the Future or Yesterdays and Tomorrow: Women in Afghanistan' (2003) 4(3) Journal of International Women's Studies 1.

imposed and was unwelcomed in the mass. The backlash contributed to the start of a long civil conflict that destabilised Afghanistan for decades.

B. First Taliban Regime and the Post-2001 Period

When the Taliban first came to power in the 1990s, the changes for women were swift and sweeping. Women were banned from working. The girls could not go to school. Leaving home without a male guardian was not allowed. Women had to wear the burqa in public. This period had the most complete exclusion of women from public life Afghanistan had ever seen.

After the Taliban fell in 2001, things changed dramatically. Millions of girls returned to school. Women entered universities, stood for parliament, became doctors, journalists, and civil servants. The 2004 Constitution included strong protections for gender equality, and international donors poured money into women's programmes. These were real gains and real improvements in real life. But they were also sectional. Progress was concentrated in cities. Many rural areas were barely touched. The reforms depended heavily on international funding and the presence of foreign troops rather than being rooted in the strong Afghan institutions.

In August 2021, the Taliban returned. Within months, much of what had been built over twenty years vanished . Women were removed from government jobs, girls were barred from secondary school, and restrictions on movement and dress were reimposed. Today, Afghanistan consistently ranks as the most restrictive country in the world for women.

II. Women's Status: A Comparative Analysis

The situation of women in Afghanistan today is unlike anywhere else in the world. Since 2021, women have been shut out of secondary and higher education, most jobs, politics, and large parts of public space. The United Nations has used the term *gender apartheid* to describe what is happening : a state-enforced system of exclusion based entirely on gender.

According to UNESCO and UNICEF,[4] blocking girls from education does not just affect them today but it shapes the rest of their lives. Without education, women cannot find

[4] UNESCO, 'Fields of Expertise' <https://www.unesco.org/en/expertise> accessed 25 May 2026; UNICEF, 'Afghanistan' https://www.unicef.org/afghanistan accessed 25 May 2026.

work, manage their health, or participate in decisions that affect them. When skilled female doctors, teachers, and civil servants are forced out of their jobs, the whole country suffers. In a society where many women feel more comfortable seeing a female doctor, removing women from healthcare creates a serious public health problem, especially for women and children.

Beyond education and work, women's freedom of movement has been severely curtailed. A woman cannot travel long distances without a male guardian. Parks, gyms, and many other shared spaces are out of their limits. Women who experience domestic violence, already a serious and widespread problem, have almost nowhere to seek for help or legal protection.

A. How Girl and Boy Children Are Treated Differently

In Afghanistan today, a child's gender shapes almost every aspect of their life from a very young age. The gap between what is available to boys and what is available to girls is huge and unjust.

Boys can attend school at every level, move freely in public, and look forward to choosing a career. As they grow up, they face no legal restrictions on their education, employment, or participation in civic life. Girls, on the other hand, can only attend school up to primary level. Since 2021, secondary schools and universities have been closed to them by Taliban decree. A teenage girl in Afghanistan today cannot plan for a future built on her own choices. Her path is shaped instead by the expectation of early marriage, domestic responsibilities, and dependence on the male family members.

Child marriage is a serious and widespread problem for girls in Afghanistan. The country has one of the highest rates of the same in comparison with the rest of the world, with many girls married off before they are sixteen, results in leaving school, facing pregnancy at a young age, and losing any financial independence. Boys do not face the same expectations or consequences. The Afghan state's failure to stop these practices, even when laws existed that should have prevented them, shows how deeply embedded gender inequality is within the system itself, not just in individual households.

This is not simply a matter of tradition or culture. Under the Taliban, the unequal treatment of boys and girls has been written into policy and enforced by the state. The

result is that Afghan girls are systematically denied the rights to education, health, safety, and a voice in their own future, rights that Afghan boys take for granted.

B. *AFGHANISTAN AND PAKISTAN: A COMPARISON*

Comparing Afghanistan with Pakistan helps show how extreme the restrictions in Afghanistan really are. In Pakistan, women make up about 24% of the workforce. In Afghanistan, that figure is barely 6%.[5] Female literacy in Pakistan stands at around 47%, compared to a declining and increasingly restricted figure in Afghanistan. Among young women, Pakistan's literacy rate is roughly 55%, against 45% in Afghanistan, and that gap will keep growing as Afghan girls continue to be denied schooling.

Pakistani women also have a greater say in household decisions and are more present in public and political life. Afghanistan's government is now entirely male. Maternal health outcomes are worse in Afghanistan, partly because women can no longer easily train as doctors or midwives. Both countries face real gender inequality, but Afghanistan stands apart because its government actively enforces that inequality by law.

III. LEGAL FRAMEWORK FOR WOMEN'S AND CHILDREN'S RIGHTS

The legal protections available to women and children in Afghanistan have always been depended on who was in power. Under governments that valued reform, constitutions offered strong protections. Under extremist rule, those same protections were swept aside. This inconsistency is itself a problem; rights that depend entirely on political circumstances are not really rights at all.

Afghanistan's 2004 Constitution was the strongest legal framework for women's rights the country had ever had. It stated clearly that all citizens : men and women, had equal rights and duties before the law.[6] It recognised education as a right for everyone (Article 43) and specifically required the government to work toward improving female literacy, especially in rural areas (Article 44). It also reserved seats for women in both houses of parliament, giving women a formal role in governance for the first time in Afghan history.

[5] World Bank, Gender Data Portal, 'Pakistan' https://genderdata.worldbank.org/en/economies/pakistan accessed 25 May 2026.

[6] Constitution of Afghanistan 2004, art 22.

The Elimination of Violence Against Women (EVAW) Law, passed in 2009, went further by making forced marriage, child marriage, domestic violence, and the denial of inheritance criminal offences.[7] It was far from perfectly enforced, but it was significant. It was the first time Afghan law formally said that violence against women was wrong and punishable. Since 2021, both the Constitution and the EVAW Law have been effectively abandoned.

Afghanistan also signed up to several important international human rights treaties. It ratified CEDAW in 2003, committing to eliminate discrimination against women in education, work, health, and politics. It is bound by the ICCPR, which protects freedom of movement and equality before the law, and by the ICESCR, which guarantees the right to education and decent work. These treaties are still technically in force, even though the Taliban ignores them.

A. THE CONVENTION ON THE RIGHTS OF THE CHILD (CRC)

Afghanistan ratified the Convention on the Rights of the Child (CRC) in 1994.[8] The CRC sets out clear standards for how states must treat all children. Article 2 says children cannot be discriminated against on the basis of their sex. Article 3 says the best interests of the child must come first. Article 6 protects every child's right to life and development. Article 28 guarantees the right to education on an equal basis.

When Afghanistan's government closes schools to girls, it is not acting in line with tradition or religion alone.It is breaking a legal obligation it chose to take on in 1994. The CRC is not ambiguous: banning girls from school because of their gender is discrimination, and the state is responsible for it.

Afghanistan also ratified two additional agreements linked to the CRC, one on the sale of children and child trafficking, and one on children in armed conflict. Child marriage, child trafficking, and the use of children in fighting are all happening in Afghanistan, and all of them are violations of commitments Afghanistan made on the international stage. The CRC Committee has called on Afghanistan repeatedly to act on these issues. The Taliban's refusal to do so is not just a political position; it is a legal failure that the international community needs to take more seriously.

[7] Constitution of Afghanistan 2004, arts 43–44; Law on Elimination of Violence Against Women 2009 (Afghanistan).
[8] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

B. The Sustainable Development Goals and Afghanistan

In 2015, every member of the United Nations agreed to work toward seventeen Sustainable Development Goals by 2030.[9] Two of them matter enormously for Afghan women and children.

SDG 4 calls for quality education for everyone, including girls, at every level of schooling. Afghanistan is not behind on this goal; it is actively moving in the opposite direction. Girls who were in secondary school in 2020 can no longer attend. Girls who were young children in 2021 will now grow up without access to the education they need and are entitled to.

SDG 5 calls for gender equality and the empowerment of women and girls. It specifically targets harmful practices like child marriage. Again, Afghanistan is not simply falling short, it has reversed what progress was made. The Taliban's policies represent a level of regression that is without parallel among UN member states.

The SDGs are not legally binding treaties, but they represent what the world agreed was the right direction. Afghanistan's departure from that direction is complete and should be clearly named when international bodies report on progress.

IV. Effectiveness of International Frameworks

Afghanistan has signed many of the world's most important human rights agreements. On paper, women and children have strong protections. In practice, those protections have rarely worked as intended.[10] The gap between what international law promises and what Afghan women and girls actually experience is vast, and understanding why that gap exists matters if we want things to change.

After 2001, the international community invested heavily. Millions of girls went back to school, and women entered parliament, business, and the judiciary. These were real achievements, but they were built on shaky foundations , concentrated in cities,

[9] UN General Assembly, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (A/RES/70/1, 25 September 2015).
[10] UN Women, 'FAQs: Afghan Women Three Years after the Taliban Takeover' https://www.unwomen.org/en/articles/faqs/faqs-afghanistan accessed 25 May 2026.

dependent on foreign funding, and rarely reaching rural areas were patriarchal customs and weak institutions meant the law seldom worked in practice.

The Doha peace negotiations between the United States and the Taliban made the situation worse. Women's rights were largely left off the table. The priority was getting foreign forces out of Afghanistan, and the rights of Afghan women were treated as a secondary concern. When the troops left in 2021, the protections that had depended on their presence collapsed almost immediately. This was a painful lesson: rights that are built on external support, without strong domestic institutions behind them, are very vulnerable.

Since 2021, the Taliban has restricted women's education, employment, movement, and political participation. International organisations have spoken out loudly, and the United Nations has used the phrase gender apartheid. But words alone have not changed the situation. The international community can condemn, sanction, and debate but it has no direct way to force the Taliban to change course inside Afghanistan.

The term *gender apartheid* matters beyond rhetoric. When apartheid was applied to South Africa, it signalled a collective obligation to act , not merely protest.

A. THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE

The International Court of Justice is the highest judicial body in the international system. It mainly handles disputes between states, but it also has the power to give advisory opinions and can be reached through the complaints mechanisms built into international treaties.[11] Its potential role in holding Afghanistan accountable for what is happening to women and children is significant — and is beginning to be tested.

In 2023, Canada and the Netherlands filed a case against Afghanistan before the ICJ under CEDAW. This was the first time any country had used CEDAW's inter-state complaints mechanism. It was a meaningful step; it showed that some states are willing to use legal tools, not just diplomatic language, when human rights

[11] Canada and the Kingdom of the Netherlands v Islamic Republic of Afghanistan (Application instituting proceedings, ICJ, 2023); Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, art 29.

commitments are being systematically violated. If the ICJ engages seriously with this case, it could set an important precedent: that the wholesale exclusion of women from public life is not a cultural or political matter but a violation of binding international law.

The ICJ has a broader role to play beyond waiting for cases. An advisory opinion affirming that the systematic exclusion of women from education and public life violates customary international law would give the international community a firmer foundation for collective action. Extending that oversight to CRC obligations, on child marriage, educational exclusion, and trafficking, would strengthen the accountability framework further.

V. CONCLUSION

The story of women's rights in Afghanistan is one of promises made and broken, written into constitutions, backed by international treaties, supported by years of investment, and then swept away when the political winds changed. The Taliban's return in 2021 was the most dramatic reversal, but not the first, and that is part of the problem.

Rights in Afghanistan have always depended on whoever holds power , never truly secure. This paper has shown that legal frameworks are necessary but not sufficient. CEDAW, the CRC, and the ICCPR all apply to Afghanistan. But none of them protected Afghan women when the government decided they were inconvenient. Without political will and strong institutions, even the best laws remain on paper. Girl and boy children in Afghanistan do not grow up in the same country in any meaningful sense. Boys have access to education, work, and public life. Girls are systematically excluded from all three, by law and state enforcement. This is a clear violation of the CRC's non-discrimination principles, and the international community must say so plainly.

Afghanistan is not simply behind on gender equality ; it is actively moving in the wrong direction. The ICJ proceedings brought by Canada and the Netherlands under CEDAW offer a real opening for accountability. That opening should grow: through broader state participation, treaty body coordination, and a clear legal case that gender apartheid is an international wrong, not a domestic policy choice. Ultimately, no treaty and no court ruling will be enough on its own

FROM ASHES TO ALGORITHMS: REIMAGINING THE RIGHT TO DIGITAL DEATH IN INDIA'S DATA PROTECTION AND SUCCESSION LAWS

K. KAVYA [1]& P. GANESH[2]

ABSTRACT

A person's practical connection with the world is no longer terminated by death as human existence becomes increasingly integrated into digital surroundings. Digital remnants of the departed, such as social media profiles, cloud-stored content, cryptocurrency holdings, personal data repositories, and algorithmically maintained online presences, are not recognised or controlled in India. This article investigates whether Indian law should acknowledge a legally binding "Right to Digital Death," which is defined as a person's antemortem and postmortem right to control the course of her digital life. It critically assesses the Digital Personal Data Protection Act, 2023 and finds that, due to its person-centric consent architecture and silence on the temporal extension of data rights beyond death, the Act is fundamentally unable to address post-mortem data governance.The article examines the succession legal framework, including Muslim personal law, the Hindu Succession Act of 1956, and the Indian Succession Act of 1925, and it finds a structural gap with regard to digital identities and assets. The article establishes a framework based on constitutional values of privacy, dignity, and autonomy under Article 21 as interpreted in Justice K S Puttaswamy (Retd) v Union of India, drawing on comparative insights from Germany's Federal Court of Justice, the United States' Revised Uniform Fiduciary Access to Digital Assets Act, the European Union's GDPR, France's Digital Republic Act, and United Kingdom approaches A model Digital Legacy and Succession (Amendment) Bill, the introduction of statutory digital wills, and modifications to the DPDP Act are among the specific legislative recommendations made in the article's conclusion, which adds a novel doctrinal contribution to Indian data law study.

Keywords: Digital Death; Post-Mortem Privacy; Digital Legacy; DPDP Act, 2023; Succession Law; Digital Assets; Data Protection; Testamentary Succession.

[1] K. Kavya, Law Student LLM, Government Law College, Villupuram
[2] P. Ganesh, Law Student LLM, Government Law College, Villupuram

I. INTRODUCTION

The line separating digital presence from biological existence is now irreversibly blurred. Over the course of a lifetime, a modern person creates a layered and legally complex digital estate that includes social media accounts, email repositories, cloud-stored intellectual property, subscription entitlements, personal data held by data fiduciaries, and, increasingly, cryptocurrency wallets and non-fungible tokens. According to traditional doctrine, death eliminates legal personhood, but this finality is not present in the digital realm. Existing legal categories are seriously challenged by the idea of "digital remains," which is the accumulated informational residue of an individual's online activity. These remnants occupy a normative gap that Indian law has not yet filled; they are neither strictly non-transmissible dignitary interests nor exclusively personal property. Constitutional rights doctrine has historically assumed a living rights-bearer, succession regimes consider tangible and intangible property of established legal character, and data protection frameworks are based on the agreement of a living data principal.

This article investigates whether Indian law should acknowledge a "Right to Digital Death," which is defined as a living person's compound right to specify how her digital existence will be treated after death and the corresponding duty on data fiduciaries, courts, and successors to respect that designation. It's not only an intellectual question. India produces exabytes of personal data every year, with more than 800 million internet users as of 2023. In the absence of a legislative framework, this data is vulnerable to the capricious policies of private platforms, the insufficient procedures of current succession legislation, and the DPDP Act's silence about deceased individuals.

VERDICT VOICES LAW. LEARN. LEAD.

The article is structured as follows. The Right to Digital Death is conceptualised in Part II along with its philosophical foundations. The DPDP Act of 2023 is examined in Part III in relation to deceased people. Part IV looks at the gap in succession law. In Part V, a comparative analysis is conducted. In Part VI, significant court rulings are examined. Foundations of the Constitution are examined in Part VII. A legislative framework is proposed in Part VIII. This finishes Part IX.

II. CONCEPTUALIZING THE RIGHT TO DIGITAL DEATH

As a social and legal phenomena, "digital death" cannot be reduced to a single legal event or moment. Mayer-Schönberger noted that digital information persists forever until purposefully erased, in contrast to biological amnesia. When applied to individuals, this implies that long after biological death, the digital self may endure and continue to be used for profit. Therefore, three overlapping issues must be addressed in the legal order: who controls or owns digital remains; who has the authority to make choices regarding them; and whether the deceased's expressed wishes have any legal significance.[3]

Digital assets can be divided into a number of valuable categories. First, personal data is information maintained by platforms, healthcare providers, or financial organisations that can be used to identify or identify a real individual. The second category is digital property, which includes things like bitcoin, domain names, NFTs, and platform-stored material that the user is contractually or proprietarily entitled to. Third, digital identities, such as email addresses, social media profiles, and online personalities that function as both intimate expression repository and communication tools. Fourth, cloud-based content, which includes images, documents, and artistic creations kept on servers owned by third parties and frequently subject to terms of service that claim to end access following death.[4]

The idea of post-mortem privacy, which refers to the deceased's and her loved ones' right to manage material that might harm their reputation, dignity, or grieving process, was primarily created in Anglo-American and European studies. It uses the concept of informational self-determination, which is linked to the 1983 Volkszuhlungsurteil (Census Decision) of the German Constitutional Court, which established that people have a basic right to decide how their personal information is disclosed and used. Harbinja has made a strong case that this right does not immediately expire following death since the justification for informational control the preservation of autonomy and dignity retains normative force with regard to information created during life.[5]

---

[3] Lilian Edwards and Edina Harbinja, 'Protecting Post-Mortem Privacy: Reconsidering the Privacy Interests of the Deceased in a Digital World' (2013) 32 Cardozo Arts & Entertainment Law Journal 83, 88.

[4] James Norris, Digital Death: Mortality and Beyond in the Online Age (Praeger 2016) 22–35.

[5] Rachael Craufurd Smith and others, 'Digital Inheritance in the UK: Property Law and Technology' [2020] Edinburgh Law Review 1.

