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Siliguri, P.O. Salbari, Dist. Darjeeling-731502 (West Bengal), India

Phone: 9434074701

iils.siliguri@gmail.com, iils.lawreview.5318@gmail.com

Website: www.iilsindia.com

ABOUT INDIAN INSTITUTE OF LEGAL STUDIES

The Indian Institute of Legal Studies established in the year 2010 has evolved into a unique system of imparting legal education not only in North Bengal but also as an emerging education and Research Centre in the SAARC region with the establishment of the Centre for SAARC on Environment Study & Research. Acknowledged as one of the best law colleges in India, Indian Institute of Legal Studies, Siliguri is nestled in the cradle of the quaint Himalayas and picturesque surroundings assimilating nature and education, a combination which is a rarity in itself. Indian Institute of Legal Studies is an institute that promotes holistic study in Law in the form of short-term courses, field work, experiential learning, and Clinical legal classes in addition to the regular undergraduate course. Post Graduate courses and Research Centre are already functional, which will mature into doctrinal courses.

The Institution takes pride in hosting workshops for police officers of North Bengal on Human Rights and Cyber Crimes, where the institute was privileged to have the presence of eminent police officers and scholars from different corners of the country. The Bureau of Police Research & Development, Ministry of Home Affairs, Government of India had approved the organising of a vertical interaction course for IPS officers on Criminal Justice Delivery System which was witnessed by the gracious presence of the Hon'ble Judges of the Supreme Court of India and the various High Courts.

The Institution has been organising a series of National and International Seminars, Conferences, Symposiums, Workshops and Inter and Intra Moot Court competitions. The Institute had started with organising a national seminar on the "Civil Justice Delivery System". Today, it has reached the peak of organising international seminars with the SAARC Law Summit & Conclave being the blooming one. Even during this pandemic, the Indian Institute of Legal Studies was the first of its kind in this region that had undertaken the initiative of conducting online classes for the students of both UG and PG courses to reach out to the students through online teaching learning mechanism from the very initial period of lockdown. Also, the college has successfully conducted internal examinations through online mode so that the continuous evaluation of students does not come to a halt.

The Institution's vital location, its active participation in imparting knowledge and moulding its students into sensible and responsible individuals has brought to its credit to serve as the nucleus for education in the North Bengal region. The emphasis in academic development with

Its adoption of inter-disciplinary and practical approaches has aided its students to gain a deeper understanding of the learning process and value for education. Additionally, it has not merely laid the importance for the value and the need to be educated individuals, or to serve as efficient lawyers, but more essentially, to be reborn as socially viable and responsible beings to construct appropriate mechanisms for building a better society for the coming future.

MESSAGE FROM THE PATRON

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Dr. Joyjit Choudhury

Founder & Chairman

Indian Institute of Legal Studies

The pursuit of legal education is not merely the study of statutes and judgments; it is the continuous search for justice, social responsibility, and intellectual growth. In this spirit, I am pleased to introduce the latest issues of the IILS Law Review, which stand as a reflection of our institution's enduring commitment to academic excellence and meaningful legal scholarship.

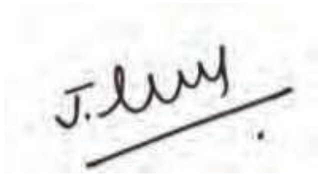
A strong academic journal serves as more than a collection of research articles—it becomes a platform where ideas are examined, perspectives are challenged, and contemporary issues are explored with depth and clarity. The IILS Law Review continues to provide such a space for thoughtful discourse, encouraging scholars and students alike to engage critically with the rapidly evolving legal and social realities of our time.

The contemporary legal landscape presents both opportunities and challenges. Questions surrounding constitutional values, technological advancement, environmental concerns, human rights, global governance, and socio-economic transformation increasingly demand careful analysis and informed discussion. It is encouraging to witness contributors addressing these complex themes with scholarly rigor, originality, and social awareness.

The dedication and hard work of the editorial board, reviewers, faculty members, and contributors deserve sincere appreciation. Their collective efforts have ensured that the IILS Law Review continues to uphold high academic standards while fostering a culture of research and intellectual inquiry within the institution. Such commitment strengthens not only the journal itself but also the larger academic environment that nurtures future scholars and legal minds.

I hope these issues will inspire readers to think critically, explore new dimensions of legal understanding, and contribute positively to academic dialogue and social progress. May the IILS Law Review continue to grow as a respected forum for scholarship, innovation, and the exchange of ideas in the field of law.

With Best Wishes,



Dr. Joyjit Choudhury

Patron

IILS Law Review

MESSAGE FROM EDITOR IN CHIEF

Dr. Trishna Gurung

Principal-in-Charge
Indian Institute of Legal Studies

It is with immense pleasure that I present to you the latest issues of the IILS Law Review. This journal remains committed to fostering high-quality academic discourse in the legal field, offering a platform for rigorous analysis, critical evaluation, and thoughtful commentary on contemporary legal issues.

As we continue to navigate the evolving legal landscape, these issues reaffirm our journal's dedication to addressing both traditional and emerging areas of law. From discussions on constitutional and environmental principles to explorations of contemporary legal challenges concerning technology, digital governance, human rights, and socio-economic policy, the IILS Law Review strives to provide its readers with thought-provoking scholarship and meaningful academic engagement.

We take great pride in featuring valuable contributions from academicians, legal scholars, and students whose research reflects both intellectual depth and social relevance. Their work not only strengthens our understanding of legal systems and institutions but also encourages constructive dialogue on issues that continue to shape the future of legal thought and jurisprudence.

I extend my heartfelt gratitude to the authors, reviewers, and members of the editorial board for their persistent efforts and dedication in maintaining the high standards of this journal. Their collective commitment and scholarly enthusiasm have played a significant role in ensuring the continued growth and credibility of the IILS Law Review.

I am confident that the diverse perspectives presented in these editions will inspire, educate, and encourage readers to engage critically with the dynamic and ever-evolving dimensions of law. We look forward to the continued support and participation of our academic community in the journey ahead.

Best Regards,

Dr. Trishna Gurung

Editor-in-Chief,

IILS Law Review

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STRATEGIC ENVIRONMENTAL ASSESSMENT AND SUSTAINABLE DEVELOPMENT IN INDIA: THE CASE FOR A STATUTORY FRAMEWORK

-Dr. Trishla Dubey[1]

ABSTRACT

India's environmental governance architecture remains overwhelmingly project-centric. Although the Environmental Impact Assessment regime has become the primary procedural device for environmental decision-making, it usually operates only after the decisive choices have already been made at the level of policy, plan, programme, corridor, basin, or master plan. This article argues that Strategic Environmental Assessment ("SEA") fills that upstream gap. Unlike project-level EIA, SEA evaluates cumulative, indirect, and long-term environmental consequences at the stage where alternatives are still genuinely open. The article first distinguishes SEA from EIA and situates SEA within the ideas of sustainable development, precaution, public participation, and environmental rule of law. It then examines comparative models from the European Union, the United Kingdom and Scotland, and Canada to identify institutional design features that India can adapt. The article next demonstrates that, while India lacks a general statutory SEA mandate, both judicial doctrine and administrative practice already point in that direction. Decisions such as Vellore Citizens' Welfare Forum, Lafarge Umiam Mining, Hanuman Laxman Aroskar, Alembic Pharmaceuticals, and Alaknanda Hydro Power collectively show that Indian environmental law values prior appraisal, expert scrutiny, meaningful participation, and cumulative analysis. The article also discusses Indian case studies from hydropower planning, highway development, and urban land-use planning. It concludes that India should adopt a binding SEA framework under the Environment (Protection) Act, 1986, or through standalone legislation, with mandatory screening, alternatives analysis, climate and biodiversity assessment, public participation, reasoned decision-making, and post-adoption monitoring.

Keywords: *Strategic Environmental Assessment; Environmental Impact Assessment; sustainable development; cumulative impacts; environmental governance.*

[1] Assistant Professor of Law, Maharashtra National Law University, Nagpur

1. INTRODUCTION

India's environmental decision-making still turns largely on the Environmental Impact Assessment ("EIA") model. That model has undeniable value, but it carries a structural limitation: by the time a project-level environmental clearance is sought, the more fundamental choices have often already been taken. Whether a river basin should host multiple hydropower projects, whether a metropolitan development plan should expand into ecologically fragile land, whether a transport corridor should privilege one route over another, or whether a sectoral policy should incentivise a particular form of extraction are all questions that arise well before an individual project appears for appraisal.[2] When environmental scrutiny begins only at the project stage, the legal process is often asked to review a fait accompli.[3]

Strategic Environmental Assessment ("SEA") responds to that upstream problem. It is not merely a larger EIA. SEA relocates environmental assessment to the stage of policies, plans, programmes and other strategic instruments. In doing so, it asks different questions: not only whether a specific project can be mitigated, but whether the larger strategy is environmentally justified, whether reasonable alternatives exist, how cumulative effects will unfold, and whether affected communities have been heard before the development path hardens.[4]

This shift matters acutely in India. River-basin planning, national and state infrastructure pipelines, coastal and tourism planning, urban master plans, industrial area development, forest diversion policy, and energy transition strategies all have environmental consequences that cannot be meaningfully understood one project at a time. The absence of a general SEA obligation leaves the legal system dependent on fragmented, sector-specific, donor-driven, or court-prompted assessments rather than a coherent statutory discipline.[5]

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[2] Environment (Protection) Act, No. 29 of 1986, Gazette of India, Extraordinary, pt. II sec. 1 (May 23, 1986); Ministry of Environment & Forests, Government of India, Notification No. S.O. 60(E), Environmental Impact Assessment Notification, 1994 (Jan. 27, 1994); Ministry of Environment & Forests, Government of India, Notification No. S.O. 1533(E), Environmental Impact Assessment Notification, 2006 (Sept. 14, 2006).
[3] Alembic Pharmaceuticals Ltd. v. Rohit Prajapati, Civil Appeal No. 1526 of 2016, decided on Apr. 1, 2020 (India); see also Shuchita Jha, Environment (Protection) Act: 39 Changes Made to Rules in 2 Years of Pandemic, Shows Report, Down to Earth (Dec. 15, 2022).
[4] Monica Fundingsland Tetlow & Marie Hanusch, Strategic Environmental Assessment: The State of the Art, 30 Impact Assessment & Project Appraisal 15 (2012); OECD, Applying Strategic Environmental Assessment: Good Practice Guidance for Development Co-operation (2006).
[5] Debojyoti Mukherjee & Asha Rajvanshi, Application of Strategic Environmental Assessment as a Land Use Planning Tool in India: A Case of Gurgaon-Manesar Development Plan, Haryana, India, 18 Journal of Environmental Assessment Policy and Management (2016); D. Victor & P. Agamuthu, Policy Trends of Strategic Environmental Assessment in Asia, 41 Environmental Science & Policy 63 (2014).

This article advances three claims. First, SEA is normatively consistent with Indian environmental constitutionalism because it operationalises precaution, sustainable development, intergenerational equity, and public participation earlier and more effectively than project-level EIA alone. Second, Indian judicial decisions already contain the doctrinal ingredients for SEA, even if courts have not expressly mandated a universal SEA framework. Third, comparative experience shows that India need not invent SEA from scratch; it can adapt proven features such as early screening, alternatives analysis, monitoring, post-adoption statements, cumulative-effects assessment, and public disclosure.[6]

The argument proceeds in five stages. Part II explains the conceptual distinction between EIA and SEA. Part III surveys comparative models. Part IV shows that India already has fragmented SEA practice. Part V demonstrates how Indian case law supplies a jurisprudential basis for SEA. Part VI then proposes a legislative and institutional blueprint for India.

2. FROM PROJECT APPRAISAL TO STRATEGIC ENVIRONMENTAL GOVERNANCE

EIA and SEA are related but distinct instruments. EIA focuses on the environmental consequences of individual projects. Its strengths lie in site-specific analysis, technical mitigation, and project conditioning. SEA, by contrast, addresses policies, plans, programmes, and comparable strategic instruments. Its central concern is whether environmental considerations are integrated at the stage where development trajectories are framed, alternatives are still open, and cumulative effects can be meaningfully confronted.[7]

Three distinctions are especially important. First, SEA is temporally earlier. It operates before downstream approvals generate path dependency. Secondly, SEA is broader in scope: it evaluates indirect, cumulative, synergistic, and long-term effects that may be invisible when projects are reviewed in isolation. Thirdly, SEA is institutionally integrative. Because it applies at the level of governance rather than a single site, it connects environment with land use, transport, energy, water, disaster risk, biodiversity, and public health.[8]

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[6] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the Assessment of the Effects of Certain Plans and Programmes on the Environment, 2001 O.J. (L 197) 30; Government of Canada, Cabinet Directive on Strategic Environmental and Economic Assessment (2024); Environmental Assessment (Scotland) Act 2005, asp 15.
[7] Tetlow & Hanusch, supra note 3, at 15–17; Thomas B. Fischer & Ainhoa González, Introduction, in Handbook on Strategic Environmental Assessment 2–3 (2021).
[8] OECD, supra note 3; UNECE, Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context art. 1 (2003).

In the Indian context, those differences are not academic. A project EIA may analyse one hydropower station, but it cannot adequately address how a chain of hydropower projects alters sediment flow, river connectivity, disaster vulnerability, fish migration, or cultural use across an entire basin. A project EIA for one highway segment may be incapable of resolving the ecological consequences of a corridor-wide planning decision. A project EIA for a township cannot substitute for an ecological assessment of the master plan that predetermined growth direction. SEA therefore complements, rather than replaces, project EIA. The former asks whether a strategic pathway is environmentally sound; the latter asks how an approved pathway should be implemented at project level.[9]

SEA also changes the legal quality of participation. Public consultation in a late-stage project appraisal frequently becomes reactive because communities are asked to comment on a project whose essential location, scale, and policy logic have already been fixed. At the SEA stage, by contrast, participation can meaningfully engage the selection of alternatives, thresholds, no-go areas, and development priorities. This is one reason why SEA is increasingly understood not only as a technical planning device but as a procedural instrument of environmental democracy.[10]

The connection to sustainable development is direct. Sustainable development does not require the abandonment of development; it requires institutional arrangements that integrate environmental limits into development choice. SEA advances this by making environmental consequences visible before policy lock-in. Precaution operates more naturally at the strategic stage because it is easier to avoid environmentally unsound trajectories than to repair them after investments, contracts, and land conversion have occurred. Intergenerational equity is likewise better served when basin-wide or region-wide decisions are assessed ex ante rather than justified ex post.[11]

For India, then, the real question is not whether EIA remains necessary. It unquestionably does. The question is whether EIA, standing alone, is procedurally capable of addressing the kinds of strategic environmental risks that now dominate contemporary governance. On that question, the answer is increasingly no.

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[9] Directive 2001/42/EC, supra note 5, arts. 1–5; Government of Canada, Cabinet Directive on Strategic Environmental and Economic Assessment §§ 4.1–4.6 (2024).

[10] UNECE, supra note 7, art. 1(d); Hanuman Laxman Aroskar v. Union of India, (2019) 15 SCC 401.

[11] Vellore Citizens' Welfare Forum v. Union of India, (1996) 5 SCC 647; Lafarge Umiam Mining Pvt. Ltd. v. Union of India, (2011) 7 SCC 338.

3. COMPARATIVE PERSPECTIVES: WHAT MATURE SEA REGIMES GET RIGHT

Comparative experience is instructive because SEA has developed most robustly where the law treats it as a mandatory and iterative process rather than a discretionary study. The European Union is the clearest example. Directive 2001/42/EC requires environmental assessment for certain public plans and programmes likely to have significant environmental effects, especially in sectors such as agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning, and land use.[12] The Directive does not stop at requiring a report. It creates a sequence: screening, scoping, environmental reporting, consultation, integration of the report and consultation outcomes into decision-making, information on the final decision, and monitoring.[13]

Two features of the EU model are particularly valuable for India. The first is its insistence on "reasonable alternatives." A legal obligation to compare alternatives prevents assessment from degenerating into a ritual justification for a pre-selected option. The second is post-adoption monitoring. Many environmental law systems do reasonably well at predicting effects but poorly at learning from actual outcomes. Monitoring creates a feedback loop between planning and implementation, allowing plans to be corrected over time.[14]

The UNECE Protocol on SEA broadens the vision further. Its objective is not merely ecological protection in the narrow sense, but the thorough integration of environmental, including health, considerations into plans and programmes through clear, transparent procedures and public participation. Although the Protocol makes SEA mandatory for plans and programmes, it also encourages attention to policies and legislation. That broader horizon is significant because many environmentally consequential decisions in modern governance are embedded in policy frameworks rather than formally labelled plans.[15]

The United Kingdom's regime, through the Environmental Assessment of Plans and Programmes Regulations 2004, operationalises many of the same ideas. It requires an environmental report, consultation, and monitoring, and it restricts the adoption of covered plans unless the assessment process has been completed.[16] Scotland goes further through the

[12] Directive 2001/42/EC, supra note 5, art. 3.
[13] Id. arts. 4–10; European Commission, Strategic Environmental Assessment, Environment.
[14] Directive 2001/42/EC, supra note 5, arts. 5, 8–10.
[15] UNECE, supra note 7, art. 1; UNECE, Summary of Procedure (noting that the Protocol requires SEA for official draft plans and programmes and also addresses policies and legislation).
[16] The Environmental Assessment of Plans and Programmes Regulations 2004, SI 2004/1633 (UK), regs. 12–17.

Environmental Assessment (Scotland) Act 2005, which is often noted for extending the framework to "strategies" as well as plans and programmes.[17] The Scottish model matters to India because many Indian executive instruments of real environmental significance are described as policies, strategies, missions, vision documents, or master plans rather than as formal "plans" in the narrow sense. A functional rather than semantic approach would therefore be essential in any Indian SEA law.

Canada's recent Cabinet Directive on Strategic Environmental and Economic Assessment illustrates a different but equally useful design choice. Effective from April 2024, it requires environmental and economic analysis for Cabinet proposals, regulatory proposals, and funding requests, with a specific focus on pollution, biodiversity, greenhouse gas emissions, climate resilience, Indigenous impacts, public concerns, cumulative effects, monitoring, and public statements.[18] The significance of the Canadian model lies in its contemporary orientation. SEA is not treated as a static environmental checklist; it is explicitly tied to climate change, biodiversity loss, cumulative effects, and transparency after government decisions are taken.[19]

Taken together, these comparative systems suggest at least six lessons for India. First, the trigger for SEA must be legal and not merely discretionary. Secondly, the scope of covered instruments must be functional, so that governments cannot avoid SEA by changing labels. Thirdly, alternatives analysis must be explicit. Fourthly, consultation must occur while strategic choices remain open. Fifthly, monitoring and public disclosure should continue after adoption. Sixthly, climate, biodiversity, cumulative impacts, and affected community concerns should be built into the assessment framework rather than left to administrative happenstance.[20]

None of these lessons is alien to Indian law. The challenge is institutionalisation. India has fragments of all these principles, but not yet a binding architecture that compels them to operate together.

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[17] Environmental Assessment (Scotland) Act 2005, asp 15, §§ 4–5.

[18] Government of Canada, Cabinet Directive on Strategic Environmental and Economic Assessment §§ 2, 4, 5 (effective Apr. 1, 2024).

[19] Environment and Climate Change Canada, Strategic Environmental and Economic Assessments (2025).

[20] Directive 2001/42/EC, supra note 5; The Environmental Assessment of Plans and Programmes Regulations 2004, supra note 15; Government of Canada, supra note 17.

4. INDIA'S PRESENT POSITION: FRAGMENTED PRACTICE WITHOUT A GENERAL SEA MANDATE

India's environmental appraisal regime is still anchored in project-level notification law. The EIA Notification of 1994 first generalised prior environmental clearance for specified categories of projects under the Environment (Protection) Act, 1986. The EIA Notification of 2006 retained the project focus, while decentralising aspects of appraisal through the Category A/Category B distinction and formalising stages such as screening, scoping, public consultation, and appraisal.[21] Yet neither framework created a general statutory obligation to assess environmental impacts at the level of policies, plans, or programmes.

That omission is striking because Indian governance routinely operates through strategic instruments. State road programmes, river-basin development, regional tourism plans, industrial estate planning, city development plans, coastal zone planning, and renewable-energy zoning all involve choices that structure later project approvals. Without SEA, environmental law meets these decisions late and in pieces.[22]

At the same time, India is not wholly unfamiliar with SEA-like practice. A number of strategic or sectoral assessments have been undertaken, often with support from international institutions, sectoral agencies, or special studies. These include assessments relating to hydropower development in the Alaknanda and Bhagirathi basins, the Gujarat State Highway Project, the Gujarat National Dairy Support Project, industrial development in Himachal Pradesh, the Pune Development Plan, and land-use planning exercises such as the Gurgaon-Manesar Development Plan.[23] These examples demonstrate administrative feasibility. They show that Indian institutions can, when prompted, evaluate environmental concerns at a strategic scale.

But ad hoc examples are not a substitute for law. Three weaknesses persist. First, most such exercises are non-binding or only indirectly linked to final decisions. Secondly, they are uneven across sectors and geographies. Thirdly, there is no uniform statutory method

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[21] EIA Notification, 1994, supra note 1; EIA Notification, 2006, supra note 1; Ministry of Environment, Forest & Climate Change, Review of EIA Notification, 1994 Was Undertaken … a New EIA Notification Dated 14 September 2006 Was Issued (Government of India explanatory material).

[22] Mukherjee & Rajvanshi, supra note 4; Victor & Agamuthu, supra note 4.

[23] National Dairy Development Board, Strategic Environment and Social Assessment (SESA) for National Dairy Support Project (NDSP) (2011); World Bank, Sectoral Environmental Assessment: India Gujarat State Highway Project (1998); Pune Municipal Corporation, Scoping Report: Strategic Environmental Assessment of Pune Municipal Corporation 2007–27 (2007); World Bank, Strategic Environmental Assessment for Industry Sector Himachal Pradesh, India (2013).

governing who must conduct them, what alternatives must be considered, how public participation occurs, how findings influence downstream approvals, and whether outcomes are monitored.[24]

The absence of a legal trigger also produces an accountability deficit. When strategic assessments are voluntary, they are vulnerable to being ignored precisely when political pressure for rapid clearance is strongest. In recent years, critiques of India's environmental governance have repeatedly highlighted the use of executive memoranda, exemptions, and procedural dilution within the appraisal system. Whatever one's normative view on regulatory reform, a project-by-project clearance model is ill-suited to absorbing the strategic consequences of wide regulatory changes.[25]

The better reading of India's experience is therefore not that SEA is alien to the country, but that it has remained a sporadic practice trapped outside a binding legal framework. The next question is whether Indian judicial doctrine can support its formal adoption. It can.

5. JUDICIAL FOUNDATIONS FOR SEA IN INDIA

Indian courts have not yet declared a universal legal obligation to undertake SEA for all policies, plans, and programmes. Nevertheless, the Supreme Court's environmental jurisprudence has developed principles that strongly support such a framework.

The starting point is *Vellore Citizens' Welfare Forum v. Union of India*, where the Supreme Court accepted sustainable development, the precautionary principle, and the polluter pays principle as part of the law of the land.[26] Although *Vellore* did not concern SEA, its significance for SEA is fundamental. A legal system committed to precaution cannot be satisfied with environmental review only after strategic choices are effectively irreversible.

Narmada Bachao Andolan v. Union of India likewise recognised that developmental decision-making requires an environmental balancing exercise rather than an afterthought.[27] The case is often invoked to show judicial deference in infrastructure matters, but it equally demonstrates that large projects raise questions extending beyond the project site. That insight, when taken seriously, points toward basin-level and policy-level scrutiny.

[24] Tetlow & Hanusch, supra note 3, at 17–21; Mukherjee & Rajvanshi, supra note 4.
[25] Jha, supra note 2; Alembic Pharmaceuticals Ltd., Civil Appeal No. 1526 of 2016.
[26] Vellore Citizens' Welfare Forum, (1996) 5 SCC 647.
[27] Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 664.

The forest jurisprudence under *T.N. Godavarman Thirumulpad v. Union of India* is also relevant. The Court's insistence that "forest" cannot be confined to narrow administrative labels and must include areas recorded as forest in government records reflects a broader anti-formalist instinct in Indian environmental law.[28] SEA would apply the same logic to strategic instruments: environmental review should turn on functional effect, not merely on whether the instrument is styled as a policy, plan, strategy, scheme, or guideline.

The need for strategic, cumulative thinking became especially visible in the litigation surrounding Himalayan hydropower. In *Alaknanda Hydro Power Co. Ltd. v. Anuj Joshi*, the Supreme Court addressed the Srinagar Hydro Electric Project in the aftermath of severe environmental controversy and wider concern over the Uttarakhand disaster.[29] Even where the immediate dispute centered on clearances and compliance, the case exposed the inadequacy of isolated project appraisal in a fragile mountain ecology. Basin-wide and cumulative questions could not be resolved by examining each project as if it existed alone.

That same theme appears more explicitly in *Lafarge Umiam Mining Pvt. Ltd. v. Union of India*. The Court emphasised sustainable development, intergenerational equity, due diligence, and the need for institutions capable of scientifically grounded environmental decision-making.[30] Of special importance, *Lafarge* gave prominence to the idea of a national regulator and to the proposition that environmental governance requires credible expertise and transparent procedure. SEA, as a structured ex ante process supported by expert appraisal, fits comfortably within this jurisprudential logic.

The participatory dimension was sharpened in *Hanuman Laxman Aroskar v. Union of India*, the Mopa airport case. There the Court stressed environmental rule of law and held that public consultation in environmental decision-making cannot be reduced to a ritual formality.[31] This reasoning cuts strongly in favour of SEA. Participation is most meaningful not when the public is invited to comment on the details of a nearly final project, but when strategic choices about location, alternatives, and scale are still open.

Finally, *Alembic Pharmaceuticals Ltd. v. Rohit Prajapati* rejected the normalisation of ex post facto environmental clearances.[32] The Court's insistence that environmental appraisal

[28] T.N. Godavarman Thirumulpad v. Union of India, (1997) 2 SCC 267.
[29] Alaknanda Hydro Power Co. Ltd. v. Anuj Joshi, Civil Appeal No. 6736 of 2013, decided on Aug. 13, 2013 (India).
[30] Lafarge Umiam Mining Pvt. Ltd., (2011) 7 SCC 338.
[31] Hanuman Laxman Aroskar, (2019) 15 SCC 401.
[32] Alembic Pharmaceuticals Ltd., Civil Appeal No. 1526 of 2016.

must be prior rather than curative is one of the strongest doctrinal bridges to SEA. If environmental clearance must precede project commencement, then a fortiori environmental appraisal should also precede the strategic decisions that determine which classes of projects will emerge and where.

Taken together, these judgments do not merely sit alongside SEA as abstract environmental principles. They collectively point toward four operational propositions: environmental appraisal should be prior, not post hoc; participation should be informed and meaningful; ecological effects must be understood cumulatively and not only site by site; and expert, transparent institutions are indispensable. These are precisely the structural commitments embodied in mature SEA systems.[33]

6. INDIAN CASE STUDIES: WHY SEA ADDS VALUE IN PRACTICE

The case for SEA in India becomes even stronger when one turns from doctrine to practice.

6.1 Hydropower planning in the Alaknanda-Bhagirathi basin

The hydropower experience in Uttarakhand is perhaps the clearest demonstration of why strategic assessment matters. The problem in the upper Ganga basin was never just one dam. It was the combined effect of multiple existing, under-construction, and proposed projects on river ecology, sediment transport, disaster vulnerability, forest loss, and local communities. Assessing each project separately obscured the transformation of the basin as a whole.[34] Strategic assessments undertaken in relation to hydropower planning in the Alaknanda and Bhagirathi basins showed the importance of no-go stretches, cumulative analysis, and a planning lens extending beyond individual project clearance.[35]

In legal terms, this matters because river systems are classic examples of ecological units that resist administrative fragmentation. A basin-level SEA can identify carrying capacity concerns, minimum ecological flow requirements, disaster-risk interactions, and cultural or spiritual values attached to free-flowing stretches. Project-level EIA, however well performed, is structurally less capable of answering those upstream questions.

[33] See Vellore Citizens' Welfare Forum, Lafarge Umiam Mining Pvt. Ltd., Hanuman Laxman Aroskar, and Alembic Pharmaceuticals Ltd., supra notes 25, 29, 30, 31.

[34] Netherlands Commission for Environmental Assessment, Strategic Environmental Assessment for Sustainable Development of the Hydropower Sector: Five Influential Cases—India, Myanmar, Pakistan, Rwanda, Viet Nam (2021).

[35] Mahendra S. Lodhi et al., Framework for Strategic Environmental Assessment in Context of Hydropower Development in the Indian Himalayan Region, 5 International Journal of Environmental Sciences 11 (2016).

6.2 Highway and corridor planning in Gujarat

The Gujarat State Highway Project illustrates the utility of sectoral or corridor-level assessment. A road sector programme generates environmental consequences that are not reducible to a single right of way: route selection, induced land-use change, habitat fragmentation, drainage, aggregate demand, safety, and social displacement may all be affected by programme-level choices.[36] A sectoral environmental assessment allows decision-makers to compare alternatives, identify environmentally sensitive segments in advance, and embed mitigation logic into programme design rather than improvising it parcel by parcel.

This is particularly relevant to contemporary India, where logistics corridors, expressways, border roads, industrial corridors, and renewable-energy transmission networks are increasingly planned at scale. Without SEA, the law addresses these networks through a series of disconnected project files.

6.3 Urban land-use planning in Gurgaon-Manesar and Pune

Urban development planning supplies a third lesson. Studies on the Gurgaon-Manesar Development Plan and the Pune Development Plan demonstrate how SEA can be used to bring ecological constraints into land-use planning, including issues such as groundwater stress, loss of open space, traffic burden, pollution load, and urban sprawl.[37] Here the strategic question is not whether one building or one layout can be mitigated, but whether the underlying growth pattern is sustainable.

Urban master plans are especially appropriate candidates for SEA because they set the framework for numerous downstream approvals. Once land is zoned, density is fixed, and infrastructure is aligned, later environmental review has limited capacity to challenge the strategic direction. SEA therefore performs a preventive function in planning law: it can expose unsound spatial choices before they are translated into thousands of legally and economically entrenched decisions.

These case studies reveal a common pattern. Whenever environmental risk is generated by a network, basin, region, or development strategy rather than a single project, SEA adds value that EIA alone cannot supply. India's own experience thus supports the doctrinal and comparative case for codification.

[36] World Bank, Sectoral Environmental Assessment: India Gujarat State Highway Project (1998).
[37] Mukherjee & Rajvanshi, supra note 4; Pune Municipal Corporation, supra note 22.

7. THE CASE FOR A STATUTORY SEA FRAMEWORK IN INDIA

A statutory SEA regime is now necessary for at least four reasons.

First, India's major environmental risks are increasingly strategic in nature. Climate change adaptation, energy transition, urbanisation, industrial clustering, river interlinking, coastal development, mining expansion, and biodiversity conservation all involve choices made at scales larger than the individual project. A purely project-centric regime will continue to misfit the problem.[38]

Secondly, SEA would improve the quality of alternatives analysis. One of the chronic weaknesses of project-level environmental decision-making is that alternatives are often narrow, superficial, or effectively foreclosed. By moving the inquiry upstream, SEA allows governments to consider no-action options, different locations, different technologies, different sequencing, and ecological limits before political and financial commitments become entrenched.[39]

Thirdly, SEA would strengthen participation and transparency. A legal requirement to publish an environmental report, consult affected communities and expert bodies, disclose how the final decision addressed environmental concerns, and monitor implementation would make strategic environmental governance more accountable. The comparative models discussed above show that these procedural obligations are not fanciful; they are workable and already institutionalised elsewhere.[40]

Fourthly, SEA would align Indian environmental law with the logic of environmental rule of law already visible in the Supreme Court's decisions. *Hanuman Laxman Aroskar* and *Alembic* in particular make it difficult to defend a system in which environmental analysis routinely arrives after strategic commitments have hardened.[41]

It is important to add what SEA is not. It is not a veto on development. Nor is it a duplicative burden that simply repeats project EIA at a larger scale. Properly designed, SEA reduces conflict and improves efficiency by identifying unsuitable pathways early, narrowing later disputes, and giving project EIAs a better strategic baseline. A project-level EIA is more

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[38] Government of Canada, supra note 17, §§ 4.1.2–4.2.8; Directive 2001/42/EC, supra note 5, Annex I.
[39] Directive 2001/42/EC, supra note 5, arts. 5 & 8.
[40] The Environmental Assessment of Plans and Programmes Regulations 2004, supra note 15, regs. 12–17; Government of Canada, supra note 17, § 5.
[41] Hanuman Laxman Aroskar, (2019) 15 SCC 401; Alembic Pharmaceuticals Ltd., Civil Appeal No. 1526 of 2016.

meaningful, not less, when it is nested within a prior strategic assessment of the basin, corridor, region, or master plan to which the project belongs.[42]

8. A BLUEPRINT FOR REFORM

India could introduce SEA through either a standalone statute or delegated legislation under the Environment (Protection) Act, 1986. The second route may be administratively quicker, but whichever route is chosen, the reform should contain several minimum elements.

8.1 Scope and trigger

SEA should be mandatory for identified classes of policies, plans and programmes prepared or adopted by public authorities and likely to have significant environmental effects. At a minimum, the law should cover land-use and master plans, river-basin and water allocation plans, transport corridors, energy and transmission plans, tourism plans for ecologically sensitive regions, industrial area and mining plans, coastal and island development plans, and large-scale sectoral policies that set the framework for future project approvals.[43]

The trigger must be functional rather than semantic. If an instrument materially structures later development consent, it should not escape SEA merely because it is called a "strategy," "mission," "scheme," or "vision document."

8.2 Core process requirements

The statute or rules should require: (i) screening; (ii) scoping in consultation with designated expert bodies; (iii) preparation of an environmental report; (iv) assessment of reasonable alternatives, including a no-action alternative; (v) evaluation of cumulative, indirect, climate, biodiversity, and disaster-risk impacts; (vi) consultation with affected communities, local authorities, and sectoral regulators; (vii) a reasoned decision explaining how environmental considerations and consultation outcomes were taken into account; and (viii) post-adoption monitoring.[44]

These elements should not be left to executive discretion in the form of informal office memoranda. They should be codified, time-bound, and judicially reviewable.

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[42] OECD, supra note 3; Tetlow & Hanusch, supra note 3.
[43] Directive 2001/42/EC, supra note 5, art. 3; Environmental Assessment (Scotland) Act 2005, supra note 16, §§ 4–5.
[44] Directive 2001/42/EC, supra note 5, arts. 5–10; Government of Canada, supra note 17, §§ 4–5.

8.3 Institutional architecture

India should create specialised SEA cells at the Union and State levels, supported by interdisciplinary expert rosters including ecology, hydrology, biodiversity, climate science, public health, land-use planning, and social impact expertise. The existing project-clearance architecture is not designed to shoulder the full burden of strategic assessment. SEA needs planning-oriented expertise, not merely project appraisal expertise.[45]

An open digital repository should host scoping papers, environmental reports, consultation responses, post-adoption statements, and monitoring reports. A legal duty to maintain a public record would directly support the values of transparency and participation already endorsed by the Supreme Court.

8.4 Relationship with project EIA

The law should expressly provide that SEA complements but does not displace project-level EIA. However, downstream project appraisal should be required to engage with the findings of any prior SEA. If a project departs from a strategic assessment, the reasons should be expressly recorded. This would prevent the current pattern in which strategic studies, when they exist at all, are treated as advisory background rather than binding inputs into later approvals.[46]

8.5 Review and remedies

Given India's existing environmental adjudicatory structure, challenges to SEA compliance could be brought before the National Green Tribunal where the matter concerns implementation under environmental law, with constitutional review remaining available before the High Courts and the Supreme Court where appropriate. Effective remedies must include the power to suspend adoption of covered plans, require further assessment, direct consultation, or order revised monitoring where statutory obligations have been ignored.[47]

9. CONCLUSION

India does not lack environmental principles. It lacks a sufficiently upstream procedural framework to apply them where they matter most. Sustainable development, precaution, public

[45] Lafarge Umiam Mining Pvt. Ltd., (2011) 7 SCC 338; OECD, supra note 3.
[46] Mukherjee & Rajvanshi, supra note 4; World Bank, supra note 35.
[47] National Green Tribunal Act, No. 19 of 2010, Gazette of India, Extraordinary, pt. II sec. 1 (June 2, 2010).

participation, intergenerational equity, and environmental rule of law all point toward a more strategic form of environmental assessment than the present project-centric regime can provide.

The Indian experience already demonstrates both the need for and the feasibility of SEA. Hydropower planning in fragile mountain ecologies, corridor-level transport development, and urban master planning all show that environmentally significant choices are made before project EIA begins. Comparative experience from the European Union, the United Kingdom and Scotland, and Canada shows that SEA can be designed as a routine and legally manageable process. Indian case law, from *Vellore* to *Alembic*, supplies the jurisprudential basis for insisting that environmental analysis be prior, expert, transparent, and meaningful.

The central claim of this article is therefore modest but urgent: SEA should become a binding part of Indian environmental law. If environmental law is to be more than a late-stage clearance ritual, it must enter the room when strategic decisions are first made. That is the institutional promise of SEA, and it is a promise India can no longer afford to postpone.

CONSTITUTIONALITY OF THE GOVERNMENT FACT CHECK UNIT: FREE SPEECH AND INTERMEDIARY LIABILITY UNDER INDIA'S IT RULES

-Azhar Ahmad[1] & Megha Kataria[2]

ABSTRACT

The rise of misinformation, disinformation, and fabricated media in digital spaces has encouraged democratic states to adopt regulatory mechanisms to secure the integrity of public discourse online. In 2023, as a response to these challenges, India amended the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 by introducing a government-designated Fact Check Unit (hereinafter referred to as the FCU), which is authorized to identify online content concerning 'government business' as 'false or fake or misleading'. This article examines the constitutional validity of the FCU mechanism, with particular reference to Article 19(1)(a), and determines whether vesting of the authority to identify and suppress allegedly false information with the executive, is compatible with the protection given under Part III of the Constitution of India. This work adopts a doctrinal and analytical legal research methodology based on an exhaustive examination of statutory provisions, delegated legislation, constitutional law, and legal doctrines, including chilling effect, natural justice, and proportionality. It concludes that the FCU mechanism is unconstitutional, since it fails the five-pronged proportionality test, is marked by incurable procedural and substantive law defects, and confers excessive authority upon the executive to determine truth. Such a framework violates free speech and expression, weakens democratic accountability, and erodes the principle of the rule of law and the marketplace of ideas.

Keywords: *Constitutional Law, Freedom of Speech & Expression, Intermediary Liability, Government Fact-Check Unit, Information Technology Rules.*

1. INTRODUCTION

The clash between the State's legitimate interest in controlling misinformation and the citizen's fundamental right to free speech continues to define constitutional and regulatory debates in the digital era.[3] The rise of social media platforms, search engines, and digital

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[1] PhD Scholar, National Law University, Delhi
[2] PhD Scholar, National Law University, Delhi
[3] Sejal Sharma, *Fake News a 'Serious Threat to Democracy', Govt Taking Steps to Tighten Rules: Vaishnaw*, HINDUSTAN TIMES (Dec. 3, 2025, 7:01 PM IST), https://www.hindustantimes.com/india-news/fake-news-a-

intermediaries has democratised access to information dissemination and encouraged unprecedented civic engagement.[4] Nevertheless, the same technological architecture has also intensified the spread of falsehoods, posing tangible dangers to public order, electoral integrity, and democratic stability worldwide.[5]

In response to this escalating crisis, the Indian Ministry of Electronics and Information Technology (MeitY) notified the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023 (hereinafter referred to as the IT Amendment Rules 2023), under the Information Technology Act, 2000 (hereinafter referred to as the IT Act).[6] The major issue within this amendment is the insertion of Rule 3(1)(b)(v). This Rule makes radical alterations to the intermediary compliance landscape. It requires intermediaries *"to make reasonable efforts by itself to ensure"* that its users *"do not host, display, upload, modify, publish, transmit, store, update, or share"* information which, *"in respect of any business of the Central Government",* is identified as *"fake or false or misleading by such fact check unit of the Central Government"* as the Ministry may specify by an Official Gazette notification.[7]

The government, thus, appoints a Fact Check Unit (hereinafter referred to as the FCU), and non-compliance with the directions of which leads to the intermediary being treated as having failed to meet its due diligence obligations and subsequently losing the safe harbour protection.[8] The amendment establishes the FCU as a '*Ministry of Truth*'[9] in the sense that it becomes the final authority determining what content concerning the Union government may be published or circulated online in India. The FCU established under the Press Information Bureau (hereinafter referred to as the PIB), which had been operational since November 2019 to counter misinformation relating to government policies and initiatives, and formally

serious-threat-to-democracy-govt-moves-to-tighten-rules-vaishnaw-101764768690270.html (last visited Apr. 23, 2026).

4 Alex O. Acheampong & John Taden, *Does Social Media Penetration Enhance Democratic Institutions? Evidence from Varieties of Democracy Data*, 178 SOC. INDIC. RES. 987, 988 (2025).

5 Iztiar Castello et al., *Social Media are a Threat for Democracy! A Political Perspective for Analyzing and Diminishing Harm*, J. MGMT. STUD. 1, 2 (2025).

6 Ministry of Electronics & Information Technology, *Government notifies amendments to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, (India),* https://www.pib.gov.in/PressReleasePage.aspx?PRID=1914433&reg=3&lang=2 (last visited Apr. 23, 2026).

7 The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 3(1)(b)(v) (as amended Apr. 6, 2023) (India).

8 The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 7 (India).

9 GEORGE ORWELL, 1984 12 (Arcturus 2013).

assumed the role of the Central Government's designated fact-checking body pursuant to a Gazette Notification by the Ministry.[10]

The constitutional issue that arises from this amendment is whether the executive branch, acting entirely through subordinate legislation, can legitimately constitute itself as the sole and final judge of the truthfulness of information concerning its own affairs. The IT Amendment Rules 2023 were challenged on the ground of being violative of the fundamental freedom of speech and expression in *Kunal Kamra v. Union of India,*[11] before the Hon'ble High Court of Bombay and subsequently before the Hon'ble Supreme Court of India.[12] The Hon'ble Supreme Court of India, in *Romesh Thappar v. State of Madras,*[13] observed that Article 19(1)(a) constitutes the essential basis upon which every democratic society is built. It warned that broad executive powers wielded in the name of maintaining 'public safety' or 'public order' cannot become a legal reason for curbing legitimate political dissent and robust civic debate. From time to time, Article 19(1)(a) has been challenged and curbed by the government and has been settled by the Hon'ble Supreme Court clarifying its importance.[14] The establishment of a government-controlled FCU under the amendment gives rise to similar apprehension that it may be used to suppress dissenting viewpoints, thereby weakening democratic pluralism and moving away from the constitutional values of inclusivity and free expression.