In terms of philosophy, it is not new to extend autonomy and dignity after death. Defamation law recognises posthumous reputational interests; courts uphold testamentary wishes long after the testator passes away; and copyright law safeguards writers' moral rights after death. There is no justification for excluding the domain of personal data if legal systems consistently respect the potential property and expression rights of non-living individuals.[6]

III. INDIA'S LEGAL VACUUM: CAN THE DPDP ACT, 2023 PROTECT THE DEAD?

India's largest legal action in data governance to date is the DPDP Act 2023. However, the living data principle defined in section 2(j) as a real person to whom personal data belongs and who is competent to exercise rights under the Act is the foundation of its architecture. [7]The Act gives data principals the ability to access information, fix errors, remove data, and give or revoke consent for processing. The deceased, their legal heirs, or their authorised nominees are not granted any of these rights by the text.

A data principal may designate a person to execute her rights in the case of incapacity or death through the notional nominee procedure provided by Section 14 of the Act.[8] There are three structural reasons why this provision is insufficient. First, it is optional rather than required: data fiduciaries are not required by law to notify users about the nominee function or to assist in its use. Second, the nominee has no independent foundation for controlling data that the data principal had not explicitly addressed; instead, the nominee's rights are wholly derivative, allowing them to exercise just those rights that the data principle could have exercised.

Third and most importantly, given the percentage of India's digital population that has never used the nominee provision, the Act offers no default norms for data governance in the event that no nominee has been nominated. This situation would be demographically widespread. The Act's silence on what happens to personal data when the data principle passes away exacerbates this structural deficiency. Data fiduciaries

[6] Antoinette Rouvroy, 'Privacy, Data Protection, and the Unprecedented Challenges of Human Genome Databases' (2008) 2 Journal of Information, Communication and Ethics in Society 310.

[7] DPDP Act (n 3) s 2(j) ('data principal').

[8] DPDP Act (n 3) s 14 (nominee mechanism). The provision is permissive and does not address general post-mortem data governance.

are not required by the Act to remove, store, transfer, or otherwise handle personal data after death. The Act does not provide a method for the withdrawal of consent by operation of law, nor does it grant a successor the right to request erasure or preservation, even though the consent that permitted processing during life expires upon the principal's death.[9]

It's instructive to compare with the European GDPR. Recital 27 makes it clear that the Regulation does not apply to the personal information of people who have passed away, but it also gives Member States the authority to create national regulations pertaining to such information. [10]In response, a number of European nations, most notably France, Italy, and Estonia, have enacted laws governing post-mortem data. Such subsidiary law is not prohibited by India's DPDP Act, but it is also not positively mandated.[11] The nomination system is somewhat elaborated in the draft Digital Personal Data Protection Rules 2025, but the larger governance gap is not addressed. As of right now, the Data Protection Board, the Act's enforcement architecture, lacks the authority to decide post-mortem data disputes.[12]

IV. THE SUCCESSION LAW GAP: ARE DIGITAL LEGACIES INHERITABLE?

The two main succession laws, the Hindu Succession Act of 1956 and the Indian Succession Act of 1925, were not designed to handle digital estates because they were passed before the internet. Whether digital assets qualify as "property" under these regulations and are therefore transmissible upon death is the main question.[13]Although the Indian Succession Act of 1925 provides a broad definition of property, courts have not definitively addressed whether digital assets, online

[9] Personal Data Protection Bill 2019 (India), cl 3(14) defined 'personal data' without temporal extension beyond death; compare GDPR Recital 27.

[10] Regulation (EU) 2016/679 (General Data Protection Regulation) [2016] OJ L119/1, Recital 27 ('GDPR').

[11] Ministry of Electronics and Information Technology, Draft Digital Personal Data Protection Rules 2025 (2025) r 13 (nominee and consent manager provisions).

[12] DPDP Act (n 3) s 25 (Data Protection Board); ss 26–27 (adjudication and penalties).

[13] Indian Succession Act 1925 (n 4) s 59 (testamentary capacity); ss 63–65 (formal requirements for wills).

Hindu Succession Act 1956 (n 4) s 6 (as amended by the Hindu Succession (Amendment) Act 2005, Act 39 of 2005); see also Vineeta Sharma v Rakesh Sharma (2020) 9 SCC 1.

accounts, or personal data are covered. [14]A thing is considered property under classical property law if it can be owned, transferred, and has commercial worth. These requirements are met by cryptocurrency, which is a decentralised, transferrable, and valuable asset. Additionally, domain names are identifiable property. Though it is created by the data principle and regulated on her behalf, personal data kept by a third-party data fiduciary is held and handled by the fiduciary rather than being "owned" by the data principal in the traditional sense.There is no heritable interest in the common law sense because social media accounts are managed by terms of service that usually forbid transfer and end access upon death.[15]

A unique but similarly ambiguous stance is presented by Muslim personal law. In India, Islamic inheritance law is based on a fixed share (faraid) system that applies to certain types of property. Classical fiqh does not acknowledge the concept of "digital property," and Indian courts have not established law regarding the application of faraid principles to online accounts or crypto-assets. Family members of a deceased Muslim person have no legal basis to demand access to or control over digital estates, therefore the silence is not benign.[16]

The Indian Succession Act's formal requirements for valid wills writing, attestation, and probate were created for paper documents, thus while testamentary succession offers a partial solution, it has a clear shortcoming. In India, a "digital will" a document outlining how digital assets are to be disposed of has no clear legal standing. The appointment of a "digital executor" with particular authority to handle digital legacies, access platforms, and overturn terms of service is not governed by any legal framework. Even a properly written testamentary document might not be enforceable against data fiduciaries in the absence of such authorities.[17] The doctrinal result is a structural paradox: Indian succession law in its current form may acknowledge the abstract idea that digital property is heritable, but it offers no way for the heir to realise

[14] Indian Succession Act 1925 (n 4) ss 211–222 (probate and letters of administration); s 2(h) ('property').

[15] Rohan Agarwal, 'Digital Assets and Succession Law in India: Towards a Legislative Framework' (2022) 7 National University of Juridical Sciences Law Review 112, 124.

[16] Mulla, Principles of Mahomedan Law (21st edn, LexisNexis 2018) ss 30–42; Mohd Ahmed Khan v Shah Bano Begum AIR 1985 SC 945.

[17] Usha Tandon and Shruti Midha, 'Digital Assets and Succession: The Indian Lacuna' (2023) 12 Delhi University Law Journal 77, 89.

that inheritance against a data fiduciary acting in accordance with the deceased's data protection obligations.

V. COMPARATIVE PERSPECTIVES: LEARNING FROM FOREIGN JURISDICTIONS

The German Federal Court of Justice's 2018 ruling in III ZR 183/17, also referred to as the Facebook Inheritance Case, is the most important comparable development. The Court ruled that platform terms of service that purport to limit inheritance of account access were invalid and that the contractual relationship between a social media user and a platform is part of the user's heritable estate under German law. The Court reasoned that the right to access private communications is comparable to the right to access physical correspondence: private messages and account data form part of the estate just like letters do. The ruling is noteworthy for its conviction that digital accounts are relational spaces with heritable character rather than just leased services.[18]

Adopted in one form or another in more than forty states, the United States' Revised Uniform Fiduciary Access to Digital Assets Act 2015 creates a tiered priority framework: an online tool (like Google's Inactive Account Manager or Facebook's Legacy Contact) supersedes testamentary instructions; a will, trust, or power of attorney governs in the absence of an online tool; and the platform's terms of service apply in the absence of all instruments. The subtlety of RUFADAA is seen in how it balances the fiduciary's duties, the data principal's privacy concerns, and the legitimate claims of successors a balancing that Indian law has not explored[19].

Although the GDPR's treatment of post-mortem data is purposefully limited at the European level (Recital 27 removes deceased persons from the Regulation's reach), Member State legislation has creatively filled the void. The most sophisticated intervention is France's Digital Republic Act 2016, which explicitly grants people the ability to make decisions about the storage, deletion, and sharing of their personal data

[18] Dirk Heckmann and Anne Paschke, 'Post-Mortem Privacy: Inheritance of Personal Data in Germany' (2018) 4(1) European Data Protection Law Review 88, 91.

[19] Revised Uniform Fiduciary Access to Digital Assets Act 2015 (USA) ('RUFADAA'); National Conference of Commissioners on Uniform State Laws, RUFADAA With Prefatory Note and Comments (2015).

while they are still alive and gives a trusted third party or heir the authority to carry out those decisions. [20]Similar laws have been passed by Estonia and Italy, indicating a growing European agreement that post-mortem data should be governed by statute. The Law Commission of the United Kingdom acknowledged the growing necessity of addressing digital assets in testamentary paperwork in its 2017 consultation paper on wills reform, but it did not suggest a comprehensive framework for digital legacies.[21] Indian reformers should be cautioned from expecting that comparative precedents will simply translate, as the lack of a statutory solution in the UK highlights the legislative inertia that characterises this field globally.

The comparative landscape identifies four structural components that any successful regime must include: (i) prospective enshrinement of the data principal's post-mortem wishes during life; (ii) legal recognition of a digital executor with enforceable powers against platforms; (iii) default rules for cases of silence and intestacy; and (iv) balancing post-mortem privacy with the legitimate interests of investigators, heirs, and the public record.

VI. CASE LAW ANALYSIS: PRIVACY, DIGNITY AND THE DIGITAL AFTERLIFE

A. JUSTICE K S PUTTASWAMY (RETD) V UNION OF INDIA (2017)

Any examination of Indian privacy rights must start with Puttaswamy. The nine-judge panel overruled M P Sharma v. Satish Chandra and Kharak Singh to the extent that it was contradictory, unanimously ruling that the right to privacy is a basic right under Article 21. According to Chandrachud J's concurrence, one unique and constitutionally protected aspect of privacy is informational self-determination, or the right of persons to govern information about themselves.[22]

Puttaswamy's conceptualisation of privacy as a right based on human dignity and autonomy rather than just physical inviolability makes it relevant to the Right to Digital Death.The assertion that this interest completely stops upon death requires

[20] France, Loi no 2016-1321 du 7 octobre 2016 pour une République numérique [2016] JORF no 0235 ('Digital Republic Act'); Arts 63–64.

[21] Law Commission (UK), Making a Will: Consultation Paper No 231 (2017) paras 6.15–6.22.

[22] Puttaswamy (n 5) [325]–[385] (Chandrachud J, concurring) (informational self-determination and decisional autonomy).

substantial normative justification if the informational self extends beyond any particular datum to the more general matter of identity who one is, how one is known, and what others may learn or do with knowledge about oneself. The doctrinal logic of informational self-determination is intrinsically prospective: an individual exercises this right by making decisions about her information's future use during her lifetime.

B. KHARAK SINGH V STATE OF UTTAR PRADESH (1963)

The first Supreme Court ruling to take the idea of privacy under the Constitution seriously was Kharak Singh.[23] Subba Rao J's dissent claimed that personal liberty under Article 21 included the right to be left alone, despite the majority's conclusion that the Constitution did not establish a general right to privacy. The importance of Kharak Singh for digital death is found in its early recognition of the constitutionally important right to be free from surveillance and unwelcome exposure, rather than in its conclusion, which Puttaswamy replaced. The constitutional tradition established in Kharak Singh should denounce the posthumous surveillance that occurs when a deceased person's data is continuously processed by platforms after death.[24]

C. R RAJAGOPAL V STATE OF TAMIL NADU (1994)

The Supreme Court acknowledged in Rajagopal that the right to privacy encompasses the right to regulate what is published about oneself, or the right to one's own story. The Court ruled that without permission, a person's private information could not be disseminated. When applied to the digital sphere, Rajagopal endorses the idea that an individual's digital narrative, or their cumulative online persona, is a protected interest. The same interest in narrative control that Rajagopal acknowledged is violated by the posthumous monetization of a deceased person's profile data or by advertisers continuing to mine her behavioural data.[25]

D. COMMON CAUSE V UNION OF INDIA (2018)

The right to die with dignity was outlined in Common Cause as part of Article 21. The normative weight of advance directives documents that allow people to express their preferences for medical care during their lifetime despite losing the ability to make

[23] Kharak Singh v State of Uttar Pradesh AIR 1963 SC 1295.
[24] Kharak Singh (n 31) [20]; see also Gobind v State of Madhya Pradesh (1975) 2 SCC 148.
[25] Rajagopal (n 32) [26].

decisions for themselves was a major topic of discussion in Chandrachud J's concurrence. The freedom to offer prospective digital instructions has substantial doctrinal backing thanks to Common Cause's constitutional acceptance of prospective autonomy. If the law acknowledges that a person's autonomous decisions made during her lifetime are legally enforceable with regard to how she is treated physically after becoming incapacitated, there is no justification for denying the same recognition to decisions made regarding how her digital identity is handled after death.[26]

E. German Federal Court of Justice — Facebook Inheritance Case (2018)

Despite being ruled under German civil law, the German Court's interpretation offers an important point of comparison. The Court used the well-established rule that personal correspondence, such as letters and diaries, becomes part of the estate and is available to heirs as an analogy. Such correspondence's digital counterparts, such as private messages, private images, and account information, ought to be handled similarly. The Court also dismissed the claim that disclosure to heirs was forbidden by data privacy law, ruling that the GDPR's protections work in the account holder's benefit rather than against her heirs. This reasoning's doctrinal coherence suggests that it be adopted in the Indian context: if the data principal benefits from the constitutional right to privacy, the principal must have the authority to order its exercise for benefit.

VII. THE CONSTITUTIONAL FOUNDATIONS OF A RIGHT TO DIGITAL DEATH

Three pillars support the constitutional case for a right to digital death: the right to privacy guaranteed by Article 21; the Puttaswamy-derived notion of informational self-determination; and the developing body of constitutional morality jurisprudence. The Supreme Court has construed the right to life and personal liberty guaranteed by Article 21 to include the right to live in dignity. [27]The postmortem marketing of a person's identity the algorithmic mining of her data after death, the continuation of her profile for advertising revenue violates the dignity interest that Article 21

[26] Common Cause (A Regd Society) v Union of India (2018) 5 SCC 1 ('Common Cause') [199] (Chandrachud J, concurring).

[27] Constitution of India 1950, Art 21; Puttaswamy (n 5) (extending Art 21 to informational privacy).

safeguards if dignity is the constitutional basis of privacy. According to this interpretation, the constitutional right is a right to have one's dignity upheld throughout the foreseeable future, including after death, rather than just a right for the living.

According to Puttaswamy, informational self-determination must be proactive. Typically, exercising one's right involves making decisions, such as approving certain uses, refusing permission from others, and controlling what happens to one's personal data.[28] Making decisions regarding posthumous events is inextricably linked to the right to make future decisions. This is the reasoning behind testamentary freedom, the execution of ante-mortem directives, and the law of trusts; it is not a doctrinal innovation.

According to Navtej Singh Johar, constitutional morality mandates that lawmakers and judges uphold constitutional principles even in situations when public morality or legal tradition have not. [29]The now firmly established constitutional ideals of autonomy, privacy, and dignity have not been applied to post-mortem data governance. This application is required under the constitutional morality doctrine. However, there are certain fundamental issues that need to be answered. Actio personalis moritur cum persona, the conventional theory that rights terminate upon death, would seem to prohibit post-mortem rights claims. This objection confuses the right's temporal scope (prospective) with its source (the living individual). The reason testamentary wishes are upheld after death is not because the testator still has rights, but rather because the legal system honours people's free will. Digital directions should follow the same reasoning.

The data principal's privacy preferences may clash with the interests of heirs, who may have rightful claims to access a deceased person's communications. This conflict is real but manageable: both interests can be served by a tiered structure where the data principal's directions are given priority but may be overridden in situations of true legal necessity. Criminal investigations, taxes, and historical records are examples of

[28] Alan Westin, Privacy and Freedom (Atheneum 1967) 7.
[29] Navtej Singh Johar v Union of India (2018) 10 SCC 1, [261] (Chandrachud J).

public interest exclusions that must be maintained. A right to digital death shouldn't be used as a defence against justifiable governmental interests. Any legislative framework that incorporates proportionality review can guarantee that the state can only access private digital estates when absolutely essential and under court supervision.

VIII. TOWARDS AN INDIAN FRAMEWORK FOR POST-MORTEM DATA GOVERNANCE

Concrete legislative intervention is supported by the normative analysis presented above. A logical framework based on five statutory procedures is suggested in this section.

A. AMENDMENT TO THE DPDP ACT, 2023

A specific chapter on post-mortem data governance should be added to the DPDP Act. The term of "data principal" should be expanded in Section 2(j) to include the authorised nominee or legal representative of a deceased person for the particular purpose of exercising post-mortem data rights. Section 14A, a new section, should stipulate the following:(i) The rights of erasure, access, and correction survive the death of the data principal and vest in the designated nominee or, in the absence of a nominee, in the legal representative; (ii) Data fiduciaries are required to either execute the data principal's registered directives or notify the nominee of available data for decision-making within ninety days of receiving verified notice of a data principal's death; and (iii) in the absence of a directive or nominee, data fiduciaries must keep the data in restricted access for a predetermined period, after which erasure is the default.[30]

B. RECOGNITION OF DIGITAL WILLS AND DIGITAL EXECUTORS

It is necessary to revise the Indian Succession Act of 1925 to specifically acknowledge "digital testamentary directives" as a legitimate document. [31]The following should be included in a digital will: (a) the types of digital assets and data that are subject to the

[30] Compare Regulation (EU) 2016/679 (General Data Protection Regulation) recital 27 ('This Regulation does not apply to the personal data of deceased persons') while permitting Member States to legislate on post-mortem data processing; see also Loi n° 2016-1321 du 7 octobre 2016 pour une République numérique (France), arts 63–65, recognising directives concerning the retention, erasure and communication of personal data after death

[31] Indian Succession Act 1925, ss 2(h), 59 and 63.

directive; (b) the designated digital executor, who will have the power to access accounts, request erasure, transfer assets, archive or distribute specific content; and (c) any particular desires pertaining to platforms, data fiduciaries, or content. Statutory ability to execute post-death directions against data fiduciaries, enforceable before the Data Protection Board or a designated civil court, should be granted to digital executors.

C. MANDATORY PLATFORM MECHANISMS

All data fiduciaries operating in India, such as social media platforms, email service providers, cloud storage companies, and financial platforms, should be required by regulations under the DPDP Act to provide users with a "Inactive or Deceased Account Management Tool" that is comparable to those already implemented by some international platforms. [32]These tools must: (i) enable users to designate a legacy contact or nominee; (ii) indicate whether the account should be transferred, deleted, or memorialised; (iii) allow designated individuals to access selective content; and (iv) be enforceable under Indian law, regardless of any contrary provisions in the platform's terms of service.