2. THE MARKETPLACE OF IDEAS AND THE STATE AS ARBITER

To systematically evaluate the constitutional feasibility of the FCU, we must first understand the jurisprudential and philosophical basis of freedom guaranteed under Article

[10] PTI, *Govt Notifies Fact-Checking Unit Under PIB to Check Fake News, Misinformation Related to Centre,* ECO. TIMES (Mar. 20, 2024), https://economictimes.indiatimes.com/tech/technology/govt-notifies-fact-checking-unit-under-pib-to-check-fake-news-misinformation-related-to-centre/articleshow/108653787.cms (last visited Apr. 13, 2026).

[11] *Kunal Kamra v. Union of India,* 2024 SCC OnLine BOM 3984 (Patel, J.) (India); *Kunal Kamra v. Union of India,* 2024 SCC OnLine Bom 360 (Gokhale, J.) (India); *Kunal Kamra v. Union of India,* 2024 SCC OnLine Bom 3025 (Chandurkar, J.) (India); *Kunal Kamra v. Union of India,* 2024 SCC OnLine Bom 3086 (Gadkari & Gokhale, JJ.) (India).

[12] *Editors Guild of India v. Union of India,* 2024 SCC OnLine SC 1537 (India).

[13] *Romesh Thappar v. State of Madras,* AIR 1950 SC 124 (India).

[14] *Brij Bhushan v. State of Delhi,* AIR 1950 SC 129 (India); *Express Newspapers (P) Ltd. v. Union of India,* AIR 1958 SC 578 (India); *Sakal Papers (P) Ltd. v. Union of India,* AIR 1962 SC 305 (India); *Bennett Coleman & Co. v. Union of India,* AIR 1973 SC 106 (India); *K.A. Abbas v. Union of India,* AIR 1971 SC 481 (India); *S. Rangarajan v. P. Jagjivan Ram,* AIR 1989 SC 149 (India); *Shreya Singhal v. Union of India,* AIR 2015 SC 1523 (India); *Subramanian Swamy v. Union of India,* AIR 2016 SC 2728 (India); *Anuradha Bhasin v. Union of India,* AIR 2020 SC 1308 (India).

19(1)(a) of the Indian Constitution. The protection of speech is not only a personal freedom, but also an essential structural requirement for democratic self-governance.[15]

According to the marketplace theory of ideas, competing viewpoints should be permitted to circulate and contend freely without governmental interference, except in emergency conditions.[16] It traces its intellectual heritage to John Milton's seminal 1644 tract *Areopagitica* and was later formalized by John Stuart Mill in his 1859 philosophical treatise *On Liberty*.[17] Mill argued forcefully against state censorship. He argued that inherent human fallibility means that no single entity, least of all the State, possesses absolute or infallible truth. Mill asserted that no one idea alone embodies the truth, and that the suppression of an idea deprives society of the chance to replace error with truth, or to achieve a more refined understanding of truth that emerges through its confrontation with opposing viewpoints.[18]

This utilitarian philosophy of Mill was integrated into legal doctrine in *Abrams v. United States*[19] by Hon'ble Justice Oliver Wendell Holmes in his dissenting opinion. Hon'ble Justice Holmes established the influential principle that society's search for truth is best served through an unrestricted exchange of ideas, where the most reliable indicator of truth is its ability to prevail through open intellectual competition.[20]

During British colonial rule in India (1858-1947), the colonial administration imposed several restrictions on free speech and expression. These included legal controls relating to sedition, contempt of court, defamation, and speech considered to promote hostility or hatred.[21] The requirement of the Vernacular Press Act, 1878, was to obtain prior licensing from the British Government, with the objective of curbing the publication of anti-colonial or critical views.[22] Similarly, the Indian Sedition Act, 1870, criminalised expressions deemed to incite disaffection against the British government. In practice, it was frequently employed to restrict political dissent and suppress criticism of colonial authority.[23] The requirement for printers and publishers under the Press and Registration of Books Act, 1867, was to register their

[15] 1 H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 491 (3rd ed. 1983).
[16] Dawn Carla Nunziato, *The Marketplace of Ideas Online,* 94 NOTRE DAME L. REV. 1519, 1526 (2019).
[17] John Durham Peters, *The Marketplace of Ideas*, in TOWARD A POLITICAL ECONOMY OF CULTURE: CAPITALISM AND COMMUNICATION IN THE TWENTY-FIRST CENTURY 67 (Andrew Calabrese & Colin Sparks eds., 2004).
[18] JOHN STUART MILL, ON LIBERTY (Longman, Roberts & Green 1869), reprinted at Bartleby.com (1999).
[19] *Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
[20] Dawn Carla Nunziato, *supra* note 16, at 1520.
[21] ABHINAV CHANDRACHUD, REPUBLIC OF RHETORIC: FREE SPEECH AND THE CONSTITUTION OF INDIA 13 (Penguin Books 2017).
[22] D.D. BASU, LAW OF THE PRESS 262 (Justice B.P. Banerjee & Vepa P. Sarathi eds. 4th ed. Wadhwa 2002).
[23] Indian Penal Code, 1860, § 124A (India).

publications with the British government, disclose ownership details, and furnish copies to authorities, thereby enabling official monitoring and indirect control over the press.[24]

Even after the end of colonial rule in 1947, certain restrictive legal frameworks continued to be invoked in independent India, which has sustained ongoing debates on the appropriate balance between individual freedom of speech and expression and legitimate state interests. Under colonial governance, freedom of speech and the right to dissent were often viewed as threats to authority, leading to the imposition of stringent controls on expression. In the Constituent Assembly debates, despite opposition from some members, provisions relating to sedition were retained within the constitutional framework at the time.[25] The Indian Constitution makers dealt with three questions in relation to freedom of speech and expression, namely extension to citizens, the extent and nature of protections to the press, and the scope and permissible limits of restrictions on the right.[26]

While quoting from the case of *Gitlow v. New York*,[27] Dr. Ambedkar said in one of the Constituent Assembly debates, "*the freedom of speech and the press does not confer an absolute right to speak or publish without responsibility*".[28] The central challenge for both the legislature and the judiciary in a democratic order lies in striking an appropriate balance between safeguarding freedom of speech and expression on the one hand, and preventing its misuse in a manner that causes harm or encroaches upon the rights of others on the other. The Indian Constitution contains restrictions that can be imposed on Article 19(1)(a) on the grounds of *"(i) sovereignty and integrity of India, (ii) the security of the State, (iii) friendly relations with foreign states, (iv) public order, (v) decency or morality, (vi) contempt of court, (vii) defamation, (viii) incitement to an offence"*.[29] The jurisprudence on freedom of speech and expression under Article 19(1)(a) in India initially developed in a strongly libertarian direction, as seen in *Romesh Thappar*[30] and *Brij Bhushan,*[31] where the Hon'ble Supreme Court invalidated restrictions on the press and held that 'public order' was not a permissible ground under Article 19(2) as originally framed, thereby significantly limiting State control over

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[24] The Press & Registration of Books Act, 1867 §§ 3 & 5 (India).
[25] James Chiriyankandath, *Creating a Secular State in a Religious Country: The Debate in the Indian Constituent Assembly,* 38 J. COMMONWEALTH & COMPAR. POL. (No. 2) (2000).
[26] Constituent Assembly Debates, Dec. 7, 1948, speech of Damodar Swarup Seth, https://eparlib.nic.in/bitstream/123456789/762993/1/cad_07-12-1948.pdf. (last visited Apr. 15, 2026).
[27] *Gitlow v. New York,* 268 U.S. 652 (1925).
[28] Constitutional Assembly Debates, Nov. 4, 1948, https://www.constitutionofindia.net/debates/04-nov-1948/ (last visited Apr. 12, 2026).
[29] INDIA CONST. art. 19, cl. 2.
[30] *Romesh Thappar v. State of Madras,* AIR 1950 SC 124 (India).
[31] *Brij Bhushan v. State of Delhi,* AIR 1950 SC 129 (India).

speech. This judicial approach prompted the enactment of the First Constitutional Amendment Act, 1951, which introduced the concept of 'reasonable restrictions' and expanded the grounds under Article 19(2) to include 'public order'.[32]

After the amendment, the court recognised the State's regulatory power while also zealously protecting freedom of press. In *Express Newspapers (P) Ltd. v. Union of India*,[33] the court held that press freedom cannot be curtailed through indirect measures such as excessive regulation of working conditions. Similarly, in *Sakal Papers (P) Ltd.,*[34] it invalidated economic controls that restricted circulation, emphasizing the importance of freedom of speech in democracy. The scope of permissible restrictions was further clarified in *Kedar Nath Singh,*[35] upholding the constitutional validity of the sedition law. In *Bennett Coleman & Co.*,[36] the court firmly recognised that freedom of the press covers both publication content and its circulation. It held that restrictions imposed through the newsprint policy violated not only the rights of publishers but also the public's right to receive information. This line of reasoning was further strengthened in *Indian Express Newspapers v. Union of India,*[37] where fiscal measures affecting the press were subjected to strict scrutiny. The court expanded the conceptual ambit of free speech in *Secretary, Ministry of I&B*,[38] recognizing that Article 19(1)(a) includes the right to receive and disseminate information through electronic media, and that airwaves are public property.

In the digital era, the Hon'ble Supreme Court further refined protection of speech and expression in *Shreya Singhal,*[39] by invalidating Section 66A of the IT Act, 2000, holding that the law was vague and excessively broad. Later, in *Anuradha Bhasin*,[40] the court recognized that internet access is closely connected to Article 19(1)(a), bringing constitutional safeguards into the online space.

Looking from this perspective, the challenge to the IT Amendment Rules 2023 in *Kunal Kamra v. Union of India*[41] raises an important constitutional concern. By giving a government FCU the authority to decide what information about 'government business' is 'fake or false or

[32] The Constitution (First Amendment) Act, 1951.
[33] *Express Newspapers (P) Ltd. v. Union of India,* AIR 1958 SC 578 (India).
[34] *Sakal Papers (P) Ltd. v. Union of India,* AIR 1962 SC 305 (India).
[35] *Kedar Nath Singh v. State of Bihar,* AIR 1962 SC 955 (India).
[36] *Bennett Coleman & Co. v. Union of India,* (1973) 2 SCC 788 (India).
[37] *Indian Express Newspapers v. Union of India,* (1985) 1 SCC 641 (India).
[38] *Secretary, Ministry of I&B v. Cricket Association of Bengal,* (1995) 2 SCC 161 (India).
[39] *Shreya Singhal v. Union of India,* (2015) 5 SCC 1 (India).
[40] *Anuradha Bhasin v. Union of India,* (2020) 3 SCC 637 (India).
[41] *Kunal Kamra v. Union of India,* 2024 SCC OnLine Bom 3086 (India).

misleading', the State effectively places itself in the position of deciding what is true. This creates a risk to the free flow of ideas and may silence legitimate criticism, satire, and dissent.

The judgments have again and again shown us that Article 19(1)(a) can be restricted only through the restrictions mentioned in Article 19(2). Therefore, to effectively curb the freedom of speech and expression, the IT Amendment Rules, 2023 must fall within the restrictions mentioned in Article 19(2). If not, then it would amount to being *ultra vires* the Constitution. In the following sections, we will analyze whether curbing freedom of speech and expression by the government's FCU by declaring the content on social media platforms[42] as fake, false, or misleading with respect to 'government business' falls within the ambit of restrictions mentioned in Article 19(2) or not?

3. INTERMEDIARY LIABILITY: DISRUPTION BY THE IT AMENDMENT RULES 2023

When the IT Act was initially enacted in 2000, its primary objective was to provide legal recognition for electronic commerce and to facilitate electronic data interchange, giving effect to a resolution of the UN General Assembly.[43] At that nascent stage of the internet, Section 79 offered a rudimentary and somewhat ambiguous shield for network service providers. It stipulated that *"an intermediary would not be liable for third-party information if they could prove that the offence was committed without their knowledge or that they exercised due diligence to prevent the commission of such offences"*.[44] This placed a heavy burden of proof on the intermediaries, creating an environment of legal uncertainty. The exponential global growth of e-commerce, user-generated content platforms, and social media necessitated a much more robust and predictable legal framework. The Information Technology (Amendment) Act, 2008, significantly revised Section 79 by introducing a conditional safe harbour regime for intermediaries. Under Section 79(1), intermediaries were granted immunity from liability for third-party content hosted on their platforms. This protection, however, depended on their remaining neutral channels under Section 79(2), meaning they could not initiate transmission, select the receiver, or alter the content. Section 79(3)(b) further created a 'notice-and-takedown' mechanism, under which immunity could be lost if an intermediary,

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[42] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 2(1)(w) (India). *"Social media intermediary means an intermediary which primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services."*
[43] The Information Technology Act, 2000, pmbl. (India).
[44] The Information Technology Act, 2000, § 79 (India).

after receiving ‘actual knowledge’ or notice from the government, failed to promptly remove unlawful material.[45]

The term ‘actual knowledge’ became a matter of dispute regarding free speech, and platforms received many takedown requests from private persons; due to the risk of losing immunity, platforms often removed lawful content without judicial scrutiny, leading to widespread over-censorship. This issue was dealt with by the Hon’ble Supreme Court of India in *Shreya Singhal v. Union of India*,[46] which was initially triggered by the arrest of two young women under Section 66A of the IT Act[47] for posting and ‘liking’ a harmless comment on Facebook regarding a political strike. Section 66A of the IT Act was declared unconstitutional and violative of Article 19(1)(a) by finding the provision to be vague.[48] This case also dealt with intermediary liability under Section 79 of the IT Act. The court opined, by applying the doctrine of ‘reading down,’[49]that compelling private intermediaries to act as proactive arbiters of legality based on private complaints would lead to over-censorship. ‘Actual knowledge’ under Section 79(3)(b) must mean knowledge obtained exclusively via a court order or a direct notification from an agency of government authorized strictly under the parameters of Article 19(2) of the Constitution. This judgment prohibited intermediaries from independently determining the legality of speech, protecting the free flow of information while ensuring illegal content could still be managed through proper legal channels.

The IT Amendment Rules 2023, however, disturb the equilibrium established by *Shreya Singhal,* while the government claims it is necessary to restrict deepfakes and disinformation. The amendment modifies the core due diligence requirements that intermediaries must fulfill to retain their Section 79 safe harbour. Specifically, Rule 3(1)(b) requires intermediaries to inform users of rules and make reasonable efforts to prevent them from hosting or sharing prohibited content. A key addition is sub-clause (v), which bars content that misleads users about the origin of a message, spreads knowingly false information, or, regarding Central Government business, is declared fake, false, or misleading by the

[45] The Information Technology (Amendment) Act, 2008 (India).
[46] *Shreya Singhal v. Union of India,* (2015) 5 SCC 1 (India).
[47] The Information Technology Act, 2000, § 66A (India) (struck down in *Shreya Singhal v. Union of India*, (2015) 5 SCC 1).
[48] Abhinav K. Shukla, *Shreya Singhal v. Union of India: A Critical Analysis,* THE SOC’Y FOR CONST. L. DISCUSSION (Apr. 10, 2024), https://www.tscld.com/shreya-singhal-v-union-of-india-a-critical-analysis. (last visited Apr. 12, 2026).
[49] *The doctrine of reading down allows courts to interpret a law narrowly when its literal meaning may violate the Constitution. Instead of striking it down, courts limit its scope to preserve the law while protecting fundamental rights.*

Government's fact-check unit.[50] The IT Amendment Rules 2023 grant the FCU the unilateral authority to flag content merely because it relates to 'government business' and is deemed 'false' or 'fake' or 'misleading' by it.[51] Now the intermediary is placed under a statutory obligation to make 'reasonable efforts' not to host it, and if it does, it is deemed to have failed its due diligence obligations, resulting in the automatic forfeiture of its Section 79 safe harbour protection.[52] This is, plainly put, coercion employed on intermediaries to act at the government's will.

The IT Amendment Rules 2023 were challenged in *Kunal Kamra*, and a division bench of the Hon'ble High Court of Bombay delivered differing opinions. Hon'ble Justice G.S. Patel opined that the amendment is unconstitutional and invalidated the IT Amendment Rules 2023 by observing that the Rules allowed the government to be the sole judge of truth regarding its own affairs.[53] He clearly noted that the vulnerability of social media intermediaries to the loss of safe harbour under Section 79 would lead to proactive censorship, allowing the government to become the final arbiter of opposing viewpoints.[54] Conversely, Hon'ble Justice Dr. Neela Gokhale dissented, holding that the challenge was premature and based on unfounded apprehensions of potential misuse rather than actual evidence. She viewed the rule as merely providing a mechanism for identifying misinformation, asserting that it did not automatically deprive intermediaries of safe harbour on grounds beyond Article 19(2), and argued that the mechanism included sufficient safeguards.[55]

Due to the split verdict, the matter was referred to a third judge. However, before the tie-breaker could be decided, the Union Government moved to operationalize the FCU. In March 2024, a bench of the Hon'ble Supreme Court led by Hon'ble Chief Justice D.Y. Chandrachud intervened, placing a stay on the notification establishing the FCU until the Hon'ble High Court of Bombay reached a final determination, acknowledging the serious constitutional questions regarding free speech at play.[56] In September 2024, Hon'ble Justice A.S. Chandurkar delivered the tie-breaker judgment, definitively concurring with Hon'ble

[50] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 3(1)(b)(v) (as amended Apr. 6, 2023) (India).
[51] Anmol Jain, *The Bombay High Court Dismisses the Ministry of Truth*, VERFASSUNGSBLOG (Oct. 8, 2024), https://verfassungsblog.de/india-fact-checking-unit-fake-news/. (last visited Apr. 20, 2026).
[52] The Information Technology Act, 2000, § 79 (India).
[53] Bhavya Solanki & Sanchita Makhija, *Fact-check Units: An Unchecked Fact Checker – Part II,* MAJMUDAR & PARTNERS (Oct. 28, 2024), https://www.majmudarindia.com/fact-check-units-part-ii/ (last visited Apr. 20, 2026).
[54] *Kunal Kamra v. Union of India,* 2024 SCC OnLine BOM 3984 (Patel, J.) (India).
[55] *Kunal Kamra v. Union of India,* 2024 SCC OnLine Bom 360 (Gokhale, J.) (India).
[56] *Editors Guild of India v. Union of India,* 2024 SCC OnLine SC 1537 (India).

Justice Patel's opinion and declaring the IT Amendment Rules 2023 as unconstitutional. Hon'ble Justice Chandurkar dismantled the arguments supporting the Rules, holding that the Rules contravened Articles 14, 19(1)(a), and 19(1)(g).[57] He emphasized the profound chilling effect caused by the Rule's vagueness and the lack of procedural safeguards, while also noting that the FCU acted as a 'judge in its own cause' contrary to the principles of natural justice established in cases like *A.K. Kraipak.*[58] Crucially, he confirmed that the rule was *ultra vires* Section 87 of the IT Act, and finally, on the basis of a concurring opinion of two Judges, the rule was declared unconstitutional.[59] It was, thereafter, appealed before the Hon'ble Supreme Court by the Union of India. It is still pending, but the court refused to stay the Hon'ble High Court of Bombay's judgment striking down the IT Amendment Rules 2023. During the proceedings, the court observed that while misinformation is dangerous, regulatory frameworks require 'clearly defined safeguards', reflecting deep judicial skepticism toward unchecked executive power over digital speech.[60]

4. TESTING THE VIRES

4.1 Administrative Action and the *Ultra vires* Doctrine

The constitutional validity of the IT Amendment Rules 2023 rests heavily on the fundamental principles of administrative law, specifically the doctrine of *ultra vires*. It means that the subordinate or delegated legislation must strictly conform to the boundaries, objectives, and scope drawn by the parent statute. It implies that the rule-making powers given to the executive can't be expanded by it beyond what the legislature explicitly granted by the parent statute.[61]

The Central Government relied on Section 87 of the IT Act, particularly sub-sections (1), (2)(z), and (2)(zg), to frame the IT Amendment Rules 2023.[62] However, the Hon'ble Supreme Court in *Global Energy Ltd. v. Central Electricity Regulatory Commission*[63] made it clear that delegated legislation cannot go beyond the limits of the parent Act. The creation of the FCU as a new regulatory body with the power to label speech and direct takedowns,

[57] *Kunal Kamra v. Union of India,* 2024 SCC OnLine Bom 3025 (Chandurkar, J.) (India).
[58] *A.K. Kraipak v. Union of India,* AIR 1970 SC 150 (India).
[59] *Kunal Kamra v. Union of India,* 2024 SCC OnLine Bom 3086 (Gadkari & Gokhale, JJ.) (India).
[60] *Editors Guild of India v. Union of India,* 2024 SCC OnLine SC 1537 (India).
[61] 1 M.P. JAIN & S.N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW 122 (6th ed. LexisNexis 2007).
[62] The Information Technology Act, 2000, § 87 (India).
[63] *Global Energy Ltd. v. Central Electricity Regulatory Commission,* AIR 2009 SC 3194 (India).

therefore, appears to go beyond procedural rule-making. Instead, it affects substantive rights by giving the executive broad control over online expression.

In *Kunal Kamra v. Union of India,*[64] litigation before the Hon'ble Bombay High Court, the petitioners argued that the impugned Rule is *ultra vires* the IT Act, which is the parent Act. Hon'ble Justice G.S. Patel, in his exhaustive opinion, concurred with this assessment. He observed, in his judgment, that Section 87 does not authorize the executive to create a substantive law designating itself as the certifier of truth. Under Section 87(2)(zg), the Central Government cannot establish an FCU to determine information connected with the affairs of the government. What was intended by Parliament in the IT Act was mere procedural guidelines, not the creation of substantive law restricting speech beyond the frame of Article 19(2). Furthermore, the petitioners highlighted that the creation of a special protected class of 'government business' under the guise of intermediary guidelines seizes the essential legislative function, violating the doctrine of separation of powers described as early as *In re: Delhi Laws Act, 1912*.[65] In contrast, the government argued that the court could narrowly interpret the Rules to avoid unconstitutionality.