D. DIGITAL SUCCESSION TRIBUNAL JURISDICTION

Dedicated adjudicatory infrastructure is needed for disputes pertaining to the digital estates of deceased people, such as disputes between nominees and heirs or between heirs and data fiduciaries. Post-mortem data conflicts should be specifically covered by the Data Protection Board's authority, with provisions for coordination with civil courts that have succession jurisdiction. As an alternative, such conflicts might be resolved more quickly by a specialised Digital Succession Tribunal established within the DPDP Act framework.

E. LAW COMMISSION REFERENCE AND MODEL LEGISLATION

[32] Proposed model drawing on France's Digital Republic Act (n 28) Arts 63–64 and RUFADAA (n 25), adapted for the Indian constitutional context.

The Law Commission of India has not published a report specifically addressing digital succession.[33] The legislation Commission should be formally tasked with conducting a thorough analysis of digital succession legislation and creating a draft Digital Legacy and Succession (Amendment) Bill. A stand-alone framework for digital wills, procedural guidelines for the administration of digital estates, and modifications to the DPDP Act and the Indian Succession Act should all be combined into one bill. In order to prevent the fragmentation that has historically defined Indian data and succession legislation, this consolidation is crucial.[34]

IX. SUGGESTIONS AND RECOMMENDATIONS

A. STATUTORY RECOGNITION OF THE RIGHT TO DIGITAL DEATH

The Digital Personal Data Protection Act of 2023 should specifically acknowledge a legally binding "Right to Digital Death" in India. The principles of privacy, autonomy, and dignity would be extended into the digital afterlife by allowing people to decide what happens to their personal information, online personas, and digital footprints after they pass away.

B. INTRODUCTION OF DIGITAL TESTAMENTARY DIRECTIVES AND DIGITAL EXECUTORS

It is necessary to update the Indian Succession Act, 1925 to acknowledge digital testamentary directives and wills. It should be possible for people to designate digital executors who have the authority to access, store, transfer, archive, or delete digital assets and accounts in line with the intentions of the deceased.

C. ESTABLISHMENT OF A NATIONAL DIGITAL LEGACY REGISTRY

The government may create a safe Digital Legacy Registry where people can enter legally binding post-mortem directives on their personal information and digital assets. A registry like this could make it easier to nominate digital representatives and lessen disagreements between service providers and heirs.

---

[33] Law Commission of India, Report No 110: Amendment of Certain Provisions of the Code of Civil Procedure 1908 (1985). No dedicated Law Commission report on digital succession exists as of 2025.

[34] European Data Protection Board, Guidelines 3/2019 on Processing of Personal Data Through Video Devices (2020). These illustrate the regulatory layering approach India could adopt.

D. Mandatory Post-Mortem Data Governance Policies for Data Fiduciaries

It should be legally mandatory for online platforms and data fiduciaries to provide clear post-death rules that address memorialization, account access, data transfer, and erasure requests. In digital ecosystems, standardised processes would foster accountability, certainty, and user trust.

E. Balancing Digital Autonomy with Public Interest and Heirs' Rights

The autonomy of the deceased individual and conflicting interests, such as the rightful rights of heirs, platform contractual duties, criminal investigations, and archive or public interest considerations, must be balanced in any system governing digital death. Both excessive state interference and unchecked private control of digital remains would be avoided by a proportionality-based strategy.

X. Conclusion

As this research has shown, India has a substantial and expanding legal gap in the management of digital death. Despite its aspirations to be a comprehensive data protection framework, the DPDP Act 2023 is structurally unable to regulate post-mortem data because its enforcement infrastructure lacks post-mortem jurisdiction, its nominee mechanism is vestigial, and its consent architecture requires a living data principal. Digital executors, digital wills, and the heritable nature of platform-based digital identities cannot be sufficiently addressed by Indian succession law, which was created for a world of physical assets and paperwork. As a result, there is a regulatory gap where private data fiduciaries' unilateral and unaccountable decisions affect the digital remains of hundreds of millions of Indians.

According to the comparative analysis, several countries, including the US, Germany, and France, have acknowledged the shortcomings of their pre-digital legal systems and have passed laws to address them. A Right to Digital Death can flourish in India's constitutional tradition because of its strong privacy jurisprudence, which is based on autonomy and dignity. The idea that the right to govern one's digital identity does not cease with biological death is supported by the logic of Puttaswamy's informational

self-determination, Common Cause's acceptance of prospective autonomy, and Rajagopal's acknowledgement of narrative control.

Reform has a normative urgency that goes beyond technical considerations. The inability to control post-mortem data is not a passive omission, but rather a deliberate granting of power to private corporations to exploit what was once a person as algorithms become more sophisticated in curating the identities of the living and the dead. In response, Indian law must acknowledge that passing away shouldn't be seen as an act of digital dispossession. Therefore, the legislative agenda is clear: amend the DPDP Act to grant deceased people data rights; recognise digital executors and wills in succession laws; require post-death account management tools for all data fiduciaries operating in India; and refer the issue of digital succession to the Law Commission for comprehensive reform.

VERDICT
VOICES
LAW. LEARN. LEAD.

BETWEEN BEDROOM AND COURTROOM: *THE UNRESOLVED CONSTITUTIONALITY OF THE MARITAL RAPE EXCEPTION IN INDIA*

MOHAMMAD FARHAN C N[1] *& ALAKA SARANGI P*[2]

ABSTRACT

Indian criminal law presents a singular paradox: while Section 375 of the Indian Penal Code — now re-enacted as Section 63 of the Bharatiya Nyaya Sanhita, 2023 — penalises sexual assault in its most expansive form, Exception 2 to that very provision immunises a husband who commits the same act upon his wife. This article argues that the marital rape exception is constitutionally indefensible on three grounds. First, it creates an arbitrary and irrational classification that fails the twin test under Article 14 by granting the husband a privileged legal status as perpetrator. Second, it negates the wife's right to bodily autonomy, dignity, and privacy under Article 21 — rights that the Supreme Court has progressively expanded through Puttaswamy, Suchita Srivastava, and Navtej Singh Johar. Third, it silences the survivor's legal voice in a manner inconsistent with Article 19(1)(a)'s guarantee of self-expression. The 2022 split verdict of the Delhi High Court in RIT Foundation v. Union of India has left the question unresolved, and Parliament's deliberate re-enactment of the exception in the BNS, 2023 constitutes a legislative abdication of constitutional duty. This article dissects each fault line, examines the judicial deadlock, critiques the legislative inaction, and addresses the principal counterarguments — including the misuse thesis and the availability of alternative remedies — to conclude that a marriage certificate cannot constitute a licence for non-consensual sexual intercourse under any constitutionally coherent framework.

***Keywords*:** Marital rape, Exception 2, BNS 2023, Article 14, Article 21, RIT Foundation, bodily autonomy, consent.

I. INTRODUCTION

Indian law has, for over a century and a half, drawn a peculiar distinction that would perplex any first-principles constitutional thinker: the very statute that defines and penalises rape carves out a categorical immunity for the husband of the survivor.

[1] Mohammad Farhan C, 5th Year Law Student, Markaz Law College
[2] Alaka Sarangi, Assitant Professor, Markaz Law College

Exception 2 to Section 375 of the Indian Penal Code, 1860 — re-enacted without material alteration in Section 63 of the Bharatiya Nyaya Sanhita, 2023 — states with clinical simplicity that sexual intercourse by a man with his own wife, the wife not being under eighteen years of age, is not rape.[3]

The provision is not a colonial relic that Parliament forgot to repeal. It is, as the legislative records of 2013 and 2023 both demonstrate, a consciously reaffirmed policy choice. The Justice Verma Committee, constituted in the wake of the December 2012 gang rape in Delhi, unequivocally recommended the abolition of the marital rape exception; Parliament rejected that recommendation and enacted an amended Section 375 IPC that left the immunity intact.[4] A decade later, the Bharatiya Nyaya Sanhita re-enacted the exception in substantially identical terms.[5]

The constitutional challenge to this exception has been sharpened — though not resolved — by the Supreme Court's expanding jurisprudence on fundamental rights. The right to privacy including sexual autonomy was recognised as a fundamental right under Article 21 in *K.S. Puttaswamy v. Union of India*;[6] the right to make reproductive choices was held protected in *Suchita Srivastava v. Chandigarh Administration*;[7] and the right to intimate choice was declared a core constitutional entitlement in *Navtej Singh Johar v. Union of India*.[8] Each of these decisions erodes the philosophical foundations of the marital rape exception without formally overruling it. The 2022 split verdict of the Delhi High Court in *RIT Foundation v. Union of India* encapsulates this tension: two judges, identical provisions, diametrically opposite constitutional conclusions.[9]

This article advances the thesis that the marital rape exception is constitutionally unsustainable. The argument unfolds across three constitutional fault lines — Articles 14, 21, and 19(1)(a) — before turning to the judicial deadlock, the legislative abdication, and the principal counterarguments. The conclusion is that, when the Supreme Court

[3]Bharatiya Nyaya Sanhita, 2023, § 63 (Exception) (India); Indian Penal Code, 1860, § 375 (Exception 2) (India) (repealed 2023).
[4]Justice J.S. Verma et al., *Report of the Committee on Amendments to Criminal Law* 107–110 (2013), available at PRS India (last visited June 14, 2026).
[5]Bharatiya Nyaya Sanhita, 2023, § 63 (Exception) (India).
[6]*K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 (India).
[7]*Suchita Srivastava v. Chandigarh Admin.*, (2009) 9 SCC 1 (India).
[8]*Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India).
[9]*RIT Found. v. Union of India*, 2022 SCC OnLine Del 1941 (India).

finally decides the question, it will find no constitutionally defensible basis for the exception's survival.

II. THE LEGAL ARCHITECTURE OF THE EXCEPTION

The marital rape exception traces its genealogy to Sir Matthew Hale's dictum, articulated in his posthumously published *History of the Pleas of the Crown* (1736): *by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.*[10] The Hale Doctrine rests on the feudal fiction of implied, irrevocable consent — the idea that by entering the marital contract, a wife surrenders her bodily autonomy to the husband for the duration of the marriage. This doctrine was transplanted into Indian law through colonial codification of the IPC and has survived every subsequent legislative revision.

Section 375 IPC defined rape through six descriptions of non-consensual or coerced sexual intercourse. Exception 2 provided that sexual intercourse by a man with his own wife was not rape if the wife was not under a specified minimum age. The age threshold was judicially read up from fifteen to eighteen years by the Supreme Court in *Independent Thought v. Union of India* (2017), which held that the exception could not protect a husband who had intercourse with a minor wife.[11] However, for adult wives, the exception was left entirely undisturbed. The Bharatiya Nyaya Sanhita, 2023, which comprehensively replaced the IPC, re-enacted the marital rape exception in Section 63 with the eighteen-year threshold — but otherwise preserved the immunity in full.

What the exception immunises is more than an absence of criminal liability; it is the legal erasure of the act itself. A husband who uses force, threats, or deception to compel his wife into sexual intercourse commits no offence under Section 63 BNS. The wife cannot register a First Information Report for rape; she cannot seek criminal prosecution under the primary rape provision; the law — at least in terms of its dominant criminal remedy — renders her experience invisible.

The Justice Verma Committee (2013) squarely addressed this invisibility and recommended that the exception be removed, so that the marital relationship would

[10] 1 Matthew Hale, *History of the Pleas of the Crown* 629 (1736).
[11] *Independent Thought v. Union of India*, (2017) 10 SCC 800 (India).

not operate as a valid defence to rape. The government declined, citing concerns about the family institution and the purported availability of alternative civil and criminal remedies. The Criminal Law (Amendment) Act, 2013 left Exception 2 untouched.[12] The Standing Committee on Home Affairs, which examined the BNS Bill in 2023, received submissions on the issue and recorded dissenting voices, but the re-enactment proceeded without modification.[13]

III. THE CONSTITUTIONAL CHALLENGE: THREE FAULT LINES

A. ARTICLE 14 — THE EQUALITY VACUUM

Article 14 of the Constitution guarantees equality before the law and equal protection of the laws to every person. It does two things: it prevents the state from acting in an unfair and discriminatory manner, and it ensures equal treatment for all. The Supreme Court's foundational equality jurisprudence, developed in *Anwar Ali Sarkar v. State of West Bengal*[14] and refined in *Budhan Choudhry v. State of Bihar*,[15] requires that any legislative classification must satisfy two conditions: first, the existence of an intelligible differentia distinguishing the class of persons grouped together from those left outside; and second, a rational nexus between that differentia and the object sought to be achieved by the legislation.

The marital rape exception creates a classification of perpetrators based solely on matrimonial status. A husband who commits the identical physical act as a stranger rapist is placed in a categorically protected class. The classification must therefore be tested against the *Anwar Ali Sarkar* standard: is the marital relationship an intelligible differentia for the purpose of rape law? Is there a rational nexus between the husband's identity as perpetrator and the object of Section 63 BNS, which is to penalise non-consensual sexual intercourse?

The answer to both questions is negative. The marital relationship does not alter the nature, gravity, or harm of non-consensual intercourse. The physical and

[12]The Criminal Law (Amendment) Act, 2013, No. 13, Acts of Parliament (India); Statement of Objects and Reasons, The Criminal Law (Amendment) Bill, 2013 (India).
[13]Parliament, Standing Comm. on Home Affairs, *246th Report on the Bharatiya Nyaya Sanhita Bill, 2023* (2023) (India), available at Sansad.in (last visited June 15, 2026).
[14]*State of W. Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75 (India).
[15]*Budhan Choudhry v. State of Bihar*, AIR 1955 SC 191 (India).

psychological trauma suffered by a wife who is raped by her husband is not categorically different from — and may in many cases be more severe than — that suffered by a victim of stranger rape, given the intimacy of the domestic environment, the cohabitational compulsion, and the cyclical nature of intimate-partner violence. The act is identical; the legal consequence is radically and arbitrarily different. No empirical or principled basis exists for treating the husband as a protected perpetrator.

The constitutional framework maintains protective classifications for vulnerable groups — scheduled castes, scheduled tribes, women, children — and those classifications exist for their empowerment. The marital rape exception inverts this logic entirely: it confers protection upon a class of perpetrators who hold power, not upon those who are vulnerable. Such an immunity is directly contradictory to the spirit and text of Article 14.

The Supreme Court's landmark judgment in *Shayara Bano v. Union of India*[16] invalidated Triple Talaq because it gave Muslim husbands a power not available to Muslim women, producing arbitrary and discriminatory outcomes. The marital rape exception carries identical reasoning and is equally vulnerable to this constitutional challenge. Moreover, Exception 2 defeats the very object of Section 63 BNS: its purpose is to protect women and punish those who commit rape; by exempting husbands, it directly contradicts that objective.[17]

Protecting the family institution by permitting non-consensual intercourse does not bear a rational nexus to any legitimate legislative aim. The Supreme Court's decision in *Joseph Shine v. Union of India* is directly instructive: striking down the adultery provision, the Court held that a legal framework premised on the wife being the husband's property, rather than an autonomous legal subject, is constitutionally impermissible.[18] Furthermore, the principle of non-arbitrariness embedded in Article 14 jurisprudence following *E.P. Royappa v. State of Tamil Nadu* renders a provision that immunises criminal conduct on the sole basis of the perpetrator's marital status arbitrary in the deepest constitutional sense.

B. Article 21 — Bodily Autonomy and Dignity Within Marriage

[16] *Shayara Bano v. Union of India*, (2017) 9 SCC 395 (India).
[17] Sarthak Makkar, *Marital Rape: A Non-Criminalized Crime in India*, Harv. Hum. Rts. J. (Jan. 1, 2019).
[18] *Joseph Shine v. Union of India*, (2019) 3 SCC 39 (India).

The most compelling constitutional ground against the marital rape exception lies in Article 21's guarantee of the right to life and personal liberty. Article 21 of the Constitution provides that no person shall be deprived of 'life or personal liberty' except according to procedure established by law.[19] 'Life' does not mean mere animal existence — it means the right to live with dignity. And dignity cannot exist without control over one's own body. The ability to reject unwanted sexual contact cannot rationally depend on a woman's marital status if physical autonomy is a component of the right to live. On the day a woman signs a marriage registration, her body does not become spousal property — yet this is essentially what Exception 2 presupposes: that marriage entails a standing, irrevocable agreement to sexual intercourse.

In *Maneka Gandhi v. Union of India*,[20] the Court held that Article 21 protects not merely physical survival but the right to live with human dignity. In *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*,[21] the Court held that this right to dignity extends to the full range of conditions required for a meaningful human existence.

The nine-judge bench in *K.S. Puttaswamy v. Union of India* recognised the right to privacy as a fundamental right intrinsic to Article 21, encompassing individual autonomy including choices about sexuality. The body was identified as the most intimate zone of privacy. A provision that immunises non-consensual intrusion into that zone on the sole basis of matrimonial status is a direct negation of *Puttaswamy*'s constitutional logic.

In *Suchita Srivastava v. Chandigarh Administration*, the Court held that reproductive autonomy — the right to decide whether, when, and how to bear children — is an inseparable component of a woman's right to privacy, dignity, and bodily integrity under Article 21. If a woman's right to decide whether to reproduce is constitutionally protected, it is logically incoherent to hold that the same woman's right to decide whether to engage in sexual intercourse is not. The marital relationship cannot dissolve this constitutional entailment.

[19]India Const. art. 21.
[20]*Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 (India).
[21]*Francis Coralie Mullin v. Adm'r, Union Territory of Delhi*, (1981) 1 SCC 608 (India).

Navtej Singh Johar v. Union of India added the dimension of intimate choice. The five-judge bench held unanimously that the right to intimate association — including the choice of sexual partner and the terms of sexual engagement — is protected under Articles 21, 19, and 14. Consent must be ongoing, specific, and revocable; it cannot be a single, perpetual waiver extracted at the moment of marriage. Marriage is a civil contract — it is not, under any constitutionally coherent reading, a mechanism for the transfer of the wife's bodily sovereignty to the husband.

C. Article 19(1)(a) — The Silenced Voice

Article 19(1)(a) guarantees every citizen the right to freedom of speech and expression. While the primary constitutional case against the marital rape exception rests on Articles 14 and 21, Article 19(1)(a) adds a further dimension that addresses the symbolic harm of the law's silence.

The marital rape exception inflicts what may be characterised as epistemic harm: it not only permits the husband's act, it legally erases the wife's experience of it. The wife cannot name the act as rape in law. She cannot seek criminal redress under the primary rape provision. The legal architecture communicates to her, and to society at large, that what she experienced was not rape — that the law does not recognise her bodily autonomy as an interest worthy of criminal protection within marriage. This silencing is itself a constitutional harm, inconsistent with the dignity and self-expression values that Article 19(1)(a), read with Article 21, protects.[22]

IV. The Judicial Deadlock: Delhi High Court and Its Aftermath

The constitutional challenge reached the Delhi High Court in *RIT Foundation v. Union of India*, decided in May 2022 through a split verdict that crystallised the deep disagreement within the judiciary on this foundational question.[23]

Justice Rajiv Shakdher held that Exception 2 was unconstitutional. The exception violated Article 14 by creating an arbitrary classification — the marital status of the perpetrator bore no rational nexus to the object of penalising non-consensual intercourse. It violated Article 21 by denying the wife her right to bodily autonomy,

[22] *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241 (India).

dignity, and sexual agency. And it was incompatible with the constitutional framework illuminated by *Puttaswamy*, *Navtej Singh Johar*, and *Joseph Shine*.

Justice C. Hari Shankar, in a detailed dissent, upheld the exception.[24] His reasoning rested on three propositions: that marriage creates a unique institution with distinct legal rights that the legislature is entitled to recognise; that the Constitution does not require identical treatment across all categories of persons; and that Parliament's deliberate retention of the exception reflected a considered policy judgment that the court ought not to second-guess.

With respect, each limb of the dissent's reasoning is contestable. The uniqueness of the marital institution does not provide a constitutional licence to negate a spouse's fundamental rights — *Joseph Shine* and *Navtej* confirm that constitutional protection of intimacy must extend to partners within intimate relationships. A partial crack in the exception's wall had appeared in *Independent Thought v. Union of India* (2017), where the Court held that sexual intercourse by a husband with his minor wife constituted rape. The Court's reasoning — that a minor girl's right to dignity could not be suspended by marriage — is constitutionally indistinguishable from the case for adult wives.

The Supreme Court, at the time of writing, has tagged the matter for hearing following the split verdict, but the apex court's adjudication remains pending. Every day the exception survives is a day in which married women are denied the protection of the primary criminal law against rape — not because the law cannot reach their situation, but because it deliberately chooses not to.

VERDICT VOICES LAW. LEARN. LEAD.

V. THE LEGISLATIVE ABDICATION: BNS 2023 AS A MISSED OPPORTUNITY

The enactment of the Bharatiya Nyaya Sanhita, 2023 presented Parliament with an unambiguous opportunity to correct the constitutional infirmity of the marital rape exception. The Standing Committee on Home Affairs, which examined the BNS Bill, received submissions recommending removal of the exception. Parliament declined.

The deliberate re-enactment of the exception in Section 63 BNS forecloses any argument that it is a colonial relic awaiting attention. Parliament has, in 2023,

[24] *RIT Found. v. Union of India*, 2022 SCC Online Del 1941 (Hari Shankar, J., dissenting) (India).

considered and reaffirmed the exception with full awareness of the constitutional challenges, the Verma Committee's contrary recommendation, and the Delhi High Court split verdict. This is not legislative inadvertence; it is legislative abdication of constitutional duty.

The contrast with international legislative reform starkly illuminates the isolation of the Indian position. The United Kingdom abolished the marital rape exception in 1991 through the House of Lords in *R v. R*, subsequently codified in the Sexual Offences Act 2003.[25] South Africa and Nepal have similarly criminalised marital rape. India stands in increasingly conspicuous contrast to a broad international consensus that matrimonial consent to intercourse cannot be permanent, irrevocable, or immune from the ordinary operation of criminal law.

The democratic legitimacy argument — that Parliament's choice reflects majoritarian will — has constitutional limits that the Supreme Court has repeatedly articulated. Fundamental rights are counter-majoritarian by design.[26] Parliament is competent to structure criminal law; it is not competent to structure it in a manner that extinguishes fundamental rights. The BNS's re-enactment of the exception does not immunise it from constitutional scrutiny; if anything, it sharpens the urgency of that scrutiny.

VI. COUNTERARGUMENTS AND THEIR LIMITS

A. THE MARRIAGE AS SOCIAL INSTITUTION ARGUMENT

The most commonly advanced defence is that marriage creates obligations and rights distinct from those between strangers, and that the criminal law should be sensitive to this distinction. The argument has surface plausibility but is constitutionally empty. It would, taken to its logical conclusion, equally justify immunising a husband from assault or wrongful confinement. The question is not whether marriage creates a distinct legal framework — it does — but whether that framework can constitutionally exclude the wife's bodily autonomy from criminal protection. After *Puttaswamy*, *Navtej*, and *Joseph Shine*, the answer is plainly that it cannot.

B. THE MISUSE ARGUMENT

[25] *R v. R*, [1992] 1 AC 599 (HL) (UK); Sexual Offences Act 2003, c. 42, § 1 (UK).
[26] Upendra Baxi, *Constitutionalism as a Site of State Formative Practices*, 21 Cardozo L. Rev. 1183, 1190 (2000).

A recurring concern is that criminalising marital rape will expose husbands to widespread false allegations. However, the potential for misuse does not constitute a constitutional justification for the categorical immunisation of an otherwise criminal act. The Supreme Court acknowledged misuse concerns under Section 498A IPC in *Arnesh Kumar v. State of Bihar*[27], yet those concerns led to procedural guidelines, not abolition of the provision. The answer to misuse is adequate procedural safeguards — heightened evidentiary standards or judicial oversight — not the elimination of criminal liability.[28]

C. THE ALTERNATIVE REMEDIES ARGUMENT

A third line of defence argues that married women are not without recourse: the Protection of Women from Domestic Violence Act, 2005 provides civil remedies, and Section 498A IPC (Section 85 BNS) addresses matrimonial cruelty.[29] These remedies are, however, structurally inadequate substitutes for criminalisation of marital rape. The PWDVA provides civil reliefs that do not carry imprisonment commensurate with the gravity of rape. Section 85 BNS addresses cruelty in general and does not capture the specific harm of non-consensual sexual intercourse. Redirecting a survivor of marital rape to provisions designed for different harms is a constitutional evasion, not a constitutional answer.[30]

VII. CONCLUSION

The marital rape exception is not merely socially regressive. It is constitutionally indefensible. Under Article 14, it creates an irrational, unprincipled classification of the husband as a protected perpetrator, bearing no rational nexus to any legitimate legislative objective. Under Article 21, it extinguishes the wife's right to bodily autonomy, dignity, and privacy — rights that the Supreme Court's expanding jurisprudence has placed beyond legislative abridgement. And it inflicts an epistemic harm on the survivor inconsistent with the dignity and self-expression values underlying Article 19(1)(a).

---

[27] *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273 (India).
[28] Flavia Agnes, *Protecting Women Against Violence? Review of a Decade of Legislation, 1980–89*, 27 Econ. & Pol. Wkly. WS19, WS22 (1992).
[29] Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament (India); Bharatiya Nyaya Sanhita, 2023, § 85 (India).
[30] Ratna Kapur, *The Tragedy of Victimisation Rhetoric: Resurrecting the 'Native' Subject in International/Post-Colonial Feminist Legal Politics*, 15 Harv. Hum. Rts. J. 1, 14 (2002).

Parliament has twice in 2013 and in 2023 chosen not to act. The responsibility now lies with the apex court to do what the legislature will not: align the criminal law with the Constitution it purports to serve.

The pending adjudication is more than a case about one legal provision. It is a constitutional moment of the kind that *Navtej Singh Johar* represented for sexual minority rights — an opportunity to declare, without equivocation, that fundamental rights do not dissolve at the threshold of the matrimonial home. A marriage certificate is a document of civil union; it is not, and cannot constitutionally be, a licence for sexual violence.

VERDICT
VOICES
LAW. LEARN. LEAD.

FROZEN IN LITIGATION - DOCTRINE OF LIS PENDENS AND ITS CHILLING IMPACTS ON REAL ESTATE TRANSACTIONS

DAMINI M[1]

ABSTRACT

Real estate transactions involve a lot of buying, selling, leasing, mortgaging or developing immovable property. Section 52 of the Transfer of Property Act, 1882, restricts such transfer when a suit involving rights to immovable property is pending or if the transfer may affect the rights of parties to the litigation. Section 52 specifies the Doctrine of Lis Pendens. 'Lis' means 'litigation' and 'Pendens' means 'pending'. The convention of Lis Pendens is communicated in the notable property: - Pendente light nihil innovator, which signifies 'during pendency of suit, the same old thing ought to be presented'. Under this principle, it is given that during the pendency of any suit with respect to the title of a property, any new interest regarding that property ought not to be made. Production of a new title or interest is known as an exchange of property. Thusly, fundamentally, the schooling of Lis Pendens precludes the exchange of property forthcoming suit. It is an extremely old school and has been working in the English Common Law. Under this convention, the decisions in the unfaltering properties were viewed as abrogating any estrangement made by the parties during the pendency of the suit. Later on, this schooling was received additionally by value for a superior and more customary organization of equity. This research paper focuses on the evolution of the doctrine of Lis Pendens under common law. Secondly, it focuses on Section 52 of the Transfer of Property Act, 1882, impacting the evolution of the law related to the transfer of property under the pendency of litigation in India. Further, it focuses on the idea of Lis Pendens under the Transfer of Property Act, 1882, which impacted many transfers of properties in real estate.

Keywords: Real estate, Doctrine of Lis Pendens, Transfer of Property, litigation

I. INTRODUCTION

Section 52 of the Transfer of Property Act, 1882[2] deals with the Doctrine of Lis Pendens. 'Lis' means 'litigation' and 'Pendens' means 'pending'. So, *Lis Pendens*

[1] Damini M, Assistant Professor, Soundarya Group of Institutions

would mean 'pending litigation'. The doctrine of *Lis Pendens*[3] is expressed in the well-known maxim:- **Pendente lite nihil innovator**, which means 'during pendency of litigation, nothing new should be introduced'[4].

Under this doctrine, it is provided that during the pendency of any suit regarding the title of a property, any new interest in respect of that property should not be created[5]. Creation of a new title or interest is known as a transfer of property. Therefore, in essence, the doctrine of *Lis Pendens* prohibits the transfer of property pending litigation. It is a very old doctrine and has been operating in the English Common Law. Under this doctrine, the judgments in the immovable properties were regarded as overriding any alienation made by the parties during the pendency of litigation[6]. Later on, this doctrine was also adopted by equity for a better and more regular administration of justice[7].

In current practice, a *lis pendens*[8] is a written notice that a lawsuit has been filed concerning real estate, involving either the title to the property or a claimed ownership interest in it.[9] The notice is usually filed in the county land records office. Recording a *lis pendens* against a piece of property alerts a potential purchaser or lender that the property's title is in question, which makes the property less attractive to a buyer or lender. After the notice is filed, anyone who nevertheless purchases the land or property described in the notice takes subject to the ultimate decision of the lawsuit[10]. A foreclosure will wipe out a *lis pendens*. If the lis pendens does not end in a foreclosure at auction, then it will stay a lis pendens, where the subsequent buyer will have constructive notice[11].

---

[2] Transfer of Property Act, 1882, § 52 (India).
[3] Doctrine of Lis Pendens, *Drishti Judiciary* (Dec. 11, 2023), https://www.drishtijudiciary.com/doctrines/transfer-of-property-act-doct/doctrine-of-lis-pendens
[4] Pendente Lite Nihil Innovetur, *LawArticle* (Nov. 21, 2025), https://lawarticle.in/pendente-lite-nihil-innovetur/
[5] *Bellamy v. Sabine*, (1857) 1 De G. & J. 566.
[6] *Turner v. Houston*, (1841) 1 Y. & C.C.C. 441.
[7] Doctrine of Lis Pendens – Section 52 of Transfer of Property Act, 1882, *Legal 60* (July 19, 2021), https://legal60.com/doctrine-of-lis-pendens-section-52-of-transfer-of-property-act-1882/
[8] Lis Pendens, *Black's Law Dictionary* (11th ed. 2019), https://dictionary.justia.com/lis-pendens
[9] Susindhra Nayagi & P. Brinda, *Safeguarding Bona Fide Purchasers: A Critical Analysis of Lis Pendens under Indian Law*, *Indian J. Legal Rsch.* (2024), https://ijalr.in/volume-6-issue-2/safeguarding-bona-fide-purchasers-a-critical-analysis-of-lis-pendens-under-indian-law-s-susindhra-nayagi-dr-p-brinda/
[10] Am. Jur. 2d *Lis Pendens* §§ 1–5 (2023); Lis Pendens, *Legal Dictionary*, https://legaldictionary.net/lis-pendens/
[11] Supra note 8.

II. OBJECTIVES OF THE STUDY

The aim of the project is to study the "Doctrine of Lis Pendens" as provided in Section 52 under the Transfer of Property Act, 1882. The objective is to provide a detailed analysis of each important aspect of the doctrine with recent amendments.

III. RESEARCH QUESTIONS

Q. How has the doctrine of Lis Pendens evolved under common law?

Q. Whether Section 52 of the Transfer of Property Act, 1882, impacted the evolution of the law related to the transfer of property under the pendency of litigation in India?

Q. Whether the idea of Lis Pendens under the Transfer of Property Act, 1882, affects the Indian property law?

IV. RESEARCH METHODOLOGY

This research study is mainly doctrinal and analytical. Keeping this in view, the researcher has gone through different books, journals, Web references, E-journal, reports etc. The relevant material is collected from the secondary sources.

V. HISTORY OF LIS PENDENS

Under the common law, the mere existence of a lawsuit potentially affecting the title to real property had the legal effect of putting the entire world on constructive notice of the suit; anyone acquiring an interest in real property which was the subject of a pending suit took that interest subject to the litigants' rights as they might be eventually determined, no matter how much later.[12] In effect, nothing relating to the ownership of the subject matter of the suit could be definitively changed while the suit was pending. Innocent buyers might discover the existence of a lawsuit too late.[13]

---

[12] *Lis Pendens: Its Effect on Prior Unrecorded Mortgages*, 15 Fla. L. Rev. 485 (1963), https://www.floridalawreview.com/api/v1/articles/78775-lis-pendens-its-effect-on-prior-unrecorded-mortgages.pdf

[13] Dr. J. James Jayapaul, 'Lis Pendens' – A Scrutiny of Its Performance in Indian Courts During Transfer of Property, 6(3) Int'l J. L. Sci. & Innovation 880 (2024), https://ijlsi.com/paper/lis-pendens-a-scrutiny-of-its-performance-in-indian-courts-during-transfer-of-property/

The harsh effect of this rule, and especially its effect on innocent purchasers (particularly vis-à-vis not-so-innocent sellers), led many jurisdictions to enact *lis pendens* statutes requiring a written notice, usually recorded in the land records where the real estate is located, for the notice provisions of the rule to be effective[14]. Typically, a separate recorded instrument is required by statute if the lawsuit in question affects title to real property. If the statutory requirements are met, the world is put on "constructive notice" of the existence of the suit, and any person acquiring an interest later does so subject to the outcome of the suit.[15] Some states' *lis pendens* statutes require the filer of the notice, in the event of a challenge to the notice, to establish that it has probable cause or a good likelihood of success on the merits of its case in the underlying lawsuit; other statutes do not have such a requirement. *lis pendens* applies in matters of parental responsibility as well[16].

VI. BASIS OF LIS PENDENS

The basis of Lis Pendens is 'necessary' rather than actual or constructive notice it may be said that this doctrine is based on notice because a pending suit is regarded as constructive notice of the fact of disputed title of the property under litigation[17]. Therefore, any person dealing with that property, pending litigation, must be bound by the decision of the Court. But, the correct view is that *lis pendens* is founded on 'necessity'. For administration of justice it is necessary that while any suit is still pending in a Court of Law regarding title of a property, the litigants should not be allowed to take decision themselves and transfer the disputed property.[18]

Lis Pendens is, therefore, based on 'necessity' and as a matter of public policy it prevents the parties from disposing of a disputed property in such manner as to interfere with Court's proceedings. When a litigation is already pending the

[14] Swetha A. & R. Preethi, *Lis Pendens: Implications and Its Exceptions in Contemporary Legal Structure*, 2 ILE Prop. & Land L. Rev. 16 (2024), https://pllr.iledu.in/lis-pendens-implications-and-its-exceptions-in-contemporary-legal-structure-a-critical-analysis/

[15] Real Property, 54 Wayne L. Rev. 387 (2008), https://waynelawreview.org/wp-content/uploads/2025/07/54WayneLRev387.pdf

[16] *Lis Pendens: Its Effect on Prior Unrecorded Mortgages*, 15 Fla. L. Rev. 485 (1963); Swetha A. & R. Preethi, *Lis Pendens: Implications and Its Exceptions in Contemporary Legal Structure*, 2 ILE Prop. & Land L. Rev. 16 (2024), https://pllr.iledu.in/lis-pendens-implications-and-its-exceptions-in-contemporary-legal-structure-a-critical-analysis/

[17] Richard R. Powell, *Powell on Real Property* § 82.01 (Michael Allan Wolf ed., 2023), available at https://www.lexisnexis.com

[18] Ralph E. Boyer, *Lis Pendens: Notice of Pending Litigation*, 44 Mich. L. Rev. 1, 2–4 (1945), https://repository.law.umich.edu/mlr/vol44/iss1/2

necessities of judicial functioning would require that the decision of the Court should be honoured and be made binding not only on the parties but also on all such persons who derive title under them by alienation made by any one of them pending litigation.[19] Without any rule prohibiting transfer pending litigation, all suits regarding specific property would be rendered meaningless by successive alienations making it almost impracticable for any person to settle his rights in property through the process of law.

Explaining the basis of this doctrine in ***Bellamy v. Sabine***[20], Turner L.J. observed:

"It is, as I think, a doctrine common to the Courts both of law and equity and rests as I apprehend, on the foundation that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations pendente lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendants alienating before the judgement or decree, and would be driven to commence his proceedings de novo, subject again to be defeated by the same course of proceedings".