The government proposed three interpretative adjustments to the above-mentioned arguments:

4.1.1 ***Confining 'Information' to 'Facts':*** The government argued that the IT Amendment Rules 2023 only target verifiable 'facts', not opinions, satire, or critique.

4.1.2 ***Diluting Takedown Mandates with Disclaimers:*** The government suggested that intermediaries were not to be forced to take down content; they could merely issue a 'disclaimer' indicating the FCU had flagged the content as 'false'.

4.1.3 ***Removing 'Misleading':*** The government offered to ignore the subjective term 'misleading' and only enforce the rule against 'fake' or 'false' content.

These interpretative adjustments were thoroughly rejected by Hon'ble Justice Patel and the subsequent tie-breaker judge, Hon'ble Justice A.S. Chandurkar.[66]

4.2 Violation of Principle of Natural Justice

The constitutional framework of the Republic of India is secured by the 'Golden Triangle' of fundamental rights established in the landmark judgment of *Maneka Gandhi v.*

[64] *Kunal Kamra v. Union of India,* 2024 SCC OnLine BOM 3984 (Patel, J.) (India).
[65] *In re: Delhi Laws Act, 1912,* 1951 AIR 332 (India).
[66] *Kunal Kamra v. Union of India,* 2024 SCC OnLine Bom 3025 (Chandurkar, J.) (India).

Union of India,[67] mandating that *"any 'procedure established by law' must not be arbitrary, fanciful, or oppressive; rather, it must be just, fair, and reasonable, strictly adhering to the principles of natural justice".* The FCU mechanism represents a systematic and comprehensive violation of these foundational administrative tenets.

The Central Government is, invariably, the primary subject of the political, economic, and social news being fact-checked. The IT Amendment Rules 2023 violate the cardinal common law maxim *nemo judex in causa sua*[68] by empowering an executive unit under direct administrative control of the central government to adjudicate the truthfulness of news concerning its own business. In *State of Punjab v. Khan Chand*,[69] the Hon'ble Supreme Court struck down laws conferring uncontrolled power on the executive without guiding principles. The FCU enjoys unfettered discretion to interpret the expansive and manipulable phrase 'business of the Central Government', effectively protecting the state from critique in the name of combating misinformation, violating Article 14's guarantee against arbitrariness. The *Maneka Gandhi* judgment firmly established that even in administrative functions, the principles of natural justice must apply, ensuring individuals have a reasonable opportunity to present their case.[70] The IT Amendment Rules 2023 selectively target online speech while leaving offline speech unaffected, despite the potential harm caused by 'false or fake or misleading' statements being substantially similar across both mediums, which is also a violation of the right to equality by creating a discriminatory framework.

4.3 'Fake or false or misleading speech' not recognized as Valid Restriction under Article 19(2)

Restrictions on free speech are constitutionally permissible in India if, and only if, they fall within the exhaustive parameters of Article 19(2) of the Constitution. These eight exhaustive grounds are*: "the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, contempt of court, defamation, or incitement to an offence."*[71] However, the grounds which are provided by the IT Amendment Rules 2023, i.e., 'falsehood,' 'fake news,' 'misinformation,' or 'inaccuracies regarding government business' are absent from the grounds enumerated under Article 19(2).

[67] *Maneka Gandhi v. Union of India,* 1978 AIR 597 (India).
[68] PB Mukharji, *Administrative Law,* 1 J. INDIAN L. INST. 39, 40 (1958).
[69] *State of Punjab v. Khan Chand,* 1974 AIR 543 (India).
[70] *Maneka Gandhi v. Union of India,* 1978 AIR 597 (India).
[71] INDIA CONST. art. 19, cl. 2.

During the *Kunal Kamra* litigation, the Union had argued that 'false' information regarding government policies inevitably threatens 'public order' or 'state security', thereby justifying the IT Amendment Rules 2023 under existing constitutional exceptions. However, this generalized, hypothetical presumption fails the rigorous legal tests established by the Hon'ble Supreme Court over decades of judicial precedents. In *Superintendent, Central Prison, Fatehgarh*,[72] the Hon'ble Supreme Court laid down the stringent 'proximate connection' test. The court held that a legislative restriction must have a direct, proximate, and rational nexus to the specific grounds in Article 19(2); the anticipated harm cannot be remote, hypothetical, or far-fetched. The IT Amendment Rules 2023, however, automatically target fake news regarding 'government business' regardless of its actual, demonstrable impact on public order. For instance, a politically motivated but factually inaccurate critique of a new tax policy, or a satirical post mocking a government scheme, clearly falls under 'government business' and can be flagged by the FCU, resulting in a takedown. Yet, such a critique may pose absolutely no proximate threat to the 'security of the State' or 'public order'.

If the flagging grounds in the IT Amendment Rules 2023 are read in isolation from the stringent requirements of Article 19(2), then the Rules will open doors for the executive's unilateral determination of 'falsity' etc. It will amount to implicitly amending the Constitution by the back door, creating a ninth, unwritten ground for speech restriction. Hon'ble Justice Patel and Hon'ble Justice Chandurkar recognized this executive overreach and held that the State cannot forcibly determine speech to be true or false to force its non-publication on grounds that fall entirely outside the exhaustive list of Article 19(2).[73]

4.4 Indirect Censorship and the Absence of Proximate Nexus

In *Bennett Coleman & Co. v. Union of India*[74], the Hon'ble Supreme Court established that the 'direct impact' and 'inevitable consequence' of a state measure determine its constitutionality, regardless of the government's stated intent. The inevitable consequence of the FCU is the proactive removal of content by terrified intermediaries, constituting a pervasive environment of prior restraint that renders the digital marketplace of ideas sterile, homogenized, and subservient to the State. When the freedom of speech and expression is adversely affected, it results in something called the 'chilling effect'. It occurs when ambiguous

[72] *Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia,* 1960 AIR 633 (India).
[73] *Kunal Kamra v. Union of India,* 2024 SCC OnLine BOM 3984 (Patel, J.) (India); *Kunal Kamra v. Union of India,* 2024 SCC OnLine Bom 3025 (Chandurkar, J.) (India).
[74] *Bennett Coleman & Co. v. Union of India,* AIR 1973 SC 106 (India).

laws, broad regulations, or the threat of severe punitive action compel citizens to preemptively self-censor lawful speech to avoid legal or administrative harassment. In *Shreya Singhal,*[75] the Hon'ble Supreme Court relied on the doctrine of 'chilling effect' to strike down Section 66A of the IT Act, recognizing that vague laws create a marketplace of ideas less open to disagreement and debate.

Hon'ble Justice Chandurkar in *Kunal Kamra*[76], citing both *Shreya Singhal,*[77] and the internet shutdown case of *Anuradha Bhasin,*[78] reiterated the centrality of this principle in Indian law. The terms 'fake,' 'false,' and 'misleading', being left undefined by the IT Act or the IT Amendment Rules 2023, leave scope for unbridled subjectivity, granting the FCU unguided and arbitrary discretion. Citizens, journalists, and political satirists, keenly aware that their critiques of 'government business' could trigger an FCU flag resulting in immediate platform takedowns and loss of monetization, will inevitably dial back their commentary to avoid confrontation with the government.

4.5 The Proportionality Standard

Modern Indian constitutional jurisprudence reflects a growing reliance on the doctrine of proportionality as the principal test for assessing the legitimacy of State-imposed restrictions on fundamental rights. *"The doctrine of proportionality is a legal standard used by courts to assess whether a State action that restricts a fundamental right is justified."*[79] In *Justice K. S. Puttaswamy,*[80] the Hon'ble Supreme Court laid down the proportionality test as the governing standard for resolving cases involving competing rights, and it was further refined in *Gujarat Mazdoor Sabha v. State of Gujarat*,[81] providing an analytical framework to prevent state overreach.

Applying the five-part proportionality test *(as per the Gujarat Mazdoor Sabha Case)* to the IT Amendment Rules 2023 shows serious constitutional problems. Although controlling misinformation may be a valid aim, protecting the government from criticism is not. Since the Rules focus on content related to 'government business', they risk being used to silence criticism rather than address genuine falsehoods. The FCU, being under executive control, also

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[75] *Shreya Singhal v. Union of India,* (2015) 5 SCC 1 (India).
[76] *Kunal Kamra v. Union of India,* 2024 SCC OnLine Bom 3025 (Chandurkar, J.) (India).
[77] *Shreya Singhal v. Union of India,* (2015) 5 SCC 1 (India).
[78] *Anuradha Bhasin v. Union of India,* AIR 2020 SC 1308 (India).
[79] 2 SAMARADITYA PAL & DEEPAN KUMAR SARKAR, INDIA'S CONSTITUTION ORIGINS AND EVOLUTION 241 (LexisNexis 1st ed. 2015).
[80] *K.S. Puttaswamy v. Union of India,* 2017 10 SCC 1 (India).
[81] *Gujarat Mazdoor Sabha v. State of Gujarat,* AIR 2020 SC 4601 (India).

lacks independence. A government body deciding the truth of claims about itself raises clear concerns of bias and unfairness.

The Rules are also more restrictive than necessary, as less harmful alternatives already exist, such as official clarifications, release of accurate information, and public responses. Instead, the IT Amendment Rules 2023 pressure intermediaries through the threat of losing safe harbour protection. Any benefit from reducing misinformation is outweighed by the harm caused to free speech, press freedom, and open democratic debate. The absence of safeguards like hearings, reasoned decisions, and an independent appeal process further increases the risk of arbitrary action. Therefore, the FCU mechanism fails the proportionality test too.

5. COMPARATIVE JURISPRUDENCE: GLOBAL APPROACHES TO MISINFORMATION AND JAWBONING

The constitutional concerns arising from the IT Amendment Rules 2023, particularly the creation of FCU, can be better understood by comparing how other countries regulate misinformation.

5.1 Government Pressure and Private Platform Censorship: Lessons from the US

The use of indirect government pressure on private digital platforms to censor content that the State cannot directly suppress is a global issue. In the United States, this is debated under the First Amendment doctrine of 'jawboning',[82] where officials use influence or pressure to shape private decisions.[83] In *Bantam Books v. Sullivan*,[84] the Hon'ble Supreme Court of the United States (hereinafter referred to as the SCOTUS) held that letters sent by a state commission urging booksellers not to sell 'objectionable' books amounted to unconstitutional censorship because they implied threats of prosecution. More recently, in *NRA v. Vullo*,[85] the SCOTUS clarified the line between lawful persuasion and unlawful coercion, holding that government communication becomes unconstitutional when it carries threats of adverse action to suppress speech.

The issue of jawboning was also highlighted in *Murthy v. Missouri*.[86] The plaintiffs argued that the Biden administration pressured social media platforms to remove content on

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[82] *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963).
[83] Jawboning, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/jawboning (last visited Apr. 22, 2026).
[84] *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963).
[85] *NRA v. Vullo,* 602 U.S. 175 (2024).
[86] *Murthy v. Missouri,* 219 L.Ed.2d 604, 144 S.Ct. 1972 (2024).

COVID-19, vaccines, and elections. Although a lower court found coercion, the SCOTUS dismissed the case on procedural grounds, saying there was no clear proof linking government pressure to specific removals. In dissent, Hon'ble Justice Samuel Alito called it a covert form of censorship. The case shows how hard it is to prove informal government censorship through private emails, calls, and back-channel pressure.

However, the IT Amendment Rules 2023 remove this evidentiary hurdle by formally legalising the jawboning process. Under the standards laid down in *Bantam Books* and *Vullo*, the Indian framework would clearly amount to unlawful coercion, as the State uses its regulatory power over intermediaries to indirectly suppress third-party speech. By using subordinate legislation to formalise jawboning, the Indian executive makes traceability requirements clear and creates a system of forced compliance that removes platforms' independent editorial discretion over content critical of the government.

5.2 Systemic Risk over Content Removal: The EU's DSA and UK's OSA

Both the European Union's Digital Services Act 2022 (hereinafter referred to as DSA) and the United Kingdom's Online Safety Act (hereinafter referred to as OSA) share the goal of creating safer online spaces, but they are different from the Indian model of FCU. The DSA deliberately avoids appointing an executive 'Ministry of Truth'. Instead of forcing platforms to remove specific posts based on a government fact-checker, the DSA compels Very Large Online Platforms to conduct rigorous systemic risk assessments. Platforms must analyze how their own algorithmic recommender systems amplify disinformation and implement structural risk mitigation strategies.[87] While the DSA addresses 'illegal content', it leaves the definition of illegality to established national laws rather than creating broad new categories of executive-defined 'fake news'.

Similarly, the UK's OSA instead focuses on procedural accountability by requiring platforms to implement complaints mechanisms tied to compliance with their own terms of service,[88] rather than empowering the State to determine the truthfulness of political speech. Both regimes prioritize transparency, accountability, and systemic design over the micromanagement of individual user posts, thereby preserving the platforms' editorial independence and the users' free-speech rights while addressing the root cause of algorithmic amplification.

[87] Digital Services Act, Regulation (EU) 2022/2065, art. 34 (EU).
[88] Online Safety Act 2023, c. 50, § 72 (U.K.).

5.3 Singapore's POFMA: Corrective Orders and Free Speech Concerns

Singapore's Protection from Online Falsehoods and Manipulation Act 2019 (hereinafter referred to as the POFMA) is often compared with India's framework as a model for tackling fake news. However, important differences show how far more extreme the Indian IT Amendment Rules 2023 are. Under POFMA, government ministers can issue Correction Directions (hereinafter referred to as the CDs) against statements they believe are false.[89] In *The Online Citizen Pte Ltd v. Attorney-General*,[90] the Hon'ble Singapore Court of Appeal created a clear five-step test to examine the validity of such orders. The court held that a CD generally does not restrict free speech under Article 14 of the Singapore Constitution, because a CD merely forces the speaker or platform to append a government notice, which is more in the form of a correction to their post rather than a takedown. While POFMA has been rightly criticized by human rights advocates for placing the burden of proof on the statement-maker to prove the truth of their statement during an appeal, the IT Amendment Rules 2023 are vastly more draconian.

6. CONCLUSION AND SUGGESTIONS

The constitutional challenge to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023 is a defining moment for Indian democracy and free speech in the digital age. The attempt to create a government-designated Fact Check Unit reflects administrative overreach and raises serious constitutional concerns.[91]

According to the *Reporters Without Borders World Press Freedom Index* (2024/2025), India ranks 151st out of 180 countries in press freedom,[92] reflecting growing concerns over regulatory pressure, misuse of laws, and restrictions on critical journalism.[93] The IT Amendment Rules 2023 make the situation more tense by shifting the burden of censorship onto private intermediaries, which are likely to comply with executive directions to avoid legal or commercial risk.

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[89] Protection from Online Falsehoods and Manipulation Act 2019, § 11 (Sing.).
[90] *The Online Citizen Pte Ltd v. Attorney-General,* 2021 SGCA 96.
[91] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 3(1)(b)(v) (as amended Apr. 6, 2023) (India).
[92] Oren Gruenbaum, *Concerns for Press Freedom Across the Commonwealth,* THE ROUND TABLE (May 7, 2025), https://www.commonwealthroundtable.co.uk/general/eye-on-the-commonwealth/concerns-for-press-freedom-across-the-commonwealth/. (last visited Apr. 22, 2026).
[93] Freedom House, *India: Freedom on the Net 2024,* FREEDOM HOUSE, https://freedomhouse.org/country/india/freedom-net/2024 (last visited Apr. 23, 2026).

By linking the safety of digital platforms to compliance with government determinations of truth, the State creates a system of indirect censorship. This violates the safeguards of Article 19(2), exceeds delegated powers under Section 87 of the IT Act, violates natural justice by allowing the government to judge its own claims, and fails the constitutional test of proportionality, as highlighted in the *Kunal Kamra* case.[94]

The wider democratic impact is equally serious. When the State gains power to decide what is true about its own functioning, media pluralism is weakened. Independent journalists and digital news platforms, which depend heavily on social media for reach and revenue, become especially vulnerable to algorithmic demotion, takedowns, or bans resulting from FCU's action. This creates a chilling effect on investigative journalism, satire, and dissent.

At the same time, India is rapidly expanding its digital regulatory framework through laws such as the Digital Personal Data Protection Act 2023 and the Telecommunications Act 2023. While tackling misinformation, deepfakes, and artificial intelligence risks is a legitimate state objective, these goals must be pursued through constitutionally valid means. Procedural safeguards such as approvals and periodic reviews do not cure the central defect of making the executive the final authority on truth. Comparative global models show that democratic states have less restrictive and more effective alternatives to address misinformation. These include platform transparency measures, independent fact-checking bodies, systemic risk assessments, media literacy initiatives, and official rebuttals based on evidence. Such measures respond to falsehoods without suppressing lawful speech.

The State may participate in the marketplace of ideas, but it cannot constitutionally appoint itself as the sole arbiter of truth. As recognised in *Romesh Thappar*, *Shreya Singhal*, *Puttaswamy*, and *Kunal Kamra*, the answer to falsehood in a democracy is more speech, not enforced silence. Therefore, the 2023 amendment to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, is incompatible with the guarantees of the Constitution of India. Its rejection is necessary to protect free expression, democratic accountability, and the rule of law in the digital age.

[94] *Kunal Kamra v. Union of India,* 2024 SCC OnLine BOM 3984 (Patel, J.) (India); *Kunal Kamra v. Union of India,* 2024 SCC OnLine Bom 3025 (Chandurkar, J.) (India).

BALANCING PLAY AND PROFESSION: THE PROMOTION AND REGULATION OF ONLINE GAMING ACT, 2025 AND ARTICLE 19(1)(G) OF THE INDIAN CONSTITUTION

- Tanya Sagar[1]

ABSTRACT

India's rapidly expanding internet access has transformed economic activity, education and entertainment sectors, all at once. Alongside these benefits, online real money games have emerged as a growing concern because of the dangers of financial distress, addiction, suicides and money laundering episodes related to it. Observing the situation, Parliament enacted The Promotion and Regulation of Online Gaming Act, 2025, imposing a blanket prohibition on all online money games, irrespective of whether they are based on chance or skill. This article critically examines the constitutional validity of the Act through the lens of Article 19(1)(g) of the Indian Constitution, which guarantees the freedom to carry on any trade or business, subject to reasonable restrictions under Article 19(6). The paper argues that while the State has an interest and also the power of protecting public welfare, on the other hand the restrictions must satisfy the Doctrine of Proportionality. The paper also argues about the unreasonable and arbitrary classification made between the physical and online mode of Games of Skill which further violates Article 14 and also how the legislation has collapsed the long-established distinction between Games of Skill and Games of Chance. The article concludes, that regulation, rather than blanket prohibition, would serve better Constitutional values, public interest, and economic freedom and would also serve the rights better guaranteed under Article 19(1)(g) of the Constitution.

Keywords: *Online Gaming Regulation; Article 19(1)(g); Doctrine of Proportionality; Games of Skill v Games of Chance; Article 19(6)*

Introduction

It is a well-known fact that India has a vast Internet user base and the majority of the numbers come from rural India. As of April 2024, 95.15% villages having access to internet with 3G/4G mobile connectivity and total internet subscribers increased from 251.59 million as on March 2014 to 954.40 million in March 2024.[2] Such huge Internet connectivity and

[1] Assistant Professor, Faculty of Legal Studies, Khwaja Moinuddin Chishti Language University, Lucknow
[2] PIB Delhi, (Aug. 02, 2024). Available at: https://www.pib.gov.in/PressReleasePage.aspx?PRID=2040566

majority from rural India has its upside and advantages as it fuels job creation in IT sector and helps small businesses become successful and gain worldwide traction, it also has great impact in the field of education and has helped students in far off places to get easier access to education.[3]

Since the use of Internet is most from rural India there are various challenges posed before the rural population due to lack of education and that problem is mostly of awareness and getting trapped in the promise of making easy money. One such promise was made by real money gaming platforms where the company owners of these online games used to trap people by making flashy and misleading advertisements that ultimately led to suicides and bankruptcy. Various incidents were reported almost every month since the inception of real money online games. A 32-year-old sales representative died by suicide on Friday after losing money in gambling mobile apps, police said Kishore Kumar lost money in online gambling games and became depressed over it[4]; a couple in Rajasthan allegedly died by suicide amid uncertainty over paying back losses incurred in online gaming[5]; a 17-year-old youth allegedly committed suicide by jumping in front of a train on Tuesday evening apparently upset over losing Rs 35,000 in an online game, police said.[6] According to a recent survey conducted, online gaming was identified as the direct reason for death due to suicides in an overwhelming majority (94.8%) of news reports[7]. Now as per this survey it is unclear what percentage of deaths exactly was due to online gambling or money games as the survey comprehensively covers all kind of suicides attributed to gaming and not only due to online money games however it is clear from the news reporting mentioned earlier that the number of suicides attributable to online money games was increasing day by day and there was a need to regulate such games as majority of the common man was falling prey to it in the hope that they might earn a fortune one day

[3] Gaurav Yadav, Internet Connectivity in India- Significance & Challenges- Explained Pointwise, ForumIAS Blogs (May 31, 2025). Available at: https://forumias.com/blog/internet-connectivity-in-india-significance-challenges-explained-pointwise/

[4] Man dies by suicide after losing money via gambling apps, The Times of India, July 05, 2025. Available at: https://timesofindia.indiatimes.com/city/trichy/man-dies-by-suicide-after-losing-money-via-gambling-apps/articleshow/122270289.cms

[5] Sushant Pareek, “No option left: Rajasthan couples dies by suicide over online gaming debt” ,NDTV India, June 02, 2025. Available at: https://www.ndtv.com/india-news/no-option-left-under-online-gaming-debt-rajasthan-couple-dies-by-suicide-8569404

[6] “MP teen dies by suicide after losing money in online game”, The Times of India, August 15, 2025. Available at: https://timesofindia.indiatimes.com/city/bhopal/mp-teen-dies-by-suicide-after-losing-money-in-online-game/articleshow/123312060.cms

[7] Yatan Pal Singh Balhara, Swarndeep Singh, Zenia Yadav, Media reporting on deaths due to suicide attributed to gaming in digital news: A case of misrepresentation and missed opportunities, Asian Journal of Psychiatry, Volume 68, (2022), December 6, 2021. Available at: https://www.sciencedirect.com/science/article/abs/pii/S1876201821004111

through such games. Looking at the situation at hand, the Parliament passed Promotion and Regulation of Online Gaming Act, 2025 in August 2025. Through this article the author tries to create a balance between the recently passed legislation and 2119(1)(g) and also examine which of the two should prevail- public interest or Art 19(1)(g)[8].