The Indian Courts have also taken the view that basis of Section 52 is not the doctrine of notice but expediency i.e. the necessity for final adjudication and public policy. It has been held that "the foundation for the doctrine of *lis pendens* does not rest upon notice, actual or constructive; it rests solely upon necessity- the necessity that neither party to the litigation should alienate the property in dispute so as to effect his opponents". In ***Rajendar Singh v. Santa Singh***[21] the Supreme Court has said that the doctrine of *lis pendens* is intended to strike at attempts by parties to a suit to curtail the jurisdiction of the Court by private dealings which may remove the subject matter of litigation from the power of the Court to decide a pending dispute and frustrate its decree.

Since the Courts in India regard 'necessary' as the basis of the doctrine of *lis pendens,* it is immaterial whether the transferee had any notice of pendency of suit or not. The transferee is bound by the decision of the Court even if he had no actual or

[19] *Jayaram Mudaliar v. Ayyaswami*, (1972) 2 S.C.C. 200, 206–07 (India).
[20] (1857) 1 De G & J 566.
[21] AIR (1973) SC 2537.

constructive notice of the pending suit. In *Bellamy's* case given above, Lord Cranworth said:-

"It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. It affects him not because it amounts to notice but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party".

VII. PROVISIONS OF SECTION 52 OF THE TRANSFER OF PROPERTY ACT-1882

The doctrine of *lis pendens* as laid down in Section 52 is given below:-

- **a.** During the pendency of a suit or proceeding.
- **b.** Property cannot be transferred or otherwise dealt with, and
- **c.** if so transferred, the transferee is bound by the decision of the Court whether or not he had notice of the suit or proceeding.

Following conditions are necessary for the application of the doctrine of *lis pendens* as given in section 52: -

a. There is a pendency of a suit or proceeding.
b. The suit or proceeding must be pending in a Court of competent jurisdiction.
c. A right to immovable property is directly and specifically involved in the suit.
d. The suit or proceeding must not be collusive.
e. The property in dispute must be transferred or otherwise dealt with by any party to suit.
f. The transfer must affect the rights of the other party to litigation.

When the above- mentioned conditions are fulfilled, the transferee is bound by the decision of the Court. If the decision of the Court is in favour of the transferor, the

transferee has rights in the property transferred to him. If the decision goes against the transferor, the transferee cannot get any interest in the property[22].

VIII. PENDENCY OF SUIT OR PROCEEDING

The section applies only where a property is transferred during pendency of litigation. Pendency of a suit is that period during which the case remains before a Court of Law for its final disposal. If a case is instituted in Court, the first step is presentation of the plaint, and the last step is passing of a decree. When the Court gives its decision by passing a decree, the case is terminated. So, the pendency of a suit begins from the date on which the plaint is presented and terminates on the date when final decree is passed.[23] The explanation to this section provides that the pendency of suit or proceeding is deemed to begin from the date of presentation of the plaint or or institution of the proceeding in a Court and continues until the suit has been disposed of by a final decree or order. However, mere presentation of plaint is not sufficient; the plaint must also be accepted by the Court. Where a plaint is presented in a Court having no jurisdiction and the plaint is returned to be filed in the Court having proper jurisdiction, the pendency would commence from the date on which the plaint is presented to another Court having proper jurisdiction. Transfer made during the interval between the first presentation of plaint (which was returned back) and the date of presentation thereof in a proper Court, is not affected by the doctrine of *lis pendens*[24].

Similarly, where a plaint is presented with insufficient Court fee and is therefore returned by the Court by the plaintiff presents it again by affixing proper Court fee, the pendency would begin from the date when it was presented second time with proper Court fee. Where an application is presented before a Court asking permission to sue in *forma pauperis*, the pendency starts from the date on which the application has been presented provided it is accepted by the Court. But, where such application is rejected, the pendency shall not commence from the date of application.

---

[22] Ralph E. Boyer, *Lis Pendens: Notice of Pending Litigation*, 44 Mich. L. Rev. 1, 3–6 (1945), https://repository.law.umich.edu/mlr/vol44/iss1/2

[23] Swetha A. & R. Preethi, *Lis Pendens: Implications and Its Exceptions in Contemporary Legal Structure*, 2 ILE Prop. & Land L. Rev. 16 (2024), https://pllr.iledu.in/lis-pendens-implications-and-its-exceptions-in-contemporary-legal-structure-a-critical-analysis/

[24] Supra note 21.

As regards termination of the suit or proceeding, the Explanation provides that pendency continues until the final decree or order in the suit or proceeding is completely satisfied or discharged unless execution of the decree has become time-barred. Execution proceedings are in fact part of the proceedings in a suit. Therefore, the pendency continues till the decree is completely execute.[25]

In ***N.C Bhartia v. Gandevi peoples Co- operative Bank Ltd.***[26] an order of attachment of judgement- debtor's property was passed during execution proceedings. Subsequently, the relatives of the judgement- debtor objected the attachment and claimed a share in that property. They also sold that property and this sale deed was executed during pendency of the execution proceedings. Gujarat High Court held that the sale deed was hit by the doctrine of *lis pendens* as given in section 52. Lis (litigation) in a mortgage suit continues after the decree and does not terminate till the security is realised for the satisfaction of the decree. After a final decree, the defendant has a right to appeal within the period of limitation. Where an appeal is preferred within limitation period, the appeal would be a continuation of the suit and the *lis* shall be deemed to continue during appeal. Transfer of property made during appeal shall be a transfer during pendency of suit and the provisions of section 52 shall apply on it. It may be concluded that for purposes of this section pendency of a suit begins from the date of presentation of a plaint and continues up to the termination of litigation including appellate stage and execution proceedings[27].

This section must be interpreted srictly. Any transfer made outside the period of litigation will not be affected by *lis pendens*. A sale-deed executed before but registered after presentation of the plaint is not affected by this section because deed operates from the date of its execution. But where the sale-deed is already registered the sale-deed would be affected by the doctrine of *lis pendens*[28].

Proceedings -: The doctrine of *lis pendens* applies to transfers during pendency of suit or proceeding. 'Proceeding' means a judicial activity whether civil or criminal. Here it means a judicial activity in respect of determining the rights in an immovable

[25] Supra note 22.
[26] AIR 2002 Guj. 209.
[27] Ibid
[28] *Thomson Press (India) Ltd. v. Nanak Builders & Invs. (P) Ltd.*, (2013) 5 S.C.C. 397, 414–15 (India), https://indiankanoon.org/doc/1378606/

property. Accordingly, for purposes of this section, there is no difference between a suit and a proceeding. This section has been applied to transfers made during revenue proceedings. A claim made under O.XXI, R. 58[29] of the Civil Procedure Code is a proceeding under this section. Similarly, proceedings for ejectment before Revenue Officer are affected by *lis pendens*. Since Registrar of Co-operative Societies is regarded as a Court, therefore, proceeding under Rule 14 of the Co-operative Societies Act, 1912[30] operates as *lis pendens*. But, proceeding before Settlement Officer is not a proceeding under this section and such proceeding cannot operates as *lis pendens*[31].

Compromise Suit -: The doctrine of *lis pendens* is applicable in cases where the pending litigation is ultimately compromised and a compromise or consent decree is passed. The word 'decree or order' in this section contemplates compromise or consent decrees. However, the compromise must be during the pendency of suit and not a compromise entered into after withdrawal of the suit.[32]

IX. PENDENCY IN COURT OF COMPENENT JURISDICTION

The suit or proceeding during which the property is transferred, must be pending before a Court of competent jurisdiction. Where a suit is pending before a Court which has no proper jurisdiction to entertain it, the *lis pendens* cannot apply. For filing a suit, the Civil Procedure Code has prescribed jurisdictions of the Courts on the ground of territory or on the basis of valuation of the subject-matter of dispute.[33] The jurisdiction of the Court is, therefore, territorial or pecuniary or, otherwise as given in this code. Thus, a suit respecting any immovable property should be filed only in the Court within whose jurisdiction the property situates. If the disputed property is situated outside the territorial limits of the Court, it has no competency to try any any suit involving that property. Accordingly, the Court cannot pass a valid decree so as to affect a transfer made *pendente lite*. *Lis pendens* is not applicable

[29] Code of Civil Procedure, 1908, O. XXI, R. 58, https://indiankanoon.org/doc/1905573/
[30] Co-operative Societies Act, 1912, r. 14, https://indiankanoon.org/doc/640923/
[31] *R.K. Mohammed Ubaidullah v. Hajee Abdul Wahab*, (2000) 6 S.C.C. 402, 410 (India), https://indiankanoon.org/doc/825024/
[32] *Nagubai Ammal v. B. Shama Rao*, A.I.R. 1956 S.C. 593, 599–600 (India), https://indiankanoon.org/doc/1932066
[33] *R.K. Mohammed Ubaidullah v. Hajee Abdul Wahab*, (2000) 6 S.C.C. 402, 410 (India), https://indiankanoon.org/doc/825024/

where the suit is pending in any Court is outside the scope of this section.[34] However, as regards pecuniary jurisdiction, if a suit is filed in a higher Court which should have been filed in the lowest Court, it has been held that there is no lack of jurisdiction; it is merely an irregularity and section 52 applies.[35]

X. RIGHT TO IMMOVABLE PROPERTY MUST BE INVOLVED

Another condition for the applicability of this section is that in the pending suit, the right to immovable property must directly and specifically be in question. The litigation should be regarding title or interest in an immovable property. Where the question involved in the suit or proceeding does not relate directly to any interest in an immovable property, the doctrine of *lis pendens* has no application[36]. For example, where a suit is pending between landlord and tenant regarding payment of rents and during litigation the landlord transfers the property, the transfer is not affected by *lis pendens* because the litigation is not with regard to any interest in the property but involves payment of rents. Similarly, where a Hindu widow filed a suit against her stepson for maintenance and specifies certain immovable properties in possession of such stepson, it was held that right to immovable property is not directly in issue and this section cannot apply.[37] Mere mention of an immovable property in the plaint is not enough, rights in respect of that immovable property must directly and substantially be in question. In a suit for specific performance of a contract to transfer an immovable property is directly and substantially in question. Therefore, transfer of that property is within the scope of this section.[38] The test whether a suit or proceeding involves any question of right in immovable property should be the nature of claim and the decree passed rather than the property mentioned in the plaint. However, following suits have been held to involve question of rights in immovable property and are within the scope of this section: -

---

[34] *Nagubai Ammal v. B. Shama Rao*, A.I.R. 1956 S.C. 593, 599 (India), https://indiankanoon.org/doc/1932066/

[35] Ibid

[36] Swetha A. & R. Preethi, *Lis Pendens: Implications and Its Exceptions in Contemporary Legal Structure*, 2 ILE Prop. & Land L. Rev. 16 (2024), https://pllr.iledu.in/lis-pendens-implications-and-its-exceptions-in-contemporary-legal-structure-a-critical-analysis/

[37] **Guruswamy Nadar v. P. Lakshmi Ammal**, (2008) 5 SCC 796, https://indiankanoon.org/doc/1540713/

[38] **Jayaram Mudaliar v. Ayyaswami**, (1972) 2 SCC 200, https://indiankanoon.org/doc/1533083/

a. A suit for partition.
b. A suit on mortgage.
c. A suit for pre-emption.
d. Easement suit.
e. Suit for maintenance by a Hindu widow in which she claims to have her maintenance made a charge on specific immovable property and a decree is passed creating a charge on such property.

Where the suit or proceeding does not involve any question of right in immovable property, *lis pendens* does not apply. Thus, these are the suits where *lis pendens* does not apply: -

a. Suit for debt or damages where the claim is limited to money.
b. A suit for the recovery of movables.
c. A suit for an account.

Similarly, a suit for recovery of rents of an agricultural holding is also outside the scope of this section.[39]

Rights in movables -: The doctrine of *lis pendens* does not apply where the suit involves rights in movable properties. Standing timber is a movable property, therefore, this section cannot apply where the issue before the Court is rights in respect of standing timber. Similarly, where certain ornaments were pledged pending a suit for their recovery, it was held that *lis pendens* is not applicable and the pledge shall not be subject to decision of the Court.[40]

XI. SUIT MUST NOT BE COLLUSIVE

Lis pendens is inapplicable if the suit is collusive in nature. A suit is collusive if it is instituted with a *mala fide* intention. *Mala fide* intention behind instituting a suit is inferred from the fact that parties to the suit know their respective rights in the

[39] **Doctrine of Lis Pendens**, Aashayein Judiciary, https://aashayeinjudiciary.com/doctrine-of-lis-pendens/
[40] *Shantabai v. State of Bombay*, A.I.R. 1958 S.C. 532 (India), https://indiankanoon.org/doc/1351956/

property and there is no actual dispute.[41] Such suit is, therefore, fictitious and the very purpose of filing the suit is to get judicial decision for some evil design e.g. defrauding a third party. Since such suits are instituted with a *mala fide* intention of causing injury to a third person, there is no question of its being a litigation involving rights in an immovable property. Where property is transferred during pendency of a collusive suit, the transferee is not bound by the result of the litigation. However, it is impossible that a suit in the beginning is *bona fide* but during pendency there is a secret agreement between the parties in the form of a compromise. In such cases too *lis pendens* is inapplicable[42].

A Hindu wife filed a maintenance suit against her husband with a secret agreement that during litigation the husband would transfer the property. During the pendency of the suit, the husband sold the property. Later on, a charge was created in favour of the wife over the property. It was held by the Privy Council that the suit was collusive in nature and was, therefore, outside the scope of *lis pendens*. Accordingly, the Court held that the purchaser was not bound by the charge on the property[43].

XII. PROPERTY IS TRANSFERRED OR OTHERWISE DEALT WITH

During pendency of suit, the property must be transferred or otherwise dealt with by any of the parties to suit. 'Transfer' includes sale, exchange, lease and mortgage. Thus, during pendency of suit if the disputed property is sold or given in exchange, is leased or is mortgaged either by plaintiff or by defendant, the doctrine of *lis pendens* shall apply on it and the transfer would be subject to decision of the Court.[44]

The expression "*otherwise dealt with*" has been interpreted to mean those transactions in which although there is transfer of some interest in the property but they do not come strictly within the meaning of 'transfer of property' as defined in

[41] *Jayaram Mudaliar v. Ayyaswami*, (1972) 2 S.C.C. 200 (India), https://indiankanoon.org/doc/1633195/
[42] M.P. Jain, *Doctrine of Lis Pendens: Its Scope and Application in India*, 14 J. Indian L. Inst. 1 (1972).
[43] *Supra Note 40.*
[44] *Hardev Singh v. Gurmail Singh*, (2007) 2 S.C.C. 404 (India). https://indiankanoon.org/doc/1639677/

Section 5[45] of this Act. Accordingly, surrender, release or partition would be regarded as transfer for purposes of this section. A contract of sale has been regarded as a transfer within the meaning of 'otherwise dealt with'. Therefore, entering into contract of sale of the disputed property during litigation shall attract the provisions of this section. Partition effected during pendency of the suit shall also come within the ambit of this section. Handing over of the disputed property during litigation would mean 'otherwise dealt with' and section 52 applies[46].

To construct building on the disputed land so as to compel the plaintiff to file another suit for its removal is dealing the property otherwise and comes within the purview of Section 52[47]. Entering into a compromise respecting disputed property with a third person during litigation is also dealing the property otherwise.

Involuntary Transfers -: Transfer of property may either be by act of parties or by operation of law. Transfers by operation of law are known as involuntary transfers e.g. Court sale or transfer made by order of Court.[48] Section 52 is applicable to both the kinds of transfers *pendente lite*. Formerly there was some doubt whether this section applies to transfers made by operation of law because this Act does not apply to such transfers. But the Privy Council had settled the law that the principle of *lis pendens* is applicable also to transfers by operation of law. The doctrine of *lis pendens* applies where the sale is made by order of the Court. Though an attachment is not a transfer, but a sale in pursuance of an attachment comes within the scope of this section. The principle of *lis pendens* applies to execution sales as well as sales for non- payment of Government Revenue[49]. The auction-purchaser is bound by the decision of the pending litigation though auction is made by Court's order. Purchaser at a sale for arrears of income-tax is affected by the rule of *lis pendens* and would be

---

[45] Transfer of Property Act, 1882, § 5 (India). *(Defines "transfer of property" – helps distinguish "otherwise dealt with")* https://indiankanoon.org/doc/1526576 /

[46] Transfer of Property Act, 1882, § 52 (India). *(Doctrine of lis pendens – transfer or otherwise dealing with property during pendency of suit)* https://indiankanoon.org/doc/1857909/

[47] Ibid

[48] *Comm'r of Income Tax v. Bhurangya Coal Co.*, A.I.R. 1958 S.C. 254 (India). https://indiankanoon.org/doc/1565904/

[49] *Rajender Singh v. Santa Singh*, (1973) 2 S.C.C. 705 (India). https://indiankanoon.org/doc/1459076/

bound by the decision of Court if he had purchased the property pending litigation.[50] Lease effected by Government in *khas mahal* is regarded as lease by the landlord and if made *pendente lite*, Section 52 is applicable on such a lease. In ***Sujan Bhan v. Guj Rai***[51] a suit for specific performance of a contract for the sale of an immovable property was pending in a Court. The property was purchased under an auction sale in execution of decree in suit filed on the basis of a promissory note. The Allahabad High Court held that the execution sale would be hit by the provisions of Section 52[52] and no title could be given to the purchaser[53].

Transfers with permission of the Court -: When a transfer is made during pendency of suit with the permission of Court, the principle of *lis pendens* is not applicable. The concluding part of this Section exempts transfers *pendente lite* if such transfer is made 'under the authority of the Court and on such terms as it any impose'. Under this clause the parties to suit are entitled to apply to the Court in which the suit is pending to get permission for the transfer. If the Court deems it fit, it may give permission for the transfer of disputed property. In such a situation, Section 52 shall not apply on the transfer of disputed property. In such a situation, section 52 shall not apply on the transfer though it is made during pendency of suit[54].

XIII. TRANSFER BY ANY PARTY TO SUIT

Transfer made during pendency of suit is not enough to attract the provisions of this section. It is necessary that transfer of disputed property is made by any party to suit. Transfer of property by a person whose title is not in any way connected with disputed property is not affected by *lis pendens*. A party to suit whose name is struck off as a contesting party by consent is not bound by the decree because *lis pendens* shall not apply to him. It is to be noted that the words 'any party' are not merely descriptive but refer to the time when the transaction takes place. The doctrine of *lis pendens* was, therefore, not applied where the transfer was made pending the suit by

---

[50] *Faiyaz Husain Khan v. Prag Narain*, (1907) L.R. 34 I.A. 102 (P.C.). https://indiankanoon.org/doc/1030304/

[51] AIR (1981) ALL. 149.