Promotion and Regulation of Online Gaming Regulation Act: A violation of INDIA CONST. Art 19, cl. 1. Sub-cl. g or a reasonable restriction under INDIA CONST. Art 19, cl. 6?

Article 19 guarantees some of the basic value and natural rights inherent in a person.[9] Article 19 is one of the important fundamental rights as it is a part of the Golden Triangle, as we all know Art 21 is controlled by Art 19 and is one of the touchstones for the validity of any law as any law affecting Art 21 must stand the test of Art 19 and Article 14 of the Constitution, these rights are very much complementary to each other and grant the most basic rights to citizens and even to non-citizens[10]. Art 19 even though is confined to giving rights only to citizens yet enumerates some of the most important fundamental rights. If there is a freedom, only then democracy can grow.[11] Our Constitution framers were wise in knowing that for a democracy system of government to work effectively it is important that people have all sorts of freedom whether it is the freedom to speak or the freedom to profess any trade or profession of their liking. In the case of ***A.K Gopalan v. State of Madras***, Patanjali Shastri, J., observed that man as a rational being desires to do many things, but in a civil society his desires have to be controlled, regulated and reconciled with the exercise of similar desires by other individuals.[12] However the framers were also aware that for a democracy to work checks and balances on people's rights is also required because without it there would be infinite encroachments and the enforcement of other laws would be difficult as then everyone would have claimed that it is their fundamental right to act in a manner abrasive to societal morality. Thus the framers thought that it was important to impose reasonable restrictions so that the rights are not misused.

[8] INDIA CONST. art. 19, cl.1, sub-cl. g.

[9] Chapter 8: Right to Freedom (Article 19-22), Manupatra. Available at: http://student.manupatra.com/Academic/Abk/Constitutional-Law-of-India/CHAPTER-8.htm

[10] Ujjwal Singh, Golden Triangle of the Indian Constitution: Interdependence of Fundamental Rights, ILE Weekly Review, Vol 1 Issue 3, (2023), Pg. No used 36. Available at: https://wr.iledu.in/wp-content/uploads/2023/08/V1I34.pdf

[11] Kashvi Sharma, Freedom of Trade and Occupation under Article 19(1)(g): Impact of the recent economic reforms and regulations, Indian Journal of Law and Legal Research, Vol VI

[12] A.K. Gopalan v. State of Madras, AIR 1950 SC 27,42 (India)

Article 19(1)(g) of the Indian Constitution guarantees to all citizens the freedom to engage in any profession, occupation, trade or business.[13] In this clause of Art 19[14], four different words are mentioned and the meaning of all these words is also different, the four words are- profession, occupation, trade and business. 'Profession' means an occupation carried on by a person by virtue of his personal and specialized qualifications, training or skill. According to legal definitions, it includes but is not limited to fields such as architecture, engineering, law, medicine, surgery, and education at various levels, including elementary and secondary schools, colleges, and seminars. These professions are typically governed by specific standards and regulations to ensure competency and ethical practice.[15] 'Occupation' means any regular work, job, principal activity, employment, business or a calling in which an individual is engaged. Legally speaking, an occupation is the work that a person does to earn a living, it can describe both long-term careers or more temporary jobs.[16] 'Trade' means any bargain or sale, any occupation or business carried on for subsistence or profit, it is an act of buying and selling of goods and services. It may include any business carried on with a view to profit whether manual or mercantile.[17] 'Business' means anything which occupies the time, attention and labour of a man for the purpose of profit. It may include in its form trade, profession, industrial and commercial operations, purchase and sale of goods, and would include anything which is an occupation as distinguished from pleasure. However legally the term 'business' means something which involves a natural person or entity performing an activity or trade with the intent of making a profit. The activity or trade may be commercial, industrial, professional, or otherwise. A business commonly involves providing goods or services for the public while operating at a profit. Nonetheless, making a profit is not the only criterion to establish the existence of a business. Non-profit organizations may also undertake a business without the intention of making a profit.[18] Even the Supreme Court has defined these four expressions in the landmark case of ***Sodan Singh v N.D.M.C and others***[19] and held that-

"Profession' means an occupation carried on by a person by virtue of his personal and specialised qualifications, training or skill. The word 'occupation' has a wide meaning such as any regular work, profession, job, principal activity, employment, business or a calling in which

[13] INDIA CONST. art. 19, cl.1, sub-cl. g.
[14] Id
[15] Profession: A comprehensive guide to its legal definition. Available at: https://legal-resources.uslegalforms.com/p/profession
[16] Occupation. Available at: https://www.law.cornell.edu/wex/occupation
[17] Trade. Available at: https://www.merriam-webster.com/dictionary/trade
[18] Business. Available at: https://www.law.cornell.edu/wex/business
[19] Sodan Singh v. New Delhi Mun. Committee, (1989) 4 SCC 155 (India)

an individual is engaged. 'Trade' in its wider sense includes any bargain or sale, any occupation or business carried on for subsistence or profit, it is an act of buying and selling of goods and services. It may include any business carried on with a view to profit whether manual or mercantile. 'Business' is very wide term and would include anything which occupies the time.

Attention and labour of a man for the purpose of profit. It may include in its form trade, profession, industrial and commercial operations, purchase and sale of goods and would include anything which is an occupation as distinguished from pleasure"

Going by the definitions of all the four words, whenever any person or a company per se designs an application or a game to be played or used by people then the sole purpose of the same is to earn profits sooner or later. Thus, the designing and launching an application or game can be considered as a 'business' because as is mentioned above, any venture which provides goods or services to the public while operating at a profit is considered a business. The shareholders of all online real money gambling games were doing business as even though the downloading of application from Play Store or App Store is free but the shareholders and owners of the business earned money through a premium service. For example, in case of Dream11, Users pick players from an upcoming game to form their ideal team and compete with others on the app. Points are awarded based on real-time player performance. The user with the highest points wins the largest share of the prize money. To join a contest, users pay a fixed entry fee, and only a limited number of participants are allowed per league. Its business strategy is structured such that it earns money from the joining fees of the contests, which users must pay to take part in paid public or private contests.[20] The platform also makes money by showing various advertisements on its application. Other than that, when users win prizes based on the real-time performance of the players they select, Dream11 takes a cut of the overall prize pool in addition to the entry fee.[21] Since the main aim of the application is to provide services to the public in return of profits thus the venture can easily be categorised as a business and would fall under the ambit of Article 19(1)(g).

As far as the restrictions under Art 19(6) is concerned, it will have to be examined whether the Act in question was a reasonable restriction on the Right to business given under Art 19(1)(g). The words used in Art 19(6) are very broad as the words used are "in the interest of general public" so that the restrictions can prima facie be applied very easily however it has

[20] Nitin Konde, Apporva Bajj, Dream11 Business and Revenue Model. How Dream11 makes money? Startup Talky, Startup Talky (April 10, 2025). Available at: https://startuptalky.com/dream11-business-model/

[21] Id

to be kept in mind that any restriction imposed on fundamental right would have to be proportional and necessary. While applying any restriction on any fundamental right, it has to be examined whether the **Doctrine of Proportionality** is fulfilled or not. Proportionality acts as a tool for courts to ensure that any infringement upon these rights is measured, necessary, and justified. The essence of the doctrine lies in maintaining a balance between individual rights and the objectives pursued by the State- this can also be called as the balancing and necessity test.[22]

This doctrine is a four-limb test laid down in ***Modern Dental College v. State of M.P***, which was later affirmed in the Aadhaar Litigation, and reiterated with respect to Article 19(1)(g) in ***Anuradha Bhasin v. Union of India***.[23]

The first limb of the test is the **Legitimate Aim Stage,** and according to this limb the restriction must serve a constitutionally permissible purpose, that means the policy or law which is being examined must have a legitimate aim or purpose like national security, public order, morality or it can also be said that the restriction must be suitably placed so that it does not look meaningless in any way. The statement of object and reasons of the Act states reasons for the introduction of the bill in Parliament and it says that[24]

"AND WHEREAS the parallel proliferation of online money games accessible through mobile phones, computers and the internet, and offering monetary returns against user deposits has led to serious social, financial, psychological and public health harms, particularly among young individuals and economically disadvantaged groups.

AND WHEREAS such games often use manipulative design features, addictive algorithms, bots and undisclosed agents, undermining fairness, transparency and user protection, while promoting compulsive behaviour leading to financial ruin.

AND WHEREAS the unchecked expansion of online money gaming services has been linked to unlawful activities including financial fraud, money-laundering, tax evasion, and in some cases, the financing of terrorism, thereby posing threats to national security, public order and the integrity of the State"

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[22] Aman Mishra, The Doctrine of Proportionality in Indian Constitutional Law and its Application in Fundamental Rights Cases, Constitutional Law Legal Sync, Legal Sync Blogs (July 15, 2025). Available at: https://api.legalsync.co.in/blog/The-Doctrine-of-Proportionality-in-Indian-Constitutional-Law

[23] Gautam Bhatia, Private tuitions, Proportionality and Policy: J&K High Court's judgment in Farooq Ahmed v UT of J&K, Constitutional Law and Philosophy (May 8, 2021). Available at: https://indconlawphil.wordpress.com/tag/article-191g/

[24] The Promotion and Regulation of Online Gaming Act, No. 32 of 2025 (India).

Reading some of the object and reason it is clear that the main focus of the law is to curb and eliminate the social ill effects that these online games have on the Indian youth which is ultimately becoming the reason behind increasing suicides and financial ruin. Other than that the bill also argues that the law is necessary to curb addiction and prevent fraud and money laundering.[25] As far as the prior object of suicides and financial ruin is concerned, that is well established through various newspaper reporting which has been earlier talked about in this article as well as excessive gambling especially during Covid quarantine had resulted in various people crushing under the weight of huge debts but as far as the other reason of money laundering is concerned, that seems to be based on perception rather than scientific methodology or data.[26] This is because no data has been made available by the government which shows that there is a strong likelihood that money laundering could be prevented or reduced by prohibition of online money games. Thus, if the aim of the bill is restricted to prevention of financial ruin of the citizens of the country then the aim is completely in line with the Constitutional ethos as the aim of prevention of financial ruin and suicides is quite in line with the principles of Article 21 and cannot be said to be unconstitutional. However, this aim can be achieved by imposing some restrictions and putting a cap on the amount a particular person can put in to avoid financial ruins and suicides.

The second limb of the test is the **Rational Nexus Stage,** and this limb requires the policy decision to be a suitable means of achieving the aim (suitability or rational connection stage). Essentially, there should be a rational nexus between the aim and the act done to reach that aim.[27] As discussed above the aim of the bill is manifold and the solution that the government thought of was by bringing a blanket ban on all types of online money games, even those which have already been declared lawful as they are considered a game of skill. By treating rummy, chess and fantasy cricket the same as roulette or slot machines, the law imposes a blanket prohibition on activities already deemed lawful. This is because they may result in "monetary or other enrichment".[28] The only reason behind imposing a blanket ban on these activities was that it results in monetary gains is arbitrary and unconstitutional in the scheme of things as no classification has been made between game of skill and game of chance and the

[25] Aman Avinav, Government gambles heavily on prohibiting online money gaming, Indian Business Law Journal, (Sep. 23, 2025). Available at: https://law.asia/online-gaming-act-ban/
[26] Id
[27] Gautam Bhatia, Private tuitions, Proportionality and Policy: J&K High Court's judgment in Farooq Ahmed v UT of J&K, Constitutional Law and Philosophy (May 8, 2021). Available at: https://indconlawphil.wordpress.com/tag/article-191g/
[28] Aman Avinav, Government gambles heavily on prohibiting online money gaming, Indian Business Law Journal, (Sep. 23 2025). Available at: https://law.asia/online-gaming-act-ban/

age old law of according legal protection to game of skill has been violated, such an arbitrary classification is violative of Article 14 of the Constitution. It must also be kept in mind that if the purpose of the bill was to prevent money laundering and other illegal transactions then all kinds of games involving money must have been restricted irrespective of the medium meaning that the legislators have left out real-life games involving money and has banned only online games, if the underlying activity, say a game of rummy, is the same, the only difference is the medium, physical as against digital. This is no rational basis for such contrasting treatment. Such classification fails the reasonableness test of article 14 of the constitution, which guarantees equality before the law and strikes down arbitrariness.[29]

The next limb of the test is the **Least Restrictive Measure Stage,** and under this stage it has to be examined whether the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation.[30] This part of the test provides that if any alternatives are available which can easily prevent the mischief then a complete or blanket ban is excessive and unconstitutional. The present bill ends the entire online money gaming ecosystem and targets every aspect of its business. It not only prohibits offering, operating and facilitating games but also makes intermediaries liable. It criminalises the advertising and promotion of games on all media platforms, prescribing penalties of up to two years' imprisonment and a fine of INR50 million (USD566,375). It restricts financial institutions, banks and payment systems from processing transactions, with the same penalties as those for operating the games. These measures silence publicity, choke financial support and kill participation.[31] The most intrusive part of this all is that it imposes all these restrictions on games of skill as well and leaves no scope for indulging in these games for mere entertainment which again seems violative of Article 21.

The last limb of the test is of **Balancing** the competing interests at hand, in the present case it is argued that the legislators have tried to balance between the rights in Art 19(1)(g) and the purported objectives of money laundering, etc it aims to eliminate. As far as the prior Supreme Court rulings are concerned, they are clear on the point that for industries like betting, gambling, and exploitative practices like moneylending, the court has removed constitutional protections on the basis that these activities do not align with public welfare, thus falling

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[29] Id

[30] Gautam Bhatia, Proportionality in Application- An analysis of the "Least Restrictive Measure", Constitutional Law & Philosophy, (May 8, 2020). Available at: https://indconlawphil.wordpress.com/2020/05/08/guest-post-proportionality-in-application-an-analysis-of-the-least-restrictive-measure/

[31] Aman Avinav, Government gambles heavily on prohibiting online money gaming, Indian Business Law Journal, (Sep. 23, 2025). Available at: https://law.asia/online-gaming-act-ban/

outside the protection of Article 19(1)(g).[32] However as far as games of skill are concerned they are still considered legal and should not have been banned because there is no reliance on luck. The Supreme Court in ***State of Bombay v RMD Chamarbaugwala***[33] held that skill-based contests are legitimate business activities, protected under the constitution's article 19(1)(g). In ***K. R. Lakshmanan v State of Tamil Nadu***[34] the Supreme Court upheld horse-racing betting as a game of skill. More recently, courts have recognised fantasy sports platforms as skill-driven, not gambling.[35] The legislators should have balanced the law by not imposing restrictions on games of skill and thus should not have imposed a blanket ban. What it did was that in one sweep it banned every kind of online money games without making a reasonable classification between game of skill and game of chance. Apart from this, the law is unbalanced in the sense that it gives state unfettered enforcement powers, under the Act the state is given the powers to invade personal electronic devices and block websites without a warrant and show cause notice which is a direct violation of Right to Privacy under Article 21.[36]

Looking at all the four limbs collectively, it is quite clear that the Act does not fulfil the Proportionality Test and it falls short of the reasonable restrictions that can be imposed while restricting the fundamental rights in question. Since the restrictions are far too severe and does not pass the test then it can be said that the Act is unreasonable and unconstitutional in that regard.

Online Money Gaming: Game of Skill or Game of Chance?

"Everyone gets lucky once in a while, but no one is consistently lucky."

-Doyle Frank Brunson,

Poker Hall of Fame Inductee

This debate of whether online real money games are games of skill or are games of chance have been ongoing since the Act came into force on October 1. It although is a well-intentioned step to eliminate money laundering but the overall sweep which also includes games of skill has been considered a bit of outreach, this sweeping inclusion has been made

[32] Kashvi Sharma, Freedom of Trade and Occupation under Article 19(1)(g): Impact of the recent reforms and regulations, Indian Journal of Law and Legal Research, Volume VI Issue IV, Pg No used 969
[33] State of Bombay v. R.M.D Chamarbaugwalla, AIR 1957 SC 699 (India)
[34] K. R. Lakshmanan v. State of Tamil Nadu, (1996) 2 SC 226 (India)
[35] Aman Avinav, Government gambles heavily on prohibiting online money gaming, Indian Business Law Journal, (September 23, 2025). Available at: https://law.asia/online-gaming-act-ban/
[36] Aaryavartt, Online Gaming Act, 2025 and Article 19(1)(g): Striking a balance between Freedom of Trade and Public Interest, Aaryavartt (September 3, 2025). Available at: https://aaryavartt.com/online-gaming-act-2025-and-article-191g-striking-a-balance-between-freedom-of-trade-and-public-interest/

clear by Sec 2(g) of the Act which defines **Online money game** as " an online game, irrespective of whether such game is based on skill, chance, or both, played by a user by paying fees, depositing money or other stakes in expectation of winning which entails monetary and other enrichment in return of money or other stakes; but shall not include any e-sports."[37] By mandating a comprehensive ban on all online real money games (ORMGs), the legislation collapses the well-established legal distinction between games of skill and games of chance.[38]

The distinction between games of skill and games of chance has long been the cornerstone of Indian gaming jurisprudence. The Public Gambling Act, 1867[39], still in force in many states, drew a bright line between the two, criminalising games of chance but exempting games where skill predominated.[40] First we will delve into what exactly do we mean by Game of Skill, as the name suggests it means those games where skill, strategy or knowledge is involved and is not merely based on luck or any mere chance or coincidence. These games rely on the player's abilities rather than luck or chance.[41] The Supreme Court of India (SC) has clarified the term "mere skill", specifying that games in which success relies more on skill than on chance will not be classified as gambling, but will be recognised as games of skill.[42] The Supreme Court has time and again through various rulings have ruled that games of rummy and horse racing are considered games of skill. In the case of ***R.M.D. Chamarbaugwalla v. Union of India***[43]and ***State of Andhra Pradesh v K. Satyanarayana & Ors.***[44] the Supreme Court categorically stated that the game of rummy although involves some element of chance but due to the unpredictable distribution of the cards in the shuffled deck, it ruled that rummy is a game of skill as it requires a certain amount of skill particularly in memorising the sequence of falling cards and strategically holding or discarding cards to build a strong hand.[45] The court

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37 The Promotion and Regulation of Online Gaming Act, No. 32 of 2025 (India).
38 Sudarshan Kumar, Aditi Pangotra and Harsha N, Skill or Chance: Will the Supreme Court strike down the Real Money Gaming ban?, SC Observer (Oct. 25, 2025). Available at: https://www.scobserver.in/journal/skill-or-chance-will-the-supreme-court-strike-down-the-real-money-gaming-ban/
39 The Public Gambling Act, No. 3 of 1867 (India)
40 Ashish Deep Verma, Skill Vs Chance Redefined? How Online Gaming Act, 2025 shifts legal landscape, LiveLaw.in (September 24, 2025). Available at: https://www.livelaw.in/law-firms/law-firm-articles-/online-gaming-act-shifts-in-legal-landscape-skill-vs-chance-redefined-vidhisastras-ashish-deep-verma-law-firm-articles-304985
41 Game of Skill Vs Chance Explained, Legal Kart (Jan. 1, 2026). Available at: https://www.legalkart.com/legal-blog/game-of-skill-vs-chance-explained
42 Abhimanyu Chopra & Aman Chaudhary, A Game of Skill or Chance? Navigating the Indian Online Gaming Landscape, AZB & Partners Advocates & Solicitors (July 19 2023). Available at: https://www.azbpartners.com/bank/a-game-of-skill-or-chance-navigating-the-indian-online-gaming-landscape/
43 R.M.D Chamarbaugwalla v. Union of India, AIR 1957 SC 628 (India)
44 State of Andhra Pradesh v K. Satyanarayana, AIR 1968 SC 825 (India)
45 Abhimanyu Chopra & Aman Chaudhary, A Game of Skill or Chance? Navigating the Indian Online Gaming Landscape, AZB & Partners Advocates & Solicitors (July 19, 2023). Available at: https://www.azbpartners.com/bank/a-game-of-skill-or-chance-navigating-the-indian-online-gaming-landscape/

further drew a distinction between rummy and other three-card games like 'Teen Patti Flush' which is entirely a game of chance as no one has control over which cards they will get thus winning or losing is pure luck. Later in 2005, the Madras High Court, in the case of Manakadu Elainger Nala Sports, Narpani Mandram v State of Tamil Nadu, ruled that games such as chess and carom, even when involving payment of club fees, i.e., payment of consideration, did not amount to gambling as the games were predominantly games of skill rather than chance. As such, they were classified as games of skill and exempted under the Public Gambling Act, 1867.[46]

Games of Chance on other hand includes such games where skill, expertise, knowledge and strategy take a back seat and the outcome is totally dependent on luck or chance. There is no way to anticipate who will win because the decisive variables are coincidental.[47] In game of chance the winning or losing of participants in entirely contingent on the happening or non-happening of a certain event and requires no skill whatsoever and that is the reason they are banned and prohibited in all its forms. Games of chance are considered against the public policy of the state as the lawmakers consider the indulgence in games of luck, chance and probability as immoral and pernicious.