[52] Transfer of Property Act, 1882, § 5 (India). *(Defines "transfer of property" – helps distinguish "otherwise dealt with")* https://indiankanoon.org/doc/1526576 /

[53] Ibid.

[54] *Amit Kumar Shaw v. Farida Khatoon*, (2005) 11 S.C.C. 403 (India).

a person who was not party at the time of transfer but, was subsequently made a party as a representative of the original defendant.[55]

XIV. TRANSFER AFFECTS THE RIGHTS OF ANY OTHER PARTY

The last condition for applicability of Section 52[56] is that the transfer during pendency must affect the rights of any other party to suit. The principle of *lis pendens* is intended to safeguard the parties to litigation against transfers by their opponents. So, the words 'any other party' here does not mean stranger to suit. It means any other party between whom and the party who transfers, there is an issue for decision which might be prejudiced by alienation. 'Any other party' here means the opposite party whose interest may be affected by transfer *pendente lite*[57]. Where the rights only of the transferor and not of the other party to suit are affected, the principle of *lis pendens* does not apply. Thus, Section 52 cannot be made applicable between parties who are at one side either as plaintiff or as defendant because there is no question of any dispute between them.[58]

For example, in a suit A is plaintiff and B, and C are co-defendants. During pendency of the suit B transfers the property. C cannot take the benefit of Section 52 because there is no dispute between B and C. but A can take the benefit of this section because he is party to suit other than the transferor and his rights may be affected by the transfer *pendente lite*.

XV. EFFECT OF THE PRINCIPLES OF *LIS PENDENS*

Lis pendens is taken as constructive notice of the pending lawsuit, and it serves to place a cloud on the title of the property in question until the suit is resolved and the notice released or the *lis pendens* is expunged.[59] Reputable, careful lenders will not lend money on the security of land which is subject to a lis pendens, as title insurance companies will not insure the title to such land: title is taken subject to the outcome of the lawsuit. Because so much real estate property is purchased with borrowed

[55] *Samarendra Nath Sinha v. Krishna Kumar Nag*, A.I.R. 1967 S.C. 1440 (India). https://indiankanoon.org/doc/1904550/
[56] Transfer of Property Act, 1882, § 52 (India).https://indiankanoon.org/doc/1526576 /
[57] *Nagubai Ammal v. B. Shama Rao*, A.I.R. 1956 S.C. 593.
[58] *Amit Kumar Shaw v. Farida Khatoon*, (2005) 11 S.C.C. 403 (India)
[59] Lis Pendens, *Virtual Underwriter*,https://www.virtualunderwriter.com/en/standard-exceptions/2011-10/SE00005301.html

money, this largely keeps the owner from selling the property. It also may keep the owner from borrowing money secured by the property (such as to pay the costs of defending the suit). Similarly, careful buyers will be unwilling to purchase the land, at least not at what the full value would be without the cloud on title[60]. It is important to note that the presence of a *lis pendens* does not prevent or necessarily invalidate a transfer of the property, although it makes such a transfer subject to the outcome of the litigation. As such, it tends to scare off diligent, reputable lenders and careful buyers. Thus, the owner is not prevented from selling the land for (non-borrowed) cash, pledging it as security for a speculative loan, or giving it away—subject to the outcome of the lawsuit. However, once the *lis pendens* is recorded, the recipient (a "purchaser" or "grantee *pendente lite*") would be deemed to have notice of the litigation, and thus would not be a *bona fide* purchaser, and the title might be regained.[61]

While it is generally thought of in connection with real property (land, buildings, and the like), the doctrine of *lis pendens* also applies to personal property. Frequently, *lis pendens* statutes only apply to real property, so the common-law doctrine probably still applies to personal property.[62]When the conditions necessary for the applicability of this section are fulfilled, the result is that the transferee is bound by the decision of the Court[63]. For e.g. in a suit between A and B respecting title of a house if B transfers the house to C during pendency and the judgment is subsequently in favour of B., then C would be entitled to the house. But if the decree is passed against B, then it is binding not only on B but also on C, with the result that C cannot get the house. Under this section, C cannot take the plea that he had no notice of pending litigation. It may be noted that normally, a decree of a Court binds only the parties to the suit. But, under the principle of *lis pendens*, a person who purchases during the pendency of the suit is also bound by the decree made against that party from whom he had purchased.

---

[60] Lis Pendens and Its Effect on Property Transactions, *Corinthian Title Company*, https://corinthiantitle.com/blog/lis-pendens

[61] *Lis Pendens Property Research Paper*, *Scribd*, https://www.scribd.com/document/721258101/lis-pendens-property-research-paper

[62] Manisha Pathak, *Transfer of Property Act*, Nat'l J. Real Est. L., Vol. 6, No. 1 (2023), https://lawjournals.celnet.in/index.php/njrel/article/view/1370

[63] Aryan Bammi, *Fraudulent Transfer of Immovable Property*, Nat'l J. Real Est. L., Vol. 5, No. 1 (2022), https://lawjournals.celnet.in/index.php/njrel/article/view/1064

The effect of *lis pendens* is, therefore, that it does not prevent the vesting of title in the transferee but only makes it subject to the rights of the parties as decided in the suit. Section 52, therefore, does not invalidate the transfer but renders if subservient or subject to the rights of the parties to litigation. The words "to affect the rights of any other party thereto under any decree or order which may be made therein" suggest that the transfer *pendente lite* is valid and good to the extent that it might conflict with rights established under the decree[64].

XVI. **CONCLUSION**

A pending suit involving title conveys notice to intending purchasers, and charges the land, in whosesoever hands it may be, with the consequences of whatever decree may be made. This is known technically as *lis pendens*. The doctrine of *lis pendens* is, that a purchase of real estate property actually in litigation, or, as the technical phrase runs, a purchase *pendente lite*, although for a valuable consideration and without any actual notice, affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree rendered in the suit. The doctrine of *lis pendens* applies only where a third person attempts to intrude into a controversy by acquiring an interest in the subject matter of the litigation. The reason of the rule is, that if a transfer of interest pending suit were to be allowed to affect the proceedings, there would be no end to litigation; for as soon as a new party was brought in he might transfer to another, and render it necessary to bring that other before the Court, so that a suit might be interminable. It will be understood, however, that the rule, that a party purchasing pendente lite is to be regarded as a purchaser with notice, subject to all the equities of the person under whom he claims, and bound by the decree that may be rendered against the person from whom he derives title, applies only to cases in which such purchaser derives title from one of the parties' litigant. If he claims adversely to both parties by title paramount, the proceedings to which he is neither party nor privy cannot bind him. The common law rule requiring purchasers, at their peril, to take notice of the pendency of suits in courts of justice for the recovery of the lands they are about to purchase, although it is really impossible that they should actually know that such suits have been

[64] Shikha Dimri, *Regulation of Real Estate Transfers and Protection of Buyers' Interest: A Perspective on Legal and Institutional Developments in India*, Think India J., Vol. 22, Issue 14 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3759289

commenced, has always been considered a hard rule, and is by no means a favorite with the courts. In fact, it has only been tolerated from a supposed necessity. Usually, the filing of a bill of complaint is itself a sufficient notice to the world, so as to defeat the transfer of real estate property by the defendant made subsequent to the filing; but in a large number of states, particularly where the provisions of the New York Code have been followed, a material change has been made to this rigorous rule. In these states the statute provides that the pendency of a suit shall not be notice to a stranger until a formal notice thereof has been filed in the office of the recorder of deeds of the county where the land is situated, and that as to one having no actual notice, he may, in good faith, and for a valuable consideration, acquire a valid title until such notice is filed. Where the suit is still pending, the notice may be shown as an appendix. If the proceedings are shown, as they should be after the bill has been filed, their orderly arrangement would be to precede the synopsis of the court proceedings. Where no notice is required, the bill itself furnishes notice as above explained. The practical purpose of a notice of pendency of suit is to restrain strangers from acquiring interests in the subject matter of the litigation during the progress of the suit.

VERDICT
VOICES
LAW. LEARN. LEAD.

RIGHT TO PRIVACY IN THE DIGITAL ERA: CONSTITUTIONAL CONTOURS AND STATUTORY SAFEGUARDS IN INDIA

DR. BHANUPRIYA KUMAWAT [1]& DR. PHALGUN PUROHIT[2]

ABSTRACT

The advent of the digital age has fundamentally recalibrated the normative and doctrinal understanding of privacy. This article examines the evolution of the right to privacy in India from a judicially developed concept to an expressly recognised fundamental right under Article 21 of the Constitution of India[3]. It analyses the landmark decision in Justice K.S. Puttaswamy (Retd.) v. Union of India [4]and its three-fold test of legality, necessity, and proportionality. The article further critically evaluates the Digital Personal Data Protection Act, 2023, assessing its adequacy in addressing contemporary challenges posed by state surveillance, data capitalism, artificial intelligence, and cross-border data flows. A comparative analysis with the European Union's General Data Protection Regulation and other global frameworks is undertaken to identify legislative gaps. The authors argue that while India has established a constitutional and statutory foundation for digital privacy, the expansive exemptions for the State, absence of surveillance reform, and limited data principal rights necessitate further jurisprudential and legislative intervention to align with international standards of informational self-determination.

Keywords: Right to Privacy; Article 21; Puttaswamy; Digital Personal Data Protection Act 2023; Informational Privacy; Proportionality

I. INTRODUCTION

Privacy as a legal concept has traversed a complex trajectory from its early articulation as the "right to be let alone[5]" to its contemporary recognition as a multifaceted right encompassing spatial, decisional, and informational autonomy. The digital transformation of society, marked by pervasive datafication, algorithmic governance,

[1] Dr. Bhanupriya Kumawat, Assistant Professor of Law, Pacific Law School, Pacific University, Udaipur

[2] Dr. Phalgun Purohit, Assistant Professor of Law, Pacific Law School, Pacific University, Udaipur

[3] 1. INDIA CONST. art. 21.

[4] (2017) 10 SCC 1

and platform capitalism, has rendered traditional conceptions of privacy inadequate. In India, the constitutional silence on privacy until 2017 necessitated judicial creativity to locate the right within the interstices of Part III of the Constitution. The unanimous nine-judge bench decision in Justice K.S. Puttaswamy (Retd.) v. Union of India fundamentally altered India's constitutional landscape by declaring privacy a fundamental right intrinsic to life and liberty under Article 21.

This article seeks to undertake a doctrinal analysis of the right to privacy in the digital era. Part II traces the constitutional evolution of privacy jurisprudence. Part III examines the legislative response through the Digital Personal Data Protection Act, 2023.[6] Part IV analyses judicial application post-Puttaswamy. Part V identifies contemporary challenges in the digital ecosystem. Part VI provides a comparative perspective, and Part VII suggests reforms. The central thesis posits that while India has achieved constitutional recognition and statutory codification of digital privacy, the framework remains State-centric and inadequately addresses the asymmetry of power between individuals and data-processing entities.

II. CONSTITUTIONAL EVOLUTION: FROM DENIAL TO RECOGNITION

The Constitution of India, as adopted in 1950, did not enumerate privacy as a fundamental right. Early jurisprudence reflected judicial reticence. In M.P. Sharma v. Satish Chandra[7], an eight-judge bench held that the power of search and seizure was not subject to a fundamental right of privacy. This position was affirmed in Kharak Singh v. State of U.P., where the majority declined to recognize privacy as a guaranteed right, though Justice Subba Rao's dissent characterized it as an essential facet of personal liberty under Article 21.

The doctrinal inflection point arrived in Justice K.S. Puttaswamy (Retd.) v. Union of India. The Supreme Court overruled M.P. Sharma and Kharak Singh [8]to the extent

3. The Digital Personal Data Protection Act, 2023, No. 22, Acts of Parliament, 2023 (India).

4. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016.

5. Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890).

[7] AIR 1954 SC 300.
[8] AIR 1963 SC 1295

they held that privacy was not constitutionally protected[9]. The Court identified three elements of privacy: (i) spatial privacy denoting the sanctity of the physical body and spaces; (ii) decisional privacy concerning intimate personal choices; and (iii) informational privacy relating to control over personal data.[10] The judgment formulated a three-fold requirement for permissible State intrusion: (i) legality, which postulates the existence of law; (ii) legitimate State aim; and (iii) proportionality, ensuring a rational nexus between the objects and the means adopted to achieve them.[11] The Court further situated privacy within the Golden Triangle of Articles 14, 19, and 21, holding that it was not an elitist construct but a postulate of human dignity. Justice Chandrachud observed that privacy is the constitutional core of human dignity. Justice Nariman traced the right to the preambular values of liberty and fraternity, while Justice Kaul emphasized its connection to the right to self-determination.

III. LEGISLATIVE FRAMEWORK: THE DIGITAL PERSONAL DATA PROTECTION ACT, 2023

The Puttaswamy judgment [12]catalysed legislative action, culminating in the Digital Personal Data Protection Act, 2023, which received Presidential assent on 11 August 2023. The Act applies to digital personal data [13]processed within India and to processing outside India if in connection with offering goods or services to Data Principals within India.

A. CORE PRINCIPLES AND OBLIGATIONS

Section 4 mandates that personal data may be processed only for a lawful purpose with consent or for certain legitimate uses. [14]Section 6 requires consent to be free, specific, informed, unconditional, and unambiguous through clear affirmative action. Data Fiduciaries must provide an itemised notice specifying the personal data and purpose.

Sections 8 to 10 impose obligations on Data Fiduciaries to ensure compliance, implement reasonable security safeguards, ensure accuracy and completeness of data, and erase personal data upon withdrawal of consent or upon the purpose being

[9] (2017) 10 SCC 1.
[10] Id. at para 122.
[11] Id. at para 131.
[12] at 1326 (Subba Rao, J., dissenting).
[13] The Digital Personal Data Protection Act, 2023, No. 22, Acts of Parliament, 2023 (India).
[14] The Digital Personal Data Protection Act, 2023, 4.

fulfilled. Significant Data Fiduciaries are subject to additional obligations, including data protection impact assessments and appointment of Data Protection Officers.

B. RIGHTS OF DATA PRINCIPALS

Chapter III confers enforceable rights: right to access information about processing, right to correction and erasure, right of grievance redressal[15], and right to nominate. Notably, the Act does not recognise the right to data portability or the right to be forgotten, which exist under the EU GDPR.[16]

C. EXEMPTIONS AND STATE POWER

Section 17 [17]provides broad exemptions for the State and its instrumentalities for purposes including sovereignty, security, public order, and prevention of offences. The Central Government may, by notification, exempt any Data Fiduciary or class thereof. Such exemptions are subject only to the procedure established by law and not to independent judicial oversight, raising proportionality concerns under the Puttaswamy test.

D. ENFORCEMENT MECHANISM

Section 18 establishes the Data Protection Board of India as an adjudicatory body with powers to impose penalties up to two hundred and fifty crore [18]rupees. Appeals lie to the Telecom Disputes Settlement and Appellate Tribunal and thereafter to the Supreme Court. The Board lacks the structural independence of a statutory regulator, as its members are appointed by the Central Government.

IV. POST-PUTTASWAMY JUDICIAL APPLICATION

The Supreme Court has applied Puttaswamy across domains. In Anuradha Bhasin v. Union of India, [19]the Court held that indefinite internet shutdowns violate Articles 19 and 21, recognising that access to the internet is integral to freedom of speech and trade. In Internet and Mobile Association of India v. Reserve Bank of India, the Court

[15] Id. ch. III.
[16] GDPR, supra note 4.
[17] The Digital Personal Data Protection Act, 2023, 17.

[18] Id. 18.
[19] (2020) 3 SCC 637.

struck down the RBI's circular prohibiting banking services to virtual currency exchanges, applying the proportionality standard.

In the Aadhaar litigation[20], Justice K.S. Puttaswamy (Retd.) v. Union of India (Aadhaar-5J), the Court upheld the Aadhaar Act but invalidated mandatory linking of Aadhaar with bank accounts and mobile numbers, holding that such linkage failed the proportionality test. The Court read down Section 57 to prohibit private entities from demanding Aadhaar.

V. CONTEMPORARY CHALLENGES IN THE DIGITAL ECOSYSTEM

A. STATE SURVEILLANCE

India lacks a comprehensive surveillance law. Interception is governed by Section 69 of the Information Technology Act, 2000 [21]and the Indian Telegraph Act, 1885[22], which permit interception without prior judicial authorisation. The Central Monitoring System, NATGRID, and deployment of Facial Recognition Technology operate without statutory basis or oversight. The Pegasus spyware investigation revealed extra-legal surveillance of journalists, activists, and constitutional functionaries.

B. PRIVATE SECTOR DATA EXPLOITATION

The digital economy operates on surveillance capitalism, characterised by behavioural advertising, dark patterns, and consent fatigue. Data Fiduciaries routinely employ bundled consent and opaque privacy policies, vitiating the free and informed elements of consent under Section 6 [23]of the DPDP Act. [24]Algorithmic profiling enables price discrimination and exclusion without transparency.

[20] (2020) 10 SCC 274 (2019) 1 SCC 1.
[21] The Information Technology Act, 2000, 69, No. 21, Acts of Parliament, 2000 (India).
[22] The Indian Telegraph Act, 1885, No. 13, Acts of Parliament, 1885 (India).
[23] Id. 16.Id. 9.

[24] The Digital Personal Data Protection Act, 2023, 6.
Id. 7(a).

C. ARTIFICIAL INTELLIGENCE AND AUTOMATED DECISION-MAKING

Automated processing under Section 7(a) of the DPDP Act permits processing for employment purposes without consent. AI-driven credit scoring, predictive policing, and social media content moderation lack algorithmic accountability mechanisms. The Act contains no provision for explanation of automated decisions or human review, unlike Article 22 of the GDPR.

D. CROSS-BORDER DATA FLOWS

Section 16 permits transfer of personal data to countries notified by the Central Government, departing from the adequacy framework under GDPR. This approach prioritises geopolitical considerations over data protection standards and risks undermining Data Principal rights upon transfer to jurisdictions with weak safeguards.