The question to be considered now is whether online money games are games of skill or games or chance. When we talk about online money games then even that is categorised in various kinds, there is online poker, online rummy, online betting, etc. In 2023, the Indian Statistical Institute, Kolkata, found that success in rummy is significantly influenced by skill. The same year, researchers at the Indian Institute of Technology, Delhi, concluded that online card games demand a predominance of skill for consistent success.[48] What the Act misses in this aspect is to differentiate between online games of skill and games of chance. The Act as earlier mentioned has put a blanket ban on each and every type of online real money game without distinguishing between game of skill and game of chance which is a direct violation of Art 19(1)(g) and also of Art 21. The legislators have equated games of skill with gambling and reasoned that since such games have addictive tendencies thus it is imperative to ban it but it is to be kept in mind that the Indian courts have time and again struck down various state

[46] Id
[47] Varun Agarwal & Kartik Sharmat, Legal Matrix for Regulating Online Rummy in India, SCC Blog (August 25, 2022). Available at: https://www.scconline.com/blog/post/2022/08/25/legal-matrix-for-regulating-online-rummy-in-india/#fn3
[48] Sudarshan Kumar, Aditi Pangotra and Harsha N, Skill or Chance: Will the Supreme Court strike down the Real Money Gaming ban?, SC Observer (October 25, 2025). Available at: https://www.scobserver.in/journal/skill-or-chance-will-the-supreme-court-strike-down-the-real-money-gaming-ban/

legislation amendments that have put a blanket ban on games of skill, one such example is of Karnataka where the Karnataka High Court in the case of ***All India Gaming Federation v State of Karnataka***[49] struck down a legislation which banned all forms of online gaming involving money, the reason given by the court was based on arbitrary and unreasonable classification as it banned games of skill as well. The court in the case held that: "…the Amendment Act does not critically adjust the boundaries of the existing category of protected activities, i.e. games of skill with the unprotected acts of gambling. Instead, State has created a wholly new category of medium-based-regulation when change of medium per se does not alter the true nature & content of the games."[50] In another recent case of ***Varun Gumber v Union Territory of Chandigarh,***[51] the Punjab and Haryana High Court held that fantasy sports were skill- based because success depends on a player's knowledge of real-world player's performance and statistical analysis. The Supreme Court's refusal to interfere gave this ruling de facto finality.[52] Taking notes from the above judgment the nature of game of skill and the skill, expertise and knowledge required for playing a game does not extinguish just because money is involved and also because it is being played through an online medium. If games of skill are allowed to be played in enclosed spaces and in physical mode then it is an absurd condition if it is banned in online mode. It is a clear violation of Article 14, 19(1)(g) and 21.

Conclusion

When the Constitution framers were drafting the Constitution then there must have been some compelling reasons behind framing Article 19 in such a way that the rights given under it would not be considered absolute rights and the state has powers to restrict those rights in the interest of public welfare however it must be kept in mind that if Article 19(1)(g) is not absolute then neither is the State's power under Art 19(6) unfettered. So, the ban imposed by the State cannot be based on an unreasonable classification and the State should maintain a balance between individual economic liberty and collective welfare of the public. The overreach of Parliament has often been the point of contention in various cases and it has repeatedly been pointed out by the Supreme Court that over-regulation in a way that destroys

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[49] All India Gaming Federation v. State of Karnataka, 2022 SCC OnLine Kar 435 (India)

[50] Sudarshan Kumar, Aditi Pangotra and Harsha N, Skill or Chance: Will the Supreme Court strike down the Real Money Gaming ban?, (Oct. 25, 2025). Available at: https://www.scobserver.in/journal/skill-or-chance-will-the-supreme-court-strike-down-the-real-money-gaming-ban/

[51] Varun Gumber v. Union Territory of Chandigarh, 2017 SCC Online P&H 5372 (India)

[52] Ashish Deep Verma, Skill Vs Chance Redefined? How Online Gaming Act, 2025 shifts legal landscape, Live Law (September 24 2025). Available at: https://www.livelaw.in/law-firms/law-firm-articles-/online-gaming-act-shifts-in-legal-landscape-skill-vs-chance-redefined-vidhisastras-ashish-deep-verma-law-firm-articles-304985

an entire lawful industry crosses constitutional limits as Constitution also envisages and promotes economic security for everyone. It is also important to note that a welfare state like ours is duty bound to protect its citizens from all kinds of harm which includes financial ruin, addiction and suicides but it should be kept in mind that such restrictions or blanket bans which have the effect of curtailing fundamental rights must be supported by empirical data and not mere speculations. In this case, as has been earlier pointed out that the absence of credible data on money laundering or terrorism financing weakens the State's justification under the Proportionality Test framework.

Another problem with the Act is that it collapses the distinction between games of skill and game of chance which undermines decades of settled law and marks a departure from constitutional continuity and well-known judicial precedents. By collapsing this distinction and equating skill-based games with gambling, the legislature has disregarded settled jurisprudence and introduced legal uncertainty into an area once marked by doctrinal clarity.

What the State could have done instead of imposing a blanket ban which curtails Games of Skill as well was to impose some restrictions on such games while declaring such games legitimate and legal, the legislators could have proposed making the games age restrictive by using age-gating pop ups, imposing spending limits on a particular gaming account attached to a particular bank account so that the fear of financial ruin is dealt with. Apart from this, the State could also impose a strict licensing regime so that the problem of terror financing can be done away with. This is because the best way to deal with this problem is to adopt a regulated model like suggested above and not through a blanket ban. In addition, legal structures must be established to suit evolving economic conditions, consistently striving for a balance between economic reforms and preserving essential liberties.[53]

In the age of fast-growing technology, technology must be seen as a facilitator and not as a determinant of legality. Everything that is tech based or works through online medium is not necessarily bad and does not every time require judicial correction. This medium based distinction is constitutionally unsustainable and violative of Article 14. In conclusion, while the Promotion and Regulation of Online Gaming Act, 2025 seeks to address genuine social harms, its sweeping restrictions fail to strike the constitutionally required balance between public interest and individual freedom. The Act, in its present form, therefore stands vulnerable

[53] Kashvi Sharma, Freedom of Trade and Occupation under Article 19(1)(g): Impact of the recent reforms and regulations, Indian Journal of Law and Legal Research, Volume VI Issue IV, Pg. No used 976

to constitutional challenge and calls for judicial and legislative recalibration rather than outright endorsement.

ALGORITHMIC FAIRNESS IN DIGITAL PROCUREMENT: REIMAGINING COMPETITION LAW FOR AI-DRIVEN PUBLIC CONTRACTING IN THE POST-COVID ERA

-Ipshita Adhikari[1] & Nitesh Singh Kushwaha[2]

ABSTRACT:

Algorithmic systems in public procurement are changing market dynamics in India. They bring efficiency but also raise worries about collusion, exclusion, and bias. This study creates an Algorithmic Procurement Competition Framework (APCF) for India's legal and constitutional setting. It looks at the limits of the Competition Act 2002, and suggests changes to Sections 3, 4, 19, 27, and a new Section 53N. The research learns from the European Union, the United Kingdom, and Canada. It stresses the need to update laws, build institutional skills, and oversee rights under Articles 14 and 19(1)(g). The method combines legal thinking with policy ideas. It addresses the lack of real procurement data through reasoned construction. By joining competition law with constitutional and administrative checks, the framework offers a plan to regulate algorithmic procurement in India. This ensures fairness, openness, and market health in an automated public contracting scene.

Keywords: *Algorithmic Procurement, Competition Law, Constitutional Oversight, Digital Markets, Regulatory Reform.*

1. INTRODUCTION

Public procurement in India accounts for roughly 20-22% of the country's gross domestic product (GDP)[3], offering a significant mechanism through its ability to influence market competition, enhance supplier diversity, and enforce the equitable allocation of resources. The COVID-19 pandemic sped up a big change in how procurement works. It pushed more people to use digital platforms like the Government e-Marketplace (GeM). From *2019–20* to *2021–22*, GeM's transaction volumes jumped from *₹58,000 crores* to over *₹1,00,000 crores.*[4] This shows more than just a move to digital. It points to a deeper change in

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[1] Final-Year B.A. LL.B. (Hons.) Student, IMS Unison University, Dehradun
[2] LL.M. (Graduate), Hidayatullah National Law University, Raipur
[3] Press Information Bureau, Government of India, FM Reviews Capital Expenditure & Payments of Maharatnas and Navratnas CPSEs (Sept. 27, 2019), https://www.pib.gov.in/PressReleasePage.aspx?PRID=1586546.
[4] World Bank Blogs, India's Government e-Marketplace: Technology for sustainable development, (Oct. 12, 2022), https://blogs.worldbank.org/en/governance/indias-government-e-marketplace-technology-sustainable-development.

how people make procurement decisions. Now, computer systems often help evaluate bids, rank suppliers, and check for compliance.

This change goes beyond just making admin work easier. Computer systems for buying stuff now have a big impact on which sellers get noticed, how bids are rated on different things, and which companies get the chance to land valuable deals. These systems, while they seem fair, can bake in unfair advantages through data-driven improvements, making existing market differences worse. At the moment, the public sector's switch from human decision-making to a machine-based approach presents unique risks.[5] *For example,* computer programs developed using past procurement data, selected based on merit, also replicate problematic and presumably unfair procurement practices, which ultimately undermine fair competition and equitable access.[6]

The handful of case studies worldwide, ranging from the errors made by the UK with its A-level grading algorithm in 2020, and why it was problematic for disadvantaged students because the data learned from was biased,[7] to Amazon's artificial intelligence hiring tool that was abandoned in 2018 because it systematically allocated lower scores for women applying for positions because the hiring data it learned from was biased, illustrate that they represent highly relevant and specific instances of serious risks.[8] These stories show how AI systems, even when not trying to be unfair, can leave people out and mess up fair competition. They do this through hidden reasoning and feedback loops that keep repeating the same mistakes.

India's digital procurement scene is growing fast, but its rules can't keep up with the new problems caused by algorithm teamwork and favoritism. Present competition law, which focuses on what people mean to do clear deals, and visible market behavior, finds it hard to handle how self-running systems act on their own.[9] Algorithms don't *"team up"* like we think; they get better, change, and end up doing the same thing, often looking just like a group working together without talking or copying each other on purpose.

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[5] Mastering Procurement Negotiation Are you Truly Prepared for the Change?" C1 India Blog (Mar. 18, 2025), https://c1india.com/how-did-the-government-e-marketplace-change-indian-procurement/.
[6] PRM360, The Impact Of Digital Transformation On Procurement, https://www.prm360.com/the-impact-of-digital-transformation-on-procurement.
[7] NHS National Library of Medicine, The algorithm will screw you: Blame, social actors and the 2020 A-level grading algorithm, (July 25, 2023), https://pmc.ncbi.nlm.nih.gov/articles/PMC10370707/.
[8] Reuters, Insight - Amazon scraps secret AI recruiting tool that showed bias against women, Reuters (Oct. 10, 2018), https://www.reuters.com/article/world/insight-amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK0AG/
[9] Public Procurement 2025 - India, Global Practice Guides (Apr. 7, 2025), https://practiceguides.chambers.com/practice-guides/public-procurement-2025/india/trends-and-developments.

Case Illustration: Quiet Algorithm Teamwork in a Procurement Bid

Scenario: *A public procurement tender on GeM asks for bids for hospital ventilators. Three suppliers -* ***AlphaMed****,* ***BetaCare****, and* ***CuraTech*** *use AI-powered bidding algorithms. These algorithms gather previous award data and monitor competitors' bids as they happen. Instead of lowering prices, the algorithms "learn" that grouping bids within a small range (₹10.2–10.4 lakh per unit) leads to higher profits in the long run. This happens because aggressive price cuts cause rivals to retaliate. After several tenders, the algorithms settle on this above-market equilibrium. Prices stay high, competition becomes fake, and the buying agency pays more even though there are multiple bidders.*

APCF Intervention:

a. *Ex-ante stage: Suppliers would need to submit* ***Algorithmic Impact Assessments*** *that reveal if their bidding systems use real-time data from competitors.*

b. *Monitoring: The* ***Algorithmic Competition Division of the CCI*** *would flag bids that cluster within a 1–2% range across tenders.*

c. *Ex-post enforcement: Detailed checks of the algorithms' training data and reward structures might show they aim to* ***"accommodate each other"*** *instead of independent competitive pricing. Even without clear collusion, fixes could include changing the algorithm design, fines, or removal from procurement lists.*

Key Point: The case shows how bidding algorithms that seem independent can lead to outcomes just like collusion, and how the **APCF gives regulators tools to prevent and fix issues, bringing back competition** in markets where algorithms handle procurement.

Seeing this gap in rules, the Ministry of Corporate Affairs put out the draft *Digital Competition Bill 2024* for people to comment on in March 2024. [10]The Bill suggests moving from after-the-fact enforcement to before-the-fact rules, giving the Competition Commission of India (CCI) power to step in in digital markets. Taking cues from the European Union's *Digital Markets Act*, the Bill focuses on Significant Digital Enterprises (SSDEs) and their linked groups, trying to stop algorithm tricks, self-favoring, and market lockouts based on

[10] Ministry of Corporate Affairs, Govt. of India, The Draft Digital Competition Bill, 2024 (Mar. 2024), https://www.mca.gov.in/bin/dms/getdocument?mds=2oZMe9iVYoKuFB0DmT5VdQ%253D%253D&type=open.

data.[11] This change in law shows India has recognized that the old competition rules need to change to deal with algorithmic power and digital differences.[12]

The merging of digital purchasing, complex algorithms and changing competition laws creates a tough analysis problem. This study looks into ***how India can rethink its competition law system to deal with algorithm risks in government buying.*** It aims to balance fairness, openness, and new ideas, while keeping the benefits that make government agencies use more automation.

2. Research Objectives and Methodology

A. Objectives

This study pursues the following core objectives:

1. To critically assess the Indian competition law and constitutional jurisprudence in relation to algorithmic harms in procurement.
2. It develops the Algorithmic Procurement Competition Framework (APCF) with statutory, institutional, and rights-based components.
3. It draws comparative lessons specifically from the EU, Canada, and the UK; these jurisdictions are substantively analyzed.
4. It proposes amendments to Sections 3, 4, 19, 27, and introduces Section 53N, along with constitutional and administrative integration.

B. Methodology

The research utilizes a normative and analytical approach to systematically analyze statutory texts, government reporting, case law, and comparative policy frameworks to assess the efficacy of India's competition law framework with respect to algorithmic risk in digital procurement. Given the absence of publicly accessible, granular procurement-level datasets on the Government e-Marketplace (GeM), the study does not claim to conduct primary econometric testing. Instead, it relies on publicly available aggregate statistics from GeM annual reports and official press releases to illustrate the scale and rapid growth of the platform, such as the crossing of ₹1 lakh crore in Gross Merchandise Value (GMV) in FY 2021–22.[13]

[11] Regulation (EU) 2022/1925 of the European Parliament and Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act), 2022 O.J. (L 265) 1.
[12] Competition Law Review Committee, Report of the Competition Law Review Committee, Ministry of Corporate Affairs, India, July 2019, https://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf.
[13] Government e Marketplace (GeM), Annual Report 2021–22, https://gem.gov.in/statistics.

The references to GeM statistics should be understood as renderings of contextual reference points and not original empirical analyses.

The analysis is therefore situated within *a doctrinal-comparative framework:* it examines Indian competition law provisions alongside international approaches, including the *EU Digital Markets Act,*[14] *the EU AI Act,*[15] and recent *U.S.*[16] and *Canadian*[17] guidelines on algorithmic accountability. Academic literature in law, economics, and computer science is integrated to explain mechanisms of algorithmic collusion, opacity, and bias in procurement settings.[18]

By synthesising these sources, the paper seeks to ***(i)*** diagnose potential risks of algorithmic collusion, exclusion, and bias in India's public procurement ecosystem, and ***(ii)*** propose the Algorithmic Procurement Competition Framework (APCF) as a suitable institutional and legal response.

3. Algorithmic Risks And Competition Law Challenges

A. How Collusive Behavior Has Changed in Digital Purchasing

Typical procurement cartels depend on clear coordination methods to manipulate tender results. These methods include direct talks between rivals, deals to divide up markets, and matching price plans. Indian competition law has dealt with this behavior through rulings like ***Excel Crop Care Ltd. v. Competition Commission of India.*** In this case, the Supreme Court backed the idea that you can infer a cartel exists based on circumstantial proof. This proof included identical bid patterns and price matches that couldn't be explained. The Court stressed that parallel actions, when paired with *"plus factors"* showing teamwork beyond normal market behavior might be enough to prove an anti-competitive agreement under *Section 3* of the *Competition Act, 2002*.[19]

Yet, the growth of algorithm-based systems in digital purchasing brings about new ways to coordinate, which test these long-standing legal frameworks. Unlike traditional cartels,

[14] Ibid.
[15] European Commission, Proposal for a Regulation Laying Down Harmonized Rules on Artificial Intelligence (Artificial Intelligence Act), COM(2021) 206 final (Apr. 21, 2021).
[16] Federal Trade Commission, Aiming for Truth, Fairness, and Equity in Your Company's Use of AI, https://www.ftc.gov/business-guidance/blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai.
[17] Treasury Board of Canada Secretariat, Directive on Automated Decision-Making, https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32592.
[18] Maurice E. Stucke & Ariel Ezrachi, Artificial Intelligence & Collusion: When Computers Inhibit Competition, 2017 U. Ill. L. Rev. 1775 (2017).
[19] Excel Crop Care Ltd. v. Competition Comm'n of India, (2017) 8 SCC 47 (India).

algorithm-driven collusion can pop up through self-running machine learning processes, reinforcement learning models like Q-learning, that, on their own, come up with pricing plans without any clear programming for anti-competitive results. In their groundbreaking 2020 research published in the *American Economic Review*, economists Calvano Calzolari, Denicolò, and Pastorello showed that Q-learning algorithms in mock oligopolistic markets ended up with higher-than-competitive pricing strategies. These algorithms figured out how to punish those who didn't play along and reward those who did, copying cartel-like outcomes without talking or meaning to.[20]

The German Federal Cartel Office's probe (2017–2019) into fuel retailers using pricing algorithms showed real-world effects of such automated coordination. The investigation found that these computerized systems, while seeming independent, had a predictable response to price changes by competitors keeping prices high. Though they didn't find direct collusion, the economic impact was similar to traditional cartel behavior, causing substantial harm to consumers.[21]

India's Government e-Marketplace (GeM) reverse auction system has risks that look similar to others. More and more suppliers use bidding algorithms boosted by machine learning, which learn from past tender information. These systems can spot patterns in how rivals act and change bids to steer clear of price battles, which might lead to unspoken teamwork.[22] Unlike when companies just happen to act the same way, which needs intent or talking when algorithms team up, it comes from the way the system is built to work best. This creates confusion in legal thinking: with no human intent or agreement, it's hard to prove cartel behavior under Indian law using the usual standards.[23]

While *Excel Crop Care* provides a theoretical basis to infer collusion from circumstantial patterns, its application to algorithmic coordination requires major changes. Investigators must include technical reviews of algorithm design, statistical studies of bidding irregularities, and expert input on optimization behavior. The Competition Commission of

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[20] Emilio Calvano, Giacomo Calzolari, Vincenzo Denicolò & Sergio Pastorello, Artificial Intelligence, Algorithmic Pricing, and Collusion, 110 Am. Econ. Rev. 3267 (2020).

[21] Bundeskartellamt [German Fed. Cartel Office], Report on Sector Inquiry into Fuel Retail Market: Monitoring and Effects of Algorithms in Fuel Retail (May 2019), https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Sector_Inquiries/Sector%20Inquiry%20Fuel%20Market%202019.pdf.

[22] World Bank Blogs, India's Government e-Marketplace: Technology for sustainable development, (Oct. 12, 2022), https://blogs.worldbank.org/en/governance/indias-government-e-marketplace-technology-sustainable-development.

[23] A Ganesh, The Indian Draft Digital Competition Bill and Report, 2025 J. of Comp. Pol'y & Reg. 2506958 (2025), https://www.tandfonline.com/doi/full/10.1080/24730580.2025.2506958.

India (CCI) now lacks the forensic tools and diverse expertise to assess these cases well. To bridge this gap, the CCI needs to reform regulations, build capacity in digital forensics, and clarify laws to address algorithmic coordination under Section 3.[24]

B. Algorithmic Dominance and Market Foreclosure

Digital procurement platforms are becoming gatekeepers to public contracting markets. They use network effects, data asymmetries, and algorithmic intermediation to gain market power. This structural control allows for new types of exclusionary abuse that don't fit traditional competition law models. The European Commission's big decision in Google Shopping shows this change. The Commission determined that Google's algorithmic self-preferencing violated *Article 102* of the *Treaty on the Functioning of the European Union* (TFEU). Google displayed algorithmic bias and gave its own comparison-shopping services a higher ranking on search results while demoting competitors.[25] The European Union's Court of Justice backed this decision, confirming that when algorithms manipulate visibility and rankings, they can shut out competitors from the market even without denying them access.[26]

India's Government e-Marketplace (GeM), the main digital buying platform, brings similar dangers. GeM's algorithms suggest that suppliers look at sellers using many factors. These include how much they sell, how fast they deliver, what ratings they got before, and how their prices stack up.[27] While each of these makes sense on its own, when you add them all up, they might shut out some sellers. This tends to help big companies that are already there. New companies, small and medium ones, might lose out because of these computer programs, even if they offer good deals. This shows what the OECD calls *"computer programs messing up fair competition,"* where systems based on lots of data make it harder for new companies to compete with the big ones already there.

Public GeM stats and official reports point to growing concentration trends. They show that a small number of big suppliers grab a large chunk of transactions. This might reflect real efficiency gains. But algorithms that boost past performance create feedback loops. These

[24] CyberPeace Foundation, Draft Digital Competition Bill, 2024, CyberPeace Blog (June 24, 2025), https://www.cyberpeace.org/resources/blogs/draft-digital-competition-bill-2024.
[25] Commission Decision of 27 June 2017, Case AT.39740 Google Search (Shopping), 2018 O.J. (C 9) 11.
[26] Google v. Commission (Google Shopping), Case C-48/21 P, ECLI:EU: C:2024:789 (ECJ Oct. 10, 2024); See also ECJ's Google Shopping Judgment: The End of a Long Saga, Covington Competition Blog (Oct. 3, 2024), https://www.covcompetition.com/2024/09/ecjs-google-shopping-judgment-the-end-of-a-long-saga/.
[27] Government e Marketplace (GeM), Brochure on GeM, at 10–14 (2020), https://gem.gov.in/resources/pdf/Brochure_on_GeM.pdf;
Guideline on Government e-Marketplace (GeM), at 3–8 (2021), https://www.suniv.ac.in/docs/Guide-line-on-GeM-SU.pdf.

loops cement the power of dominant players.[28] These loops aren't just about money; they touch on constitutional issues. Under *Articles 14* and 19*(1)(g)* of India's Constitution, algorithms that shut out firms based on size, where they're from, or a lack of past data might break equality and trade rights.[29] If buying algorithms always puts certain types of suppliers at a loss without clear reasons, they could face challenges. These challenges might come not just under competition law, but also through constitutional review.

SMEs are at risk. OECD studies show that buying algorithms often hurts companies without long track records, which slows down new ideas and market energy.[30] *In India,* where small businesses play a key role in the economy, these exclusionary effects harm both fair competition and bigger growth plans. To tackle algorithm control, we need two-sided rules - ones that mix competition enforcement with basic rights protection and changes to government buying practices.

C. Data-Driven Market Manipulation

The merging of big data analysis and algorithm-based choices brings new ways to manipulate markets that go beyond typical antitrust groups. Major buying platforms gather huge sets of data about supplier prices, delivery results, rule-following, and bidding habits. This uneven info allows for predictions that can be used to shape auction design, judging factors, and timing, pushing competitive results to favor certain sellers or platform-linked groups.[31]

This kind of meddling isn't always out in the open. The murky nature of algorithm-based systems lets unfair practices hide in technical setups that seem unbiased.[32] Those in charge of buying might use their judgment through algorithm settings - like giving more weight to fast delivery than competitive prices - while keeping up a front of unbiased automation. This

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[28] Government e Marketplace (GeM), Brochure on GeM, at 5–9 (2020), https://gem.gov.in/resources/pdf/Brochure_on_GeM.pdf.

[29] [29] India Const. art. 14, 19(1)(g); See also Mubashshir Syed & Niti Agarwal, Algorithmic Bias and the Right to Equality: Reimagining Constitutional Protections in the Digital Era, Indian J. Const. L. (2023), https://www.ijrdo.org/index.php/bm/article/download/6403/4024/.

[30] Organisation for Economic Co-operation and Development (OECD), SMEs in Public Procurement 27–34 (2018), https://www.oecd.org/publications/smes-in-public-procurement-9789264307476-en.htm.

[31] Tamás Fekete, AI and Public Procurement Law: Early Indian Lessons, SSRN Paper (2024), https://papers.ssrn.com/sol3/Delivery.cfm/4924801.pdf?abstractid=4924801&mirid=1&type=2.

[32] Cory Doctorow, The End of the Google Shopping Saga, Kluwer Competition Law Blog (Oct. 27, 2024), https://legalblogs.wolterskluwer.com/competition-blog/the-end-of-the-google-shopping-saga/.

creates gaps in responsibility that chip away at openness, which is key to keeping public purchasing honest.[33]

Machine learning systems trained on old procurement data make these risks even worse. Cathy O'Neil claims in *Weapons of Math Destruction* that algorithms often see past discrimination as a way to predict things, which keeps structural biases going in areas like hiring, lending, and criminal justice.[34] In buying goods and services, we see the same issues when algorithms use risk scores based on location, ways to guess a company's size, or group businesses in ways that show old disadvantages instead of what they can do now. These biases are not merely technical issues, they are inherent within the system, and new rules are required to address them.[35]

To address these problems, competition watchdogs need to build the ability to check algorithms, require openness in scoring methods, and make sure buying platforms explain the reasons behind automated reviews.[36] The suggested *Digital Competition Bill 2024* provides a promising plan by introducing upfront rules for big digital companies, including making them responsible for their algorithms and banning unfair treatment. But putting these rules into action must go hand in hand with changes specific to government buying - such as checks for fair algorithms, guarantees for small businesses to take part, and reviews to make sure everything follows the constitution. This will help make sure digital government buying leads to fair competition for everyone instead of leaving some out.

4. Comparative Regulatory Frameworks and Enforcement Measures

A. European Union: Risk-Based Algorithmic Governance and Competition Integration

The European Union leads the world in setting rules for algorithm systems those used in important areas like government buying. The Artificial Intelligence Act (Regulation (EU) 2024/1689), which became law in July 2024, creates a unified legal system for making, using, and watching AI systems across EU countries. It takes a stepped, risk-based view calling AI

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[33] M Fazekas et al., Public Procurement Cartels: A Large-Sample Testing of Screens Using Machine Learning, Gov. Transparency Inst. WP/2023:02 (2023), https://www.govtransparency.eu/wp-content/uploads/2023/04/Fazekas-et-al_PP-cartel-detection_GTI-WP_2023.pdf.

[34] Cathy O'Neil, Weapons of Math Destruction: How Big Data Increases Inequality (2016).

[35] Transparency International, Algorithms in Public Administration: Challenges to Transparency and Accountability (Nov. 19, 2023), https://www.transparency.org/en/blog/algorithms-artificial-intelligence-public-administration-transparency-accountability.

[36] New Report, Draft Digital Competition Bill, 2024 for India, Indic Pacific (Mar. 26, 2024), https://www.indicpacific.com/post/new-report-draft-digital-competition-bill-2024-for-india-feedback-report-iplr-ig-003.

systems used in government buying *"high-risk"* under *Article 6(2).*[37] This means these systems must meet tough rules before use, including checks for proper working, detailed technical papers, and ways for humans to keep an eye on things.

This framework requires procurement algorithms to undergo assessments that have an impact on their accuracy, strength, ability to withstand cyber-attacks, and efforts to reduce bias throughout their lifespan. *Article 13* puts transparency duties in place, making it necessary to give affected suppliers clear explanations of how algorithmic decisions are made.[38] This rule is important in procurement situations where scoring systems that aren't clear can hide unfair outcomes. Suppliers need to be able to challenge automated decisions through easy-to-use review processes, to ensure fairness and responsibility in the procedure.

The AI Act doesn't stand alone. The Digital Markets Act (Regulation (EU) 2022/1925) supports it. This act places structural rules on chosen *"gatekeeper"* platforms, often big digital middlemen with strong market power. These rules include making algorithms clear, requiring systems to work together, and banning self-promotion.[39] All these rules affect procurement platforms that control supplier access and bid visibility. The DMA's approach to regulating before problems occur is different from usual competition enforcement. It allows for early action before harm happens.

The European Competition Network (ECN) backs up the enforcement of risks from algorithms by coordinating probes across national competition watchdogs. In its 2021 working paper on *"Algorithms and Collusion,"* the ECN lays out step-by-step methods to spot algorithmic teamwork. It stresses number-crunching of odd price patterns, market features that might lead to silent collusion, and deep dives into how algorithms are built and what data trains them.[40] This all-in approach shows a shift in thinking: competition law now goes beyond just human deals to cover self-running systems that can cause unfair outcomes through their optimization rules.

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[37] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), 2024 O.J. (L 217) 1. Available at: https://eur-lex.europa.eu/eli/reg/2024/1689/oj

[38] Id. arts. 13, 16.

[39] Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector, 2022 O.J. (L 265) 1. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R1925

[40] European Competition Network, Algorithms and Collusion – ECN Guidance, Working Paper, Dec. 15, 2021 (Available at European Commission competition website.)

The AI Act, DMA, and ECN protocols work together to create a complex regulatory system that combines preventive measures with after-the-fact enforcement. This approach serves as an inspiring model for countries like India, where digital buying platforms such as GeM are growing without matching algorithmic responsibility. The EU's focus on openness, challenge ability, and lowering system-wide risks lays the groundwork to rethink competition law in an era of self-operating decision systems.

B. United States: Federal Acquisition Integration and Technical Standards

The US has put in place a multi-layered system to regulate how algorithms are used in government purchasing. This system combines orders from the top technical rules and ways to keep competition fair. In October 2023, the President signed Executive Order 14110. The Executive Order directs federal agencies to determine if AI systems being used in their work, including procurement, are safe, fair, and reliable.[41] To make this happen, the Office of Management and Budget wrote two memos: *M-24-10* and *M-24-18*. These memos say agencies need to look at how AI systems might affect which suppliers can take part, how bids are judged, or who gets contracts.[42]

The *Federal Acquisition Regulation* (FAR) now includes these mandates, adding bias prevention protocols to technical evaluation standards. For procurement contracts worth over *$10 million,* agencies must conduct algorithmic audits and require contractors to disclose all AI systems they used to prepare or evaluate bids.[43] These regulations are designed to prohibit automated systems from producing unfair outcomes or impacting competition.

To implement these safety procedures, the *National Institute of Standards and Technology* (NIST) developed an *AI Risk Management Framework* (AI RMF) to provide a framework for agencies to identify bias, assess performance, and mitigate risk. It focuses on ongoing oversight requiring tools to detect statistical bias and assess risks throughout the system's life to keep algorithmic systems fair and responsible over time.[44]

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41 Exec. Order No. 14110, 88 Fed. Reg. 70233 (Oct. 18, 2023). Available at: https://www.federalregister.gov/documents/2023/10/18/2023-22257/safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence

42 Office of Mgmt. & Budget, Memorandum M-24-10, Initial Implementation Guidance for the Safe, Secure, and Trustworthy Development and Use of AI (Mar. 2024); Memorandum M-24-18, Advancing the Responsible Acquisition of AI in Government (Sept. 24, 2024). Available at: https://www.whitehouse.gov/omb/briefing-room/memos/

43 48 C.F.R. § 16.504 (FAR), See also OFCCP Guidance on Automated Systems Use, May 2024.

44 National Inst. of Standards & Tech., AI Risk Management Framework, Version 1.0 (Jan. 2023), https://www.nist.gov/ai-risk-management-framework.

The crackdown on algorithmic wrongdoing goes beyond procurement. The *Federal Trade Commission* (FTC) has gone after cases of algorithmic bias and misleading AI practices in business settings. Its 2021 guidance on algorithmic accountability confirms that standard antitrust rules apply to automated decision-making systems. It also states that companies using these systems must follow competition law rules.[45] This mix of procurement rules, tech standards, and antitrust action shows a complete governance model that India can use to shape its own digital competition system.

C. Canada: Algorithmic Impact Assessment and Public Procurement Transparency

Canada's algorithmic management in government guidelines prioritizes open and transparent processes and careful risk assessment. The *Directive on Automated Decision-Making* (DADM), amended in 2023 to require algorithmic impact assessments (AIA) to review all government systems that have ramifications for people's rights, public benefits, or purchasing decisions. The assessments consider how impactful the decisions are to people, how sophisticated the algorithms are, the chances for potential adverse differential treatment, and if decisions made wholly or partially through automation are reversible. They use a scoring system with different levels to decide how much oversight is needed.[46]

The proposed *Artificial Intelligence and Data Act* (Bill C-27), now under review by parliament, expands these duties to private contractors and public agencies that use AI in procurement. It brings in legal rules that have an impact on transparency, fairness, and accountability, with fines for those who don't follow them. The Act makes it necessary to share algorithmic impact assessments with the public.[47] This allows civil society and watchdog groups to examine procurement algorithms and how they affect the market.

This open approach to AI systems lays the groundwork to enforce competition laws. By keeping records of how algorithms are designed, judged, and performed, Canada's system makes it easier to look into unfair practices and unequal access in government contracts. It also

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[45] Federal Trade Comm'n, Aiming for Truth, Fairness & Equity in Your Company's Use of AI (Oct. 7, 2021), https://www.ftc.gov/business-guidance/blog/2021/10/aiming-truth-fairness-and-equity-your-companys-use-ai; See also Hogan Lovells LLP, The FTC is Regulating AI: A Comprehensive Analysis (July 24, 2023).
[46] Treasury Board of Canada Secretariat, Amendments to the Directive on Automated Decision-Making (Apr. 25, 2023), https://www.canada.ca/en/government/system/digital-government/policies-standards/policy-service-digital-announcements/amendments-directive-automated-decision-making.html.
[47] An Act respecting the responsible use of artificial intelligence and data, Bill C-27, 44th Parl., 1st Sess. (Can. 2024) (proposed).

fits with bigger ideas about fairness and equality in the constitution, making sure AI doesn't hurt democratic responsibility or shut people out of the economy.[48]

D. Integration with India's Emerging Digital Competition Framework

India's proposed *Digital Competition Bill 2024* has a revolutionary impact on competition law enforcement, introducing rules that digital companies with major market power must follow before problems arise. The Bill names *"Significant Digital Enterprises"* (SSDEs) and *"Associate Digital Enterprises"* (ADEs), making them follow rules to prevent them from manipulating algorithms in favor of their own products, and limiting access to their platforms.[49]

When it comes to government buying, these rules matter. The Bill says big online platforms must be open about how their systems work. They need to explain the thinking behind their ranking systems, what they use to make suggestions, and how they make choices. All of these things affect how visible suppliers are and how bids get judged. These rules aim to stop secret ways of keeping some sellers out and to make sure new and small businesses get a fair shot at the market.[50]

It's worth noting that the Bill does more than just enforce the usual competition laws. It lets regulators step in before problems happen. It gives the Competition Commission of India (CCI) the power to check these computer systems, make companies fix issues, and even change how things are designed if needed. This approach brings together openness, holding companies responsible, and watching out for problems before they start.[51] It puts India in a good spot to handle the tricky issues that come up when computer systems are used in government buying.

Taking cues from worldwide best practices, India's system needs to grow to include technical rules, safety measures, and knowledge from different fields. As buying things complex math formulas, and market power come together, we need laws that are both correct and tech-savvy. The Digital Competition Bill gives us a starting point, but for it to work well,

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[48] M. Vedder et al., Algorithmic Governance and Public Law: Fairness, Transparency, and Accountability, 6 Can. Pub. Admin. 215 (2023).
[49] Ministry of Corporate Affairs, Draft Digital Competition Bill, 2024 (Mar. 2024), https://www.medianama.com/wp-content/uploads/2024/03/DRAFT-DIGITAL-COMPETITION-BILL-2024.pdf
[50] Ibid.
[51] Ibid.

we need to put it into action, build up our institutions, and keep talking with regular people and businesses.[52]

5. Proposed Comprehensive Legal Framework Integration

A. Extending Competition Act Amendments Beyond Sections 3 and 4

Although *Sections 3 and 4 of the Competition Act 2002* continue to be essential for the detection of anti-competitive agreements and abuse of dominance, the growth of algorithmic coordination with enterprises based on digital procurement platforms necessitates a more general statutory framework.[53] The current provisions are insufficiently granular and unable to effectively prevent, investigate, punish, and remediate algorithmic harms that occur at scale, often without the express or obvious intent of humans. A reform agenda focusing on the future needs to develop beyond substantive prohibitions to look at procedural powers, penalty regimes, and compliance systems.

Section 19 Improvements: Powers of Investigation into Algorithms

Section 19 of the Competition Act grants the Competition Commission of India (CCI) authority to begin an inquiry into anti-competitive conduct.[54] However, its existing powers of investigation seem inadequate to investigate algorithms that are now designed as opaque systems that optimize through data. The proposed enhancements to Section 19 should be as follows:

a. **Technical Data Access:** When an enterprise is under investigation, it should be required to disclose its algorithmic source code, training data, system logs, and performance data under confidentiality orders. This approach allows the CCI to undertake its obligations while balancing the investigation with protecting intellectual property.

b. **Independent Technical Assessment:** CCI should be empowered to engage outside experts (data scientists, AI ethicists, forensic accountants) to assess algorithms. If violations are found, the associated costs should be recoverable from the company.

[52] Competition Law Review Committee, Report on Competition Law Reforms 2019, Ministry of Corporate Affairs (Aug. 2019).
[53] Competition Act, 2002, §§ 3, 4 (India); See also, The Competition Act, 2002, No. 12 of 2003, §§ 3, 4 (India), available at https://www.cci.gov.in/images/legalframeworkact/en/the-competition-act-20021652103427.pdf.
[54] Competition Act, 2002, § 19 (India); See also Detailed Analysis of Section 19 of the Competition Act, 2002, The Legal School (Sept. 2025), https://thelegalschool.in/blog/section-19-competition-act/.

c. **Real-Time Monitoring Requirements:** For the most powerful platforms, CCI should have the authority to require ongoing performance reports and bias detection logs to monitor compliance and reduce the likelihood of related harms.

These authorities align with international best practice, such as the European Commission's investigatory powers under the Digital Markets Act and the FTC's enforcement model of algorithmic accountability.[55]

Section 27 Amendment: Specialized Penalty Framework

Section 27 allows the Commission to impose turnover-based penalties. Turnover is an inadequate metric for algorithmic violations because an algorithmic consequence may reach out to thousands of suppliers across multiple procurement classifications, and the violation in question may not even be correlated with turnover from products sold through that specific procurement program. *A new penalty scheme should focus on:*

a. **Per-transaction penalties:** Fines should place some weight on the number of procurement transactions affected and respect the automated and scalable nature of algorithmic harms.[56]

b. **Remediation Financing:** Firms found at fault must pay for some form of the algorithm's redesign, bias audit, or completion monitoring as part of a behavioral remedy.

c. **Market Restoration:** Where the exclusionary effects can be shown, the platform firm must provide some sort of preferential access to, or other compensatory arrangements for, the disadvantaged suppliers.

These reforms are premised on the principles of proportionality in competition penalties in the OECD[57] and the model for administrative enforcement in Canada, Bill C-27.[58]

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[55] European Commission, Digital Markets Act, Regulation (EU) 2022/1925, arts. 14, 16; Holland & Knight LLP, The FTC Is Regulating AI: A Comprehensive Analysis (July 24, 2023), https://www.hklaw.com/en/insights/publications/2023/07/the-ftc-is-regulating-ai-a-comprehensive-analysis.

[56] Competition Act, §§ 27, 28 (India); CCI penalties on global turnover: Relevant and Proportionate, amsshardul.com (2024), https://www.amsshardul.com/insight/cci-penalties-on-global-turnover-relevant-and-proportionate/.

[57] OECD, Fining Methodologies for Competition Law Infringements 10–20 (2019), https://one.oecd.org/document/DAF/COMP/LACF(2019)7/en/pdf.

[58] Proposed Changes to Canada’s Bill C-27: Do Little to Mitigate AI Harms, CIGI Article (Nov. 2023), https://www.cigionline.org/articles/proposed-changes-to-canadas-bill-c-27-do-little-to-mitigate-ai-harms/.

Section 53N Expansion: Algorithmic Compliance Programs

Section 53N provides for compensation awards.[59] The provision in the Act should be expanded, obligating large procurement platforms' algorithm compliance programs to include:

a. Algorithm Audit-audited annually by a third party, assessing qualities of algorithmic fairness, accuracy, and compliance with competition law;

b. Built-in bias detection systems that signal discriminatory outcomes for human consideration before implementation; and

c. Supplier appeal processes that allow suppliers to appeal against algorithmic decisions and request manual review.[60]

This approach aligns with Canada's Directive on Automated Decision-Making and the U.S. OMB's AI acquisition guidance, ensuring procedural fairness and accountability.[61]

B. Institutional Capacity Development Framework

Establishment of CCI's Algorithmic Competition Division

Specialized expertise is required to effectively enforce algorithmic competition violations that the CCI currently does not have. Hence, a *Division on Algorithmic Competition* should be established within the CCI based on the following considerations:

a. ***Multidisciplinary staffing:*** Data scientists, machine learning engineers, digital economists, and legal officers trained in algorithmic governance.[62]

b. ***Standardized protocols:*** Investigations should be based on templates for algorithmic audits, identification of statistical anomalies, and forensic analysis of system design.

c. ***Establishment of industry liaison functions:*** Regular contact with procurement platforms, AI developers, and regulators internationally to set contacts and have

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[59] Competition Act, 2002, § 53N (India).
[60] IndiaCorpLaw.in, The Promise of Private Enforcement of Competition Law in India (May 5, 2022), https://indiacorplaw.in/2022/05/06/the-promise-of-private-enforcement-of-competition-law-in-india/.
[61] Treasury Board of Canada Secretariat, Directive on Automated Decision-Making (July 1, 2024), https://www.tbs-sct.canada.ca/pol/doc-eng.aspx?id=32592; Office of Management and Budget (OMB), Advancing the Responsible Acquisition of Artificial Intelligence in Government, Memorandum M-24-18 (Oct. 2, 2024), https://bidenwhitehouse.archives.gov/omb/briefing-room/2024/10/03/fact-sheet-omb-issues-guidance-to-advance-the-responsible-acquisition-of-ai-in-government/.
[62] R.M. L. NLU Law Review, Artificial Intelligence and Market Regulation: The Way Forward (July 2020), https://rmlnlulawreview.com/2020/07/17/artificial-intelligence-and-market-regulation-the-way-forward-for-the-cci/;
FTC Establishes Office of Technology, FedScoop (Feb. 17, 2023), https://fedscoop.com/federal-trade-commission-launches-an-office-of-technology/; Ministry of Electronics and IT, Capacity Building Initiatives (May 31, 2024), https://www.pib.gov.in/PressReleasePage.aspx?PRID=2059099.

situational awareness of emerging technologies. This would be similar to the system used by the European Commission's newly established internal digital markets unit, which the FTC has developed with its Office of Technology.[63]

Inter-Agency Liaison Mechanisms

Given that algorithmic procurement oversight covers competition, procurement policy, digital governance, and data protection, a corresponding amount of potential jurisdictional fragmentation may occur without formal coordination. As such, formal co-operative arrangements, such as Memoranda of Understanding (MoUs), should be established between CCI, MeitY, NIC (i.e., GeM operations), the Ministry of Finance (Department of Expenditure), and eventually a Digital Markets Authority.