E. PROTECTION OF CHILDREN

Section 9 prohibits tracking, behavioural monitoring, and targeted advertising directed at children, and mandates verifiable parental consent. However, the Act delegates age-verification mechanisms to rules, and the absence of a statutory definition of detrimental effect creates interpretational ambiguity.

VI. COMPARATIVE PERSPECTIVE

The EU General Data Protection Regulation, 2016 [25]establishes a high-watermark for data protection, emphasising lawfulness, fairness, transparency, purpose limitation, data minimisation, accuracy, storage limitation, integrity, and accountability. It recognises the right to erasure, right to data portability, and right to object to automated processing. The California Consumer Privacy Act, 2018 [26]grants rights to know, delete, and opt-out of sale. Brazil's Lei Geral de Protecao de Dados [27]adopts GDPR principles with adaptation for the Global South.

[25] GDPR, supra note 4.
[26] Cal. Civ. Code 1798.100 et seq. (2018).
[27] Lei No. 13.709, de 14 de Agosto de 2018, Diário Oficial da União [D.O.U.] de 15.08.2018 (Brazil).

India's DPDP Act converges with these frameworks on consent and security but diverges on State exemptions, absence of data portability, and limited institutional independence of the enforcement body. The legislative choice reflects a policy preference for State sovereignty and ease of doing business over maximalist individual autonomy.

VII. THE PROPORTIONALITY STANDARD AND BALANCING OF INTERESTS

The right to privacy is not absolute. Puttaswamy adopted the European doctrine of proportionality, as elaborated in Modern Dental College v. State of M.P[28]. The four-pronged test requires: (i) legitimate goal; (ii) suitable means; (iii) necessity, denoting the least restrictive measure; and (iv) balancing or proportionality stricto sensu.

Applying this to digital governance, blanket data retention under Section 67C of the IT Act, mandatory facial recognition in public spaces, and unfettered exemptions under Section 17 of the DPDP Act merit strict scrutiny. The Supreme Court in Ritesh Sinha v. State of U.P[29]. permitted collection of voice samples, emphasising that privacy must be balanced against compelling State interests. However, such balancing cannot become a judicial imprimatur for surveillance overreach.

VIII. RECOMMENDATIONS AND WAY FORWARD

First, India must enact a comprehensive surveillance reform legislation instituting prior judicial authorisation, necessity, and time limits for interception, as recommended by the B.N. Srikrishna Committee. [30]

Second, the Data Protection Board must be conferred with structural independence, security of tenure, and financial autonomy to ensure impartial adjudication.

Third, the DPDP Act should be amended to incorporate the right to data portability, right to explanation of automated decisions, and a qualified right to be forgotten, subject to freedom of expression and public interest.

[28] (2016) 7 SCC 353.
[29] (2012) 6 SCC 571.
[30] B.N. Srikrishna Committee, A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians, Report of the Committee of Experts on Data Protection (2018).

Fourth, algorithmic accountability must be mandated through algorithmic impact assessments and audit requirements for Significant Data Fiduciaries deploying AI systems.

Fifth, public awareness and digital literacy programmes are essential to enable Data

IX. CONCLUSION

The digital era has reconfigured the relationship between the individual, the State, and the market. Puttaswamy elevated privacy from a common law derivative to a fundamental right, and the DPDP Act, 2023 provides the statutory architecture for data governance. Nevertheless, the framework remains incomplete. Expansive State exemptions, absence of surveillance safeguards, and weak institutional design dilute the promise of informational self-determination.

Privacy in the twenty-first century is not merely a negative right against intrusion but a positive right to control one's informational persona. As Justice Kaul cautioned, the right to privacy is inextricably bound up with all exercises of human liberty. [31]The realisation of constitutional privacy in cyberspace requires constant vigilance, legislative refinement, and judicial innovation to ensure that technological advancement does not subvert human dignity. The Indian legal system stands at a critical juncture where it must choose between a surveillance State and a digital democracy. The choice will determine whether the right to privacy remains a constitutional promise or becomes a lived reality.

VERDICT VOICES LAW. LEARN. LEAD.

[31] (2017) 10 SCC 1 at para 542 (Kaul, J.)

RAMESH KUMAR PATI V. STATE OF ODISHA: ECONOMIC OFFENCES & PRIVILEGED VC'S

SIBA PRASAD PANIGRAHI[1]

ABSTRACT

Financial irregularities by the Vice Chancellors (VCs) appear at regular intervals as news articles; however, there is no report on their conviction. This sets a series of questions: whether the VCs are privileged for economic offences, how they manage to escape from legal liabilities, what are its implications etc. This article critically examines a Public Interest Litigation (PIL) involving the oldest technical institute of Odisha, Veer Surendra Sai University of Technology (VSSUT), adjudicated by the High Court of Odisha in 2024. The analysis with the help of the information issued to VSSUT webpage by the apex executive body of VSSUT, the Board of Management (BOM), reveals few interesting areas those remain underexplored in the scholarship.

Key Words: Economic Offence; Criminal Breach of Trust; VSSUT; Odisha High Court

I. INTRODUCTION

Indian media reported financial irregularities by the Vice Chancellors (VCs) of IIM Rohtak, RGPV Bhopal, Pondicherry University, and Salem Periyar University[2]. The Central Bureau of Investigation (CBI), on 01 February 2025, arrested three VCs in connection with bribes for National Assessment and Accreditation Council (NAAC) accreditation[3]. Allegations on the VCs are not limited to financial irregularities, those extends to research fraud, recruitment scam, maladministration, sexual harassment, inaction on complaint of sexual harassment, abetment to suicide, and attempt to murder[4]. However, these are only few examples from a lot; zooming on a smaller locality, the picture would be clearer.

Veer Surendra Sai University of Technology (VSSUT), Biju Patnaik University of Technology (BPUT), and Sambalpur University are three universities in western

[1] Siba Prasad Panigrahi, Associate Professor, VSSUT Burla
[2] Panigrahi S.P. (2024). Indian VCs in recent news, Mendeley Data, V1, https://doi.org/10.17632/2k5y2b94ft.1
[3] CBI arrests 10 over bribery for NAAC accreditation, Time of India, 02 February 2025
[4] Panigrahi S P (2024). Research crime in Indian universities: Need for examining Administrative *mens rea,* available at: https://jpassociates.co.in/research-crime/

Odisha; Prof. C.R. Tripathy was Professor of VSSUT, VC of Sambalpur University prior to become the VC of BPUT. Prof. Sanjiv Mittal and Prof. Amiya Rath succeeded Prof. Tripathy as VC of Sambalpur University and BPUT respectively. Similarly, Prof. Bansidhar Majhi succeeded Prof. Atal Chaudhari as VC of VSSUT. Media reports on these VCs are:

(i) The then Governor directed state vigilance to probe into allegations of bribe for job scam against Prof. Tripathy; the allegation involved Dr. Ramakant Panigrahi; Dr. Panigrahi was terminated as Lecturer (Assistant Professor) to be appointed as Professor of CET Bhubaneswar[5].

(ii) Prof. Majhi promoted the same Dr. Panigrahi as Professor; the matter has been moved to the High Court of Odisha on the question of legality in the process of promotion; whereas the promotion issue under consideration of the court, Prof. Majhi appointed him as Dean, Faculty & Planning[6].

(iii) Prof. Mittal was inflicted with the allegations of attempt/ abetment[7] to suicide as well as financial irregularities[8].

(iv) Research Misconduct by Prof. Rath attracted international watchdogs[9].

(v) The BOM, VSSUT exposed the academic, administrative and financial irregularities of Prof. Chaudhuri[10]; the Chancellor withdrawn the powers of VC from Prof Chaudhari before end of his tenure[11].

Thus, all the VCs of these three universities were alleged with economic offences. But surprisingly, none of these VCs are neither under trial nor convicted on the date of

[5] Guv directs for Vig probe against BPUT VC, the Pioneer, 20 May 2018, available at: https://www.dailypioneer.com/2018/state-editions/guv-directs-for-vig-probe-against-bput-vc.html
[6] *Padmanav Dash & Ors V. VC, VSSUT & Ors*, WP(C) 16124/2022
[7] Patnaik L, Sambalpur University Vice Chancellor Sanjiv Mittal gets anticipatory bail in abutment to suicide case, The time of India, 04 July 2021, available at: https://timesofindia.indiatimes.com/city/cuttack/sambalpur-vc-gets-anticipatory-bail-in-abetment-to-suicide-case/articleshow/84086930.cms
[8] Guv directs Sambalpur University to initiate action against ex-VC, The New Indian Express, 14 October 2022
[9] Report available at: https://retractionwatch.com/2025/09/11/amiya-kumar-rath-university-vice-chancellor-retraction-tortured-phrases/
[10] MOM available at: https://vssut.ac.in/doc/38th-Minutes-of-BoM.pdf
[11] Powers of VSSUT Vice Chancellor curtailed before end of Tenure, Times of India, 07 February 2021, available at: https://timesofindia.indiatimes.com/city/bhubaneswar/powers-of-vssut-vice-chancellor-curtailed-before-end-of-tenure/articleshow/80733609.cms

submission of this article. These reports raise a series of questions as research questions for this article:

RQ-1: Whether the VCs are privileged from being convicted in economic offences?

RQ-2: If not, how the VCs manage to flee away from their legal liabilities?

RQ-3: What are the effects of these economic offences?

This article critically analyse the case, *Ramesh Kumar Pati V. State of Odisha* (*Ramesh Pati*) to examine above mentioned research questions. Following section briefs *Ramesh Pati* case and the judgement.

II. RAMESH PATI CASE[12]

In this case the State of Odisha represented by the Principal Secretary (PS) of Skill Development and Technical Education (SDTE) Department, the VC of VSSUT, the Chairman of Write-off Committee of VSSUT, and the Registrar of VSSUT are the opposite parties. Ramesh Pati case also included all members of write off Committee as *proforma* opposite parties. The petitioner is an advocate from the locality of VSSUT. *Ramesh Pati* case stands on the allegation "*Prof. Bansidhar Majhi, sold/ auctioned valuables of VSSUT worth around 20 Crore rupees during summer vacation (May-June) of 2022 in absence of consent/ approval of members of write-off committee*". The allegation was raised by a member of write of committee through the Chairman of the Committee submitted to the PS, SDTE.

Inaction of the PS within reasonable period forced the concerned member filed a writ petition in the high court of Odisha. Meanwhile, an advocate from the locality, Sri Pati availed necessary evidence from the said writ petition and filed this PIL praying the court for direction to an inquiry by state Vigilance/ other independent agency.

Later, the petitioner submitted a representation to the state vigilance. The division bench of Odisha High Court on 06.02.2024 issued the judgement as:

> "*As agreed by learned counsel for the parties and after going through the records, this Court, without expressing any opinion on the merits of Ramesh Pati case, disposes of the Writ Petition directing Opposite Party No.1 to consider the representation filed by the petitioner vide Annexure-3 series, and*

[12] WP(C) 28966/2023, decided on 06 February 2024

pass appropriate order in accordance with law within a period of three months from the date of production of certified copy of this order".

With the help of the related legal provisions, *Ramesh Pati* case has been analysed in the following section.

III. ANALYSIS

The instant case is related to write-off which is the process of disposing obsolete items according to the rules established by the state/ centre. The write-off committee of a public organization identifies and records the obsolete items, separates according to the original cost of items, records on camera whereas the detailed process outlined in the store rules as well as financial rules of the respective Government. The allegation relates to sale/ auction of valuable items and not the obsolete ones. The allegation relates to the absence of consent/ approval of the members of the write-off committee whereas the value set is at 20 Crore rupees. Also, sale is alleged to take place while the vacational employees, i.e., the teachers of VSSUT were on vacation.

The VC is Principal Executive officer of VSSUT as laid down in section 12(1) of VSSUT Act-2008 (VSSUT Act[13]). The VC has been entrusted with the public property lying within the university by the VSSUT Act. It is alleged that the VC disposed public property with violation of prescribed law. The allegation has all the ingredients of the offence of Criminal Breach of Trust (CBT) defined under section 405 Indian Penal Code, 1860 (IPC) or corresponding section 316 (1) under Bharatiya Nyay Sanhita, 2023 (BNS)[14].

Further, above mentioned alleged offence defrauds the institution (VSSUT) for monetary benefit by the VC whereas those were in active connivance with the said VC. This fulfils the essentials of economic offence defined under section 111(1)(iii) of BNS. Thus, the allegation amounts to economic offence.

Supreme Court of India in *Saumya Chaurasia*[15], the claim of any privilege or benefits under section 218 of BNSS (correspondingly section 197 of CrPC) that requires sanction from a superior officer to investigate or prosecute is not extended to the

[13] Available at: https://vssut.ac.in/doc/VSSUT_ACT.pdf
[14] The Supreme Court of India in *Hukam Ram v/s State of H.P.*, Cr. Revision No. 579/2023, judgment dated 08.05.2025
[15] *Saumya Chaurasia vs ED*. SLP (Criminal) No. 12494 of 2024, decided on 25.09.2024

public servants inflicted with corruption allegations. Thus, the VCs inflicted with economic offence cases do not have any privilege under the statutes, for two reasons:

(i) Economic offences constitute a class apart, have deep rooted conspiracies:

The Supreme Court of India in *Y.S.Jagan Mohan Reddy vs C.B.I*[16], and *Serious Fraud Investigation Office V. Nittin Johari & Anr*[17], termed economic offences as: "*Economic offences constitute a class apart and need to be visited with a different approach*" and "*economic offences have deep rooted conspiracies*" respectively.

But, in *Ramesh Pati case*, though there is loss of 20 Crore rupees to the public exchequer, the court dealt with *Ramesh Pati* case as a normal writ petition.

(ii) Economic offence case cannot be settled between the parties

While dealing with a case of economic offences involving corruption & loss to public exchequer in *Anil Bhavarlal Jain & Anr V. State of Maharastra & Ors*[18], the Supreme Court of India refused to quash the corruption case based on the settlement arrived between the parties and held:

> "*A substantial injury was caused to the public exchequer and consequently it can be said that public interest has been hampered. Keeping in view the fact that in the present case a special statute i.e. PC Act has been invoked, we are of the view that quashing of offences under the said Act would have a grave and substantial impact not just on the parties involved, but also on the society at large. As such the High Court of Bombay committed no error in declining to exercise its inherent powers in the present case, thereby refusing to quash the criminal proceedings*".

But, in *Ramesh Pati case*, though there is loss of 20 Crore rupees to the public exchequer, the the judgement has been reached based on the settlement arrived between the parties.

a. How the VCs managing the economic offence to flee away from their legal liabilities?

[16] Criminal Appeal No-730 of 2013 arising out of SLP(Crl)3404 of 2013, decided on 09.05.2013, Also see: *Pravez Khan vs Directorate Of Enforcement* on 4 May, 2026
[17] 2025 INSC 477, decided on 9 April 2025
[18] (Crl.) No. 10078 of 2023, decided on 20.12.2024

Section 19(2) of VSSUT Act prescribes the composition of BOM of VSSUT, wherein the VC as Chairman of BOM; PS, SDTE as a member. The PS, SDTE is duty bound to make an investigation into the allegation by appropriate state agency, vigilance. But, in *Ramesh Pati*, the PS observed complete silence. After more than one year of the alleged offence, i.e., in September 2023, BOM termed this illegal sale as write-off, and thus approved the economic offence of the VC as official one in absence of investigation by appropriate agency[19]. The Supreme Court of India in *Kim Wansoo v. State of Uttar Pradesh & Ors*[20], termed this kind of acts as those of the PS & BOM are connivance with the accused VC and shall be examined for abetment. It can be appropriately investigated on the issue of BOM members in connivance with the accused.

b. Effects of Economic offences

VSSUT is the most reputed, glorious and the oldest technical institute of the state of Odisha. This note visited the VSSUT webpage to read the tenure of Prof. Bansidhar Majhi as VC of VSSUT from 2021 to 2024. As many as 30 writ petitions were filed in the High Court of Odisha having VSSUT as opposite party in the calendar year 2023. This is a sign of disorder at VSSUT and jettisons to the glory of VSSUT.

In one of the cases, *Padmanav Dash & Ors V. VC, VSSUT & Ors*[21], the petitioners alleged illegality in promotion of teachers by the VC whereas all the teachers those were promoted to the level of Professor appears as opposite parties in the said case. This article found that all the said professors were appointed either as Deans or as Head of Department (HOD) with gross violation of the section 19(1) read with sections 21(1), 22(1), 23(1) and 24(1) of VSSUT Statute read with decisions of BOM[22]. This shows the acceleration of undeserved ambitions by the said Professors whereas the offence killed the conscience.

The situation discussed above justifies the judgement of the Gujrat High Court in *Archana Mukesh Raval V. State of Gujrat*[23], wherein the court observed:

> "*Corruption mothers disorder, destroys societal will to progress, accelerates undeserved ambitions, kills the conscience, jettisons the glory of the*

[19] BOM: 45-18 of MOM available at: https://vssut.ac.in/doc/Minutes-45th-BOM.pdf
[20] SLP(Crl) No.4849 of 2020, judgement dated 02 January 2025
[21] WP(C) 16124/2022
[22] BOM:38-02/ BOM:36-15.5 of MOM available at: https://vssut.ac.in/doc/38th-Minutes-of-BoM.pdf
[23] R/CR.MA/6233/2020, decided on 07 March 2022

institutions, paralyses the economic health of a country, corrodes the sense of civility and mars the marrows of governance".

IV. CONCLUSION

In summary, relying on primary legal sources such as judicial decisions, statutory provisions, official records, and authoritative reports, this note comments *Ramesh Pati case* as 'a case of economic offence settled outside' with violation of the legal position settled by the Supreme Court of India. Prof. Bansidhar Majhi could able to manage the economic offence with help of PS, SDTE and the BOM of the university. It is important to note that the BOM condemned the irregularities of Prof Atal Chaudhari is not the same BOM that helped Prof. Majhi. Here some of the members were illegally recruited[24] where as few others were bribed with lucrative awards[25] to manage the said offence. The effects of the economic offence prove the judgement of the High Court of Gujarat as the corruption mothers disorder, jettisons to the glory of the institution and enhances social will to progress.

To conclude the discussion in responding to the RQ-1, economic offences are neither a part of the duty of the VC nor any provision under IPC/ BNS providing privilege. In response to RQ-2, in association with equal minded perpetrators the VCs manage to flee away from their legal liabilities; in the instant case, the network of people helping the VCs to flee away from legal liabilities is equally liable for the said offence vide section 34 IPC and as settled by *Rambilas Singh V. State of Bihar*[26] and *Hardev Siingh V. State of Punjab*[27]. In response to RQ-3, the VC being representative of the Chancellor-cum-Governor of Odisha to manage the university as academic head of the university, is expected to be academic role model for the society; the allegations of dishonesty not only ruin the public trust on the university but also economic offences adversely affect the public exchequer.

[24] WP(C) 4128/2024, the High Court of Odisha
[25] Information availed from VSSUT webpage
[26] AIR 1989 SC 1593:1989 CrLJ 1782
[27] AIR 1975 SC 179:1975 CrLJ 243

CORPORATE GOVERNANCE AND ESG COMPLIANCE: EMERGING CHALLENGES AND OPPORTUNITIES

MAHETA AMIT KIRITBHAI[1]

ABSTRACT

Corporate governance has undergone a remarkable transformation in recent years due to increasing emphasis on Environmental, Social, and Governance (ESG) principles. Investors, regulators, consumers, and other stakeholders have shifted their expectations from traditional profit-oriented corporate models towards sustainable and responsible business practices. ESG compliance has emerged as a significant mechanism for promoting transparency, accountability, ethical conduct, and long-term value creation. In India, several regulatory developments, including the Companies Act, 2013, the Securities and Exchange Board of India (SEBI) regulations, and the Business Responsibility and Sustainability Reporting (BRSR) framework, have strengthened the integration of ESG considerations into corporate governance structures. Despite these advancements, corporations face numerous challenges in implementing ESG standards effectively. Issues relating to lack of uniform reporting standards, greenwashing, inadequate data disclosure, increased compliance costs, and difficulties in balancing profitability with sustainability objectives continue to hinder ESG adoption. At the same time, ESG compliance presents substantial opportunities for enhancing corporate reputation, attracting responsible investments, improving stakeholder confidence, and ensuring sustainable economic growth. This paper critically examines the relationship between corporate governance and ESG compliance, analyses the existing legal and regulatory framework, identifies emerging challenges, and explores the opportunities created by ESG-oriented governance mechanisms. The study further provides recommendations aimed at strengthening ESG integration and promoting sustainable corporate practices in India.

Keywords: Corporate Governance; ESG Compliance; Sustainability; SEBI; Companies Act, 2013; Business Responsibility

[1] Maheta Amit Kiritbhai, Faculty, Gyanmanjari Innovative University, Bhavnagar, Gujarat

I. INTRODUCTION

Corporate governance constitutes the framework of rules, principles, and processes through which corporations are directed and controlled. Traditionally, corporate governance focused primarily on protecting shareholders' interests and maximizing profits. However, globalization, environmental concerns, social inequalities, and increasing stakeholder activism have transformed the understanding of corporate governance into a broader concept encompassing sustainability and ethical responsibility. Corporate governance principles have evolved globally through international frameworks emphasizing transparency, accountability, and stakeholder participation. The Organisation for Economic Co-operation and Development (OECD) has recognized effective corporate governance as a foundation for sustainable economic growth and responsible corporate behaviour.

Environmental, Social, and Governance (ESG) factors have emerged as essential indicators for evaluating corporate performance and long-term sustainability. ESG principles encourage corporations to consider environmental protection, social welfare, employee rights, ethical business conduct, and effective governance mechanisms while making strategic decisions. Consequently, ESG compliance has become an indispensable component of modern corporate governance systems.

Globally, organizations such as the United Nations, the Organisation for Economic Co-operation and Development (OECD), and the World Economic Forum have emphasized the importance of sustainable corporate practices. The United Nations Sustainable Development Goals (SDGs) have further accelerated the integration of ESG principles into corporate governance frameworks. Similarly, investors and financial institutions increasingly evaluate companies based on their ESG performance before making investment decisions.[2]

In India, the evolution of ESG governance has been significantly influenced by legislative and regulatory measures. The Companies Act, 2013 introduced provisions relating to corporate social responsibility, independent directors, and enhanced disclosures. Furthermore, SEBI has implemented several initiatives, including the Business Responsibility and Sustainability Reporting (BRSR) framework, to improve

[2] Andrei Shleifer and Robert W Vishny, 'A Survey of Corporate Governance' (1997) 52 Journal of Finance 737.

transparency and accountability among listed entities. Although ESG compliance offers several benefits, corporations encounter various practical and legal challenges in its implementation. The absence of universally accepted standards, inconsistent disclosure requirements, greenwashing practices, lack of expertise, and increased regulatory burdens have complicated the process of ESG integration. Nevertheless, effective ESG compliance has the potential to generate competitive advantages, strengthen stakeholder relationships, and contribute to sustainable economic development. The present study aims to analyse the evolving relationship between corporate governance and ESG compliance, evaluate the regulatory framework governing ESG practices in India, identify the major challenges faced by corporations, and examine the opportunities arising from sustainable governance practices. The paper further seeks to propose recommendations for enhancing ESG implementation and promoting responsible corporate behaviour.[3]

II. RESEARCH OBJECTIVES

The present study seeks to examine the evolving relationship between corporate governance and Environmental, Social, and Governance (ESG) compliance in the context of modern business organizations. The specific objectives of the study are as follows:

- To analyse the concept and significance of corporate governance and ESG compliance.
- To examine the legal and regulatory framework governing ESG practices in India.
- To study the role of the Companies Act, 2013 and the Securities and Exchange Board of India (SEBI) in promoting sustainable corporate governance.
- To identify the emerging challenges associated with ESG implementation and compliance.
- To evaluate the opportunities and advantages offered by ESG-oriented governance mechanisms.
- To compare Indian ESG practices with international standards and best practices.

[3] Robert G Eccles, Ioannis Ioannou and George Serafeim, 'The Impact of Corporate Sustainability on Organizational Processes and Performance' (2014) 60 Management Science 2835.

- To suggest measures for strengthening ESG compliance and improving corporate governance frameworks.

III. RESEARCH QUESTIONS

The present study attempts to answer the following research questions:

- What is the relationship between corporate governance and ESG compliance?
- How has ESG emerged as an important component of modern corporate governance?
- What are the major legal and regulatory mechanisms governing ESG practices in India?
- What challenges are faced by corporations in implementing ESG standards?
- How do ESG principles contribute to long-term value creation and sustainable development?
- What lessons can India learn from international ESG frameworks and practices?
- What measures can be adopted to ensure effective ESG compliance and corporate accountability?

IV. RESEARCH METHODOLOGY

The present research is doctrinal and analytical in nature. It primarily relies upon secondary sources of data, including books, journal articles, research papers, reports published by international organizations, government publications, statutes, regulations, and judicial decisions. The study adopts a qualitative approach to analyse the existing legal framework and corporate governance mechanisms relating to ESG compliance. Various reports issued by the Securities and Exchange Board of India (SEBI), the Ministry of Corporate Affairs, the Organisation for Economic Co-operation and Development (OECD), the World Economic Forum, and the United Nations have been referred to for understanding contemporary developments in ESG governance. The research also employs a comparative approach to evaluate international best practices and their relevance to the Indian corporate landscape. Through analytical examination, the study identifies emerging challenges and proposes suitable recommendations for strengthening ESG integration in corporate governance systems.

V. REVIEW OF LITERATURE

A review of existing literature reveals that corporate governance and ESG compliance have become increasingly interconnected in recent years. Various scholars, institutions, and international organizations have emphasized the importance of integrating sustainability concerns into corporate decision-making processes. According to Shleifer and Vishny (1997), corporate governance refers to mechanisms through which investors ensure returns on their investments. Their study primarily focused on shareholder protection and managerial accountability. However, subsequent developments expanded the concept beyond shareholder interests.[1]

Cadbury (1992) highlighted in the Cadbury Report the importance of transparency, accountability, and ethical conduct as fundamental principles of corporate governance. [4]These principles later became central to ESG-oriented governance frameworks.

Eccles, Ioannou, and Serafeim (2014) argued that companies adopting sustainable governance practices generally outperform those that neglect environmental and social considerations. Their research demonstrated that ESG factors contribute to long-term value creation and organizational resilience[5].

The Organisation for Economic Co-operation and Development (OECD) has consistently advocated for integrating sustainability into corporate governance systems. According to the OECD Principles of Corporate Governance, responsible business conduct and stakeholder engagement are essential components of effective governance.[6]

The World Economic Forum has emphasized that ESG metrics are increasingly becoming crucial indicators for evaluating corporate performance. It has advocated for standardized reporting frameworks and greater transparency in sustainability disclosures.[7]

---

[4] Adrian Cadbury, Report of the Committee on the Financial Aspects of Corporate Governance (1992).
[5] Robert G Eccles, Ioannis Ioannou and George Serafeim, 'The Impact of Corporate Sustainability on Organizational Processes and Performance' (2014) 60 Management Science 2835.
[6] Organisation for Economic Co-operation and Development, OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (OECD Publishing 2023).

[7] World Economic Forum, Measuring Stakeholder Capitalism: Towards Common Metrics and Consistent Reporting of Sustainable Value Creation (2020).

In the Indian context, the Companies Act, 2013 introduced several provisions aimed at improving governance standards, including mandatory Corporate Social Responsibility (CSR), enhanced disclosure requirements, and independent directorship. These reforms have contributed significantly to the evolution of responsible corporate governance. SEBI has further strengthened ESG governance by introducing the Business Responsibility and Sustainability Reporting (BRSR) framework for listed entities. The BRSR framework aims to enhance transparency, comparability, and accountability regarding sustainability-related disclosures. Several scholars have also pointed out challenges associated with ESG implementation. These include the absence of universally accepted standards, increased compliance costs, lack of expertise, and the growing phenomenon of greenwashing. Such concerns highlight the necessity for robust regulatory frameworks and improved disclosure mechanisms. Overall, the existing literature indicates that ESG compliance is gradually transforming traditional corporate governance models into broader stakeholder-oriented frameworks that prioritize sustainability, accountability, and long-term economic development.

VI. CONCEPT OF CORPORATE GOVERNANCE AND ESG

Corporate governance refers to the system of rules, practices, and processes by which a company is directed and controlled. It involves balancing the interests of a company's many stakeholders, including shareholders, management, customers, suppliers, financiers, government, and the community. The fundamental objective of corporate governance is to ensure transparency, accountability, fairness, and ethical conduct in corporate decision-making. Traditionally, corporate governance was narrowly focused on shareholder wealth maximization. However, modern governance frameworks have expanded this scope to include stakeholder interests and long-term sustainability. This shift has been significantly influenced by Environmental, Social, and Governance (ESG) principles.[8]

ESG represents three critical factors used to evaluate a company's ethical impact and sustainability performance:

[8] Organisation for Economic Co-operation and Development, G20/OECD Principles of Corporate Governance (OECD Publishing 2023). Global Reporting Initiative, GRI Universal Standards (2021).

- Environmental factors include climate change policies, carbon emissions, waste management, energy efficiency, and environmental conservation practices.
- Social factors include employee welfare, human rights, diversity and inclusion, consumer protection, and community engagement.
- Governance factors include board structure, executive compensation, audit systems, transparency, and shareholder rights.

The integration of ESG into corporate governance reflects a paradigm shift from short-term profit orientation to long-term value creation and responsible business conduct.

VII. EVOLUTION OF ESG COMPLIANCE

The concept of ESG has evolved gradually over several decades. Initially, corporate governance was driven by financial reporting and compliance with legal obligations. However, global financial crises, environmental degradation, and social inequality highlighted the limitations of traditional governance models.

KEY DEVELOPMENTS IN ESG EVOLUTION INCLUDE:

1. 1970S–1990S: ETHICAL INVESTING PHASE

Investors began excluding companies involved in unethical activities such as tobacco, weapons, and pollution-heavy industries.

2. 1990S–2000S: CORPORATE SOCIAL RESPONSIBILITY (CSR) EXPANSION

CSR became a mainstream concept, emphasizing voluntary corporate contributions to social welfare.

3. 2000S–2010S: SUSTAINABILITY INTEGRATION

ESG factors began to be integrated into investment decisions, risk management, and corporate strategies.

4. 2015 ONWARDS: GLOBAL STANDARDIZATION ERA

The adoption of the United Nations Sustainable Development Goals (SDGs) and Paris Climate Agreement strengthened global ESG commitments.

5. PRESENT ERA: REGULATORY ESG COMPLIANCE

ESG is now increasingly mandatory rather than voluntary, with strict disclosure requirements introduced by regulators such as SEBI in India.[9]

VIII. LEGAL AND REGULATORY FRAMEWORK IN INDIA

India has developed a robust regulatory framework to support corporate governance and ESG compliance. Key legislative instruments include the Companies Act, 2013 and SEBI regulations.

8.1 COMPANIES ACT, 2013

The Companies Act, 2013, is a landmark legislation that strengthened corporate governance in India through various provisions:

- Mandatory Corporate Social Responsibility (CSR) under Section 135
- Requirement of independent directors in listed companies
- Formation of audit committees and nomination committees
- Enhanced disclosure norms in financial reporting
- Protection of minority shareholders' rights

These provisions collectively promote transparency, accountability, and ethical governance.[10]

8.2 SEBI REGULATIONS AND BRSR FRAMEWORK

The Securities and Exchange Board of India (SEBI) has introduced several governance reforms to enhance ESG compliance. The most significant development is the Business Responsibility and Sustainability Reporting (BRSR) framework, which replaced the earlier Business Responsibility Report (BRR). BRSR requires top listed companies to disclose ESG-related performance indicators, including:

- Environmental impact and resource usage
- Social responsibility initiatives
- Governance practices and ethical standards
- Risk management and sustainability strategy

[9] United Nations Environment Programme Finance Initiative, Principles for Responsible Investment (2023).
[10] The Companies Act, No. 18 of 2013, India Code

This framework aligns Indian corporate reporting with global sustainability standards and enhances investor confidence.[11]

8.3 Other Regulatory Developments

- National Guidelines on Responsible Business Conduct (NGRBC)
- Reserve Bank of India (RBI) sustainability initiatives in the financial sector
- Climate-related disclosure expectations aligned with global frameworks such as TCFD

IX. Role of ESG in Modern Corporate Governance

ESG has become a central pillar of modern corporate governance due to its ability to enhance long-term sustainability and risk management.

9.1 Risk Mitigation

ESG frameworks help companies identify environmental and social risks such as climate change, labour disputes, and regulatory penalties.

9.2 Investor Confidence

Institutional investors increasingly rely on ESG ratings to make investment decisions. Companies with strong ESG performance attract more capital.

9.3 Enhanced Corporate Reputation

Strong ESG compliance improves brand value and stakeholder trust.

9.4 Long-Term Value Creation

ESG-focused companies are better positioned for sustainable growth and resilience in volatile markets.

X. Importance of ESG in Corporate Governance

The importance of ESG in corporate governance can be summarized as follows:

- Ensures ethical and responsible business conduct
- Promotes sustainable development goals
- Enhances transparency and accountability
- Improves access to global capital markets

[11] Securities and Exchange Board of India Act, 1992, No. 15, Acts of Parliament, 1992 (India)

- Reduces regulatory and reputational risks
- Strengthens stakeholder engagement

ESG is no longer optional but a strategic necessity for modern corporations operating in a globalized economy.[12]

XI. International Comparative Analysis

11.1 European Union (EU)

The EU has one of the most advanced ESG regulatory frameworks, including the Corporate Sustainability Reporting Directive (CSRD). It mandates detailed ESG disclosures and sustainability reporting for large companies.

11.2 United States

In the US, ESG regulation is more market-driven than mandatory. Agencies like the SEC have proposed climate disclosure rules, but ESG compliance is largely driven by investor pressure.

11.3 United Kingdom

The UK has integrated Task Force on Climate-related Financial Disclosures (TCFD) requirements into corporate reporting, making climate risk disclosure mandatory for large firms.

11.4 India

India's approach is evolving through SEBI's BRSR framework, CSR provisions under the Companies Act, 2013, and increasing emphasis on sustainability reporting. India is moving toward a hybrid model combining mandatory and voluntary ESG

XII. Case Studies

12.1 Tata Group (India)

Tata Group has been a pioneer in corporate governance and sustainability. Its companies actively integrate ESG principles into operations, focusing on environmental conservation, employee welfare, and ethical governance.[13]

[12] Task Force on Climate-related Financial Disclosures, Recommendations of the Task Force on Climate-related Financial Disclosures (2017).
[13] Tata Group, Sustainability Report (2023).

12.2 INFOSYS

Infosys has adopted strong ESG reporting practices and is committed to carbon neutrality, diversity, and transparent governance structures[14].

12.3 UNILEVER

Unilever is globally recognized for its Sustainable Living Plan, integrating ESG into its core business strategy, leading to long-term profitability and brand strength[15].

XIII. FINDINGS AND ANALYSIS

The study reveals several key findings:

- ESG has evolved from voluntary CSR initiatives to mandatory governance frameworks.
- Regulatory bodies like SEBI have significantly strengthened ESG compliance in India.
- Companies with strong ESG performance demonstrate better long-term financial stability.
- However, implementation gaps exist due to lack of standardization and skilled professionals.
- Greenwashing remains a major threat to ESG credibility

XIV. CONCLUSION

Corporate governance is undergoing a fundamental transformation with the integration of ESG principles. ESG compliance has emerged as a key driver of sustainable development, responsible investment, and long-term corporate success. In India, regulatory reforms such as the Companies Act, 2013 and SEBI's BRSR framework have significantly strengthened ESG governance. However, challenges such as lack of standardization, greenwashing, and implementation costs must be addressed to ensure effective ESG integration. Overall, ESG represents not merely a compliance requirement but a strategic shift toward sustainable and responsible capitalism.

[14] Infosys, ESG Report, 2023

[15] Unilever, Sustainable Living Plan Report (2023).

The law as it is — *and as it ought to be.*

Verdict Voices is a journal of law and justice devoted to rigorous scholarship and fearless commentary, bringing together articles, case notes and interviews from students, scholars and practitioners.

SUBMISSIONS	law.verdictvoices@gmail.com
ONLINE	www.verdictvoices.com
FOLLOW	https://www.linkedin.com/company/verdict-voices/ · LinkedIn

LAW · LEARN · LEAD

VOLUME I · ISSUE I · JULY 2026