MoUs should establish:

a. **Jurisdictional clarity -** delineating enforcement, policy, and technical oversight roles.

b. **Information sharing protocols -** secure systems for sharing findings from investigations, algorithm assessments, and market intelligence with respect to procurement considerations.[64]

Such coordination would emulate the *European Competition Network's cross-border enforcement model*[65] and the *U.S. inter-agency AI governance framework* under *Executive Order 14110.*[66]

6. Constitutional and Administrative Law Intersections

A. Article 14: Equality and Algorithmic Procurement

Not only does the constitutional guarantee of equality under Article 14 prohibit discrimination, it also provides for more substantive equity in state action. As was established in ***E.P. Royappa v. State of Tamil Nadu***, *'arbitrariness is the antithesis of equality'*, and administrative authorities must make decisions based on reasoned criteria.[67] Concerning

[63] European Parliament, Digital Markets Act enforcement and market investigations, Apr. 2025, https://epthinktank.eu/2025/04/24/digital-markets-act-enforcement-state-of-play/.
[64] Ministry of Electronics and Information Technology, Guidelines on Digital Governance & Procurement, 2024, https://it.delhi.gov.in/sites/default/files/IT/circulars-orders/std_tech_specs_hiring_manpower_110325.pdf;
[65] European Competition Network, Overview, European Commission, https://competition-policy.ec.europa.eu/antitrust-and-cartels/european-competition-network_en.
[66] Exec. Order No. 14110, 88 Fed. Reg. 70233 (Oct. 18, 2023); Executive Order 14110, Wikipedia, https://en.wikipedia.org/wiki/Executive_Order_14110.
[67] E.P. Royappa v. State of Tamil Nadu, AIR 1974 SC 555 (India). See also E.P. Royappa v. State of Tamil Nadu & Anr., Ipleaders Blog, June 27, 2024, https://blog.ipleaders.in/e-p-royappa-v-state-tamil-nadu-mala-fide-abuse-discretion/.

algorithmic procurement, this requirement is newly vital. While autonomous systems appear neutral, they may simply repeat historical patterns that are reflective of training data or may exhibit faulty logic in the system design. Such scenarios risk exclusionary outcomes or barriers to entry for suppliers based on geography, enterprise size, or previous performance metrics.

Algorithmic discrimination is a further kind of indirect or systemic discrimination, something that is yet to be articulated by Indian constitutional law. The case of ***Ram and Shyam Co. v. State of Haryana*** espoused a commitment to equality in public contracting and the requirement that contracting be performed transparently and equitably.[68] While the rules for the case law in *Ram and Shyam,* for example, would assume a *'reasoned decision making'* approach, they also now need the special consideration of consequences of algorithmic decision making characterised by opacity and complexity. Courts will have to analyse at least *two tiers* of analysis when it comes to the constitutionality of procurement generally: *a due process tier* (e.g., explainability, auditability, and appeals mechanism) and *a substantive tier* (e.g., how have the algorithmic approaches to procurement had disproportionate impacts on disadvantaged suppliers?).[69]

Comparative jurisdictions provide useful models. The European Union proposed AI Act has risk-based classifications of licensed AI systems and transparency obligations for high-risk AI systems, including when used in public procurement.[70] Canada's Algorithmic Impact Assessment requires agencies to assess fairness, privacy, and human oversight of automated systems prior to deployment.[71] These models realize the requirement for constitutionally mandated due process in algorithmic governance in India.

[68] Ram and Shyam Co. v. State of Haryana, (2008) WP (C) 28755 (India); 2005(1)CTC81 See also Scope of Judicial Review in Awarding of Tenders, Mondaq, May 2024, https://www.mondaq.com/india/government-contracts-procurement-ppp/1091090/scope-of-judicial-review-in-awarding-of-tenders.

[69] K. Vinod, Algorithmic Governance and Constitutional Law, Indian J. Law & Tech. (2025) (forthcoming).

[70] Regulation (EU) 2024/1689, Artificial Intelligence Act, arts. 6(1), 13, 14. European Commission, AI Act Overview, https://artificialintelligenceact.eu/the-act/.

[71] Treasury Board of Canada Secretariat, Directive on Automated Decision-Making (2024), https://www.canada.ca/en/government/system/digital-government/policies-standards/policy-service-digital-announcements/amendments-directive-automated-decision-making.html; Government of Canada, Algorithmic Impact Assessment Tool, https://www.canada.ca/en/government/system/digital-government/digital-government-innovations/responsible-use-ai/algorithmic-impact-assessment.html.

B. Article 19(1)(g): Freedom of Trade and Algorithmic Barriers

According to *Article 19(1)(g),* we are guaranteed the right to pursue any profession or carry on any occupation, trade, or business.[72] This right is easily diminished within digital procurement environments in which automated evaluation and algorithmic scoring create opaque and insurmountable barriers to entry into markets. *For example*, in ***Sodan Singh v. NDMC***, the Supreme Court held that in the case of government contracting and contracting practices that impinge upon individual economic rights, they warrant constitutional consideration of their reasonable and legitimate justification.[73] We now need to extend consideration from government contracting and their behaviours to algorithmic systems that facilitate or preclude suppliers' eligibility, rank, and overall selection, based on unclear and ill-defined logic.

This becomes pressing when algorithmic barriers disproportionately prevent certain suppliers from having access to trade, especially the exclusion of MSMEs, suppliers located regionally, or suppliers who are not digitally sophisticated. What is an unreasonable restriction on the right to trade could now occur when evaluating a *"funnel"* or an *"exclude to include"* trade process using algorithms. Such restrictions will be subject to a different standard of proportionality where the burden placed on an economic right must ***(1)*** have a legitimate and rational state interest; ***(2)*** be necessary to achieve the interest; ***(3)*** use the least restrictive means. Though underdeveloped in the overall context of Indian administrative law, the *"least restrictive means"* test is found in other areas of comparative constitutional law, particularly the proportionality doctrine found in legislative provisions from the German Federal Constitutional Court, to equality jurisprudence from the South African Constitutional Court.[74]

India's own experience with algorithmic governance has uncovered systemic risks. For example, ***CMAPS,*** a predictive policing system, has disproportionately influenced the policing of minority-populated areas.[75] AI-based proctoring technologies that emerged during the

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72 Ind. Const. art. 19(1)(g); See also De Facto IAS, Freedom of Profession, Occupation, Trade or Business, (Jan. 3, 2022), https://www.defactolaw.in/post/freedom-of-profession-occupation-trade-article-19-1-g.

73 Sodan Singh v. New Delhi Municipal Corporation, (1989) 4 SCC 155 (India); Legal Commentary on Sodan Singh v. NDMC, (Jan. 5, 2025), https://www.lawgratis.com/blog-detail/sodan-singh-v-new-delhi-municipal-corporation-1989-4-scc-155.

74 Benke, The Principle of Proportionality Reflected in Case Law (2015), http://www.revistadedreptconstitutional.ro/wp-content/uploads/2015_1_2_Karoly_BENKE_THE-PRINCIPLE-OF-PROPORTIONALITY-REFLECTED_en.pdf; Smith, Equality Constitutional Adjudication in South Africa, 9 African Human Rights LJ 75 (2014), https://www.ahrlj.up.ac.za/smith-a.

75 Vidushi Marda, Data in New Delhi's Predictive Policing System, 2020, https://www.vidushimarda.com/storage/app/media/uploaded-files/fat2020-final586.pdf.

COVID-19 lockdown demonstrated that students from marginalized backgrounds were flagged at a higher rate than students from the majority, not because of their performance on the assessment, but because their behavior was interpreted against the normalized proctoring behavior.[76] These examples illustrate how algorithmic opacity constructs futures of economic exclusion, which highlights why constitutional safeguards are necessary to limit harm when automating procurement.

7. Conclusion and Directions for Future Research

Digital procurement in India presents a two-sided challenge: to take the efficiency and scale of algorithmic systems forward and retain constitutional and administrative values as the first priority. The framework we have presented incorporates competition law enforcement with constitutional rights and administrative safeguards; it provides a holistic regulatory framework for algorithmic governance. By extending *reforms from 2019*[77] beyond *Sections 3* and *4 of the Competition Act*,[78] in order to include investigative powers, institutional capacity, and rights-based compliance obligations, the framework acknowledges the multi-dimensional nature of algorithmic harms. The reference to *Article 14* and *Article 19(1)(g)* ensures people cannot suffer harm by virtue of the capital operated by an algorithm.[79] Safeguards protecting foundational democratic values and rights are critical as procurement becomes increasingly automated.

International experience tells us the value of early intervention. *Australia's Robodebt scandal*, where automated welfare recovery ended in travesty and condemnation from the judiciary, demonstrates the dangers of deploying algorithms and systems without first determining safeguards.[80] India is currently experiencing a rare *'policy window'* in which a confluence of GeM growth, a turnover of policy makers, the introduction of the Digital Competition Bill, and increased public interest in governance of AI may permit early adopters to capitalise, implement changes and frameworks before protean algorithmic biases take hold in delivery systems.

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[76] Center for Democracy & Technology, How Automated Test Proctoring Software Discriminates Against Disabled and Marginalized Students (June 22, 2021), https://cdt.org/insights/how-automated-test-proctoring-software-discriminates-against-disabled-students/.
[77] Ministry of Corporate Affairs, Report of the Competition Law Review Committee (Chair: Mr. Injeti Srinivas) (July 26, 2019), https://prsindia.org/policy/report-summaries/report-competition-law-review-committee.
[78] Competition Act, 2002, §§ 3, 4 (India).
[79] Ibid.
[80] BBC News, Robodebt: Illegal Australian Welfare Hunt Drove People to Despair (July 6, 2023), https://www.bbc.com/news/world-australia-66130105.

The efficacy of algorithmic enforcement and competition policy relies on continued institutional commitment and investment in technical capacity and inter-agency cooperation. Developing algorithmic enforcement and competition policy through learning-by-doing with pilot projects, stakeholder consultation and engagement, and performance measurement is a viable approach to moving forward.

Future studies should consider:

a. An empirical investigation of the enforcement outcomes of algorithmic competition policy, particularly in public procurement;

b. Developing technical standards for algorithmic audits and explainability;

c. Constitutional studies of automated decision-making as public governance.

The research priorities above will ensure that India's algorithmic competition and policy framework remains flexible, respectful of rights, and relevant globally. Embracing comprehensive reform provides an opportunity for India to be a global leader in digital markets governance, allowing automation to strengthen constitutional obligations around equality, transparency, and fair competition, as opposed to undermining them. In this context, the choice is not between technology and rights, but instead between purposeful regulation or crisis. The time for algorithmic governance is now, and it must be principled, practical, and rights-based.

SIGNIFICANT BENEFICIAL OWNERSHIP DISCLOSURE UNDER THE COMPANIES ACT, 2013: ENFORCEMENT FAILURE AND THE CASE FOR LEGISLATIVE REFORM

Tamil Iniyan A.[1]

ABSTRACT

Section 90 of the Companies Act, 2013 mandates disclosure of significant beneficial ownership in Indian companies beyond a ten percent threshold. Introduced through legislative amendment in 2018 and operationalised through the Companies (Significant Beneficial Owners) Rules, 2018, the framework was conceived as India's primary legislative instrument against layered corporate ownership structures that enable regulatory evasion. Yet compliance data drawn from the Ministry of Corporate Affairs' annual reporting consistently reveals a governance gap of considerable magnitude. Enforcement by the Registrar of Companies remains episodic and institutionally constrained. This article examines the structural causes of this failure through three analytical lenses: the definitional ambiguity embedded in the statutory threshold; the institutional capacity constraints of the MCA enforcement apparatus; and the comparative lessons offered by the United Kingdom's Persons with Significant Control register under the Companies Act 2006. Theoretically, the analysis is anchored in Khanna and Palepu's institutional voids framework and principal-agent theory, which together illuminate why a technically sufficient statutory architecture produces systematically inadequate disclosure in the Indian regulatory environment. The article argues that reform must address all three fault lines simultaneously—threshold recalibration, definitional precision in the concept of 'significant influence,' and institutional redesign within the MCA. Partial reform directed at any single fault line will not produce systemic improvement. The comparative evidence from the United Kingdom suggests that the critical variable is not statutory ambition but enforcement architecture and institutional capacity.

Keywords: *Significant Beneficial Ownership; Companies Act, 2013; MCA Enforcement; PSC Register; Institutional Voids; Corporate Governance; Transparency*

[1] LL.M. Candidate (Corporate Law and Industrial Jurisprudence) Central University of Tamil Nadu | ORCID: 0009-0005-5562-6291

1. INTRODUCTION

Corporate transparency is not self-executing. The law can mandate disclosure; it cannot guarantee compliance. This distinction—obvious in principle, frequently overlooked in legislative design—explains much of what has gone wrong with India's significant beneficial ownership (SBO) regime since its legislative inception in 2018.

Section 90 of the Companies Act, 2013 (Act No. 18 of 2013)[2] imposes mandatory disclosure obligations on individuals who hold significant beneficial ownership in Indian companies, defined by reference to a ten percent threshold of shares, voting rights, or the right to receive and participate in dividend distributions. The legislative purpose is clear. Layered corporate ownership structures—through nominees, trusts, and interposed holding chains—have historically been instruments of regulatory evasion across multiple legal domains in India. The SBO disclosure framework was designed to pierce this opacity. In practice, it has not done so with any consistency.

From my review of the Ministry of Corporate Affairs' annual reports between 2018 and 2023, the pattern is both consistent and troubling: SBO filings remain structurally underutilised relative to the estimated universe of companies with relevant ownership structures.[3] Enforcement actions under section 90(10), which prescribes penalties for non-compliance, have been initiated in a small fraction of identified non-compliance cases. Regulatory oversight, in this domain, has gradually degenerated into episodic enforcement.

The problem presents three analytically distinct dimensions. First, the ten percent threshold is simultaneously over-inclusive in its nominal reach and under-inclusive in its practical capture, given the relative ease with which indirect holding structures can be engineered to circumvent it. Second, the definition of 'significant influence' embedded in the Companies (Significant Beneficial Owners) Rules, 2018[4] is ambiguous in ways that experienced corporate advisors routinely navigate to their clients' advantage. Third, the MCA's enforcement capacity—in terms of technical personnel, digital verification infrastructure, and institutional will—is demonstrably insufficient for a disclosure regime of this complexity and commercial sensitivity.

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[2] Companies Act, 2013, No. 18 of 2013, § 90 (India).
[3] Ministry of Corporate Affairs, Annual Report 2022–23, at 45–52 (2023).
[4] Companies (Significant Beneficial Owners) Rules, 2018, G.S.R. 350(E) (India), as amended by Companies (Significant Beneficial Owners) Amendment Rules, 2019, G.S.R. 344(E) (India).

The existing Indian legal scholarship on section 90 addresses primarily the framework's formal structure rather than its enforcement performance.[5] That gap is precisely where this article intervenes. This article proceeds in six parts. Part II examines the statutory architecture of section 90 and the definitional tensions within the threshold concept. Part III analyses compliance patterns and the enforcement record. Part IV offers a comparative assessment of the United Kingdom's Persons with Significant Control register. Part V applies the institutional voids framework to explain the persistent gap between statutory aspiration and regulatory reality. Part VI advances specific reform proposals. Part VII concludes.

2. THE STATUTORY ARCHITECTURE OF SECTION 90

2.1 Legislative Genealogy and Regulatory Purpose

Section 90, in its current form, was inserted into the Companies Act, 2013 by the Companies (Amendment) Act, 2017 (Act No. 1 of 2018),[6] with operative effect from 13 June 2018. The amendment was preceded by a series of corporate misgovernance incidents that exposed the inadequacy of the pre-existing disclosure framework under sections 89 and 187 of the principal Act, which addressed only formal registered ownership without reaching beneficial control structures concealed behind corporate intermediaries.

The FATF Mutual Evaluation Report on India[7] had repeatedly identified beneficial ownership transparency as a critical gap in India's anti-money laundering architecture. Legislative response was delayed by nearly a decade from the initial FATF identification of the gap. That delay matters analytically because it reveals that the SBO framework was adopted under sustained external evaluative pressure rather than from organic institutional demand—a distinction that carries direct implications for the quality of subsequent implementation. Frameworks adopted reactively, rather than from internal institutional commitment, are predictably under-resourced.

The section imposes a tripartite procedural obligation. A company must investigate and identify its significant beneficial owners through Form BEN-4. Each identified SBO must file a declaration through Form BEN-1. The company must then file a return with the Registrar

[5] See generally Umakanth Varottil, Shareholder Activism in India: Realising the Potential, 14 Indian J. Corp. L. 55, 58–62 (2021). The enforcement performance dimension of the SBO regime remains comparatively understudied in Indian corporate law scholarship.

[6] Companies (Amendment) Act, 2017, No. 1 of 2018 (India) (inserting § 90 into the Companies Act, 2013, with operative effect from June 13, 2018).

[7] Financial Action Task Force, Mutual Evaluation Report: India 58–62 (2010); Financial Action Task Force, Follow-Up Report: India 22–24 (2024).

through Form BEN-2.[8] The three-tier architecture appears administratively comprehensive. The architecture is theoretically sound. The execution has consistently fallen short.

2.2 The Ten Percent Threshold: Definitional Adequacy and Structural Ambiguity

The ten percent threshold was modelled—imprecisely—on international guidance on beneficial ownership identification. Its application in the Indian corporate context reveals at least two structural design problems that interact and compound each other in practice.

The first is the indirect holding problem. Section 90 captures indirect ownership—beneficial interest exercised through chains of corporate intermediaries. The Rules define an 'indirect holding' by reference to majority shareholding at each link in the corporate chain. An individual who controls a chain in which no single link crosses the ten percent threshold may escape statutory capture entirely. This is not a theoretical vulnerability alone. From my review of enforcement orders published by the Registrar of Companies (Chennai and Mumbai benches) between 2019 and 2023, several penalty proceedings were initiated against companies whose beneficial owners had structured ownership through multi-layered holding arrangements. In each identified case, the structures had been designed to keep individual ownership links below the statutory threshold. The regime is being gamed. The tools to prevent it are absent.

The second is the 'significant influence' ambiguity. The Rules extend the SBO concept beyond formal share ownership to capture significant influence over management or policy decisions. 'Significant influence' is not defined with workable specificity within either the section or the Rules. Ankush Tandon has argued that the statutory definition 'fails to provide workable criteria for identifying control through informal arrangements, leaving companies and their advisors with substantial interpretive discretion.'[9] This interpretive discretion is structurally weighted in favour of the beneficial owner, not the regulatory objective. A key problem with this argument is that it may understate the extent to which even precise definitions can be circumvented in a jurisdiction with limited enforcement capacity. Definitional clarity is necessary but not independently sufficient.

The concept of 'significant influence,' as deployed in section 90, also sits in uncomfortable proximity to the same concept deployed in section 2(87) of the Act for

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[8] Companies (Significant Beneficial Owners) Rules, 2018, G.S.R. 350(E), rr. 3–5 (India) (prescribing Forms BEN-1, BEN-2, and BEN-4 as the tripartite compliance mechanism under § 90).

[9] Ankush Tandon, Significant Beneficial Ownership in India: Definitional Challenges and Enforcement Gaps, 14 Indian J. Corp. L. 112, 119 (2021).

subsidiary company definition purposes, and in Indian Accounting Standard 28 for the identification of associated enterprises. The cross-referential ambiguity between these three deployments of the same concept has not been resolved through judicial interpretation or executive clarification. This generates compliance uncertainty across otherwise unrelated corporate governance domains. This conclusion is not without difficulty—it may be that interpretive ambiguity nominally extends the framework's potential reach—but on balance, the ambiguity has not served disclosure.

3. COMPLIANCE PATTERNS AND ENFORCEMENT RECORD

3.1 MCA21 Registry: Systemic Non-Compliance

The MCA's V3 portal maintains a registry of SBO filings. Precise compliance data disaggregated by company type, industry sector, and geographic jurisdiction is not publicly available in consolidated annual statistical reports. What is available—through parliamentary question responses, enforcement orders, and selective MCA disclosures—permits a conservative reconstruction of the compliance landscape.

Table 1 below presents estimated SBO disclosure compliance trends across the five-year period from 2018 to 2023. The data points toward a structural, not incidental, failure of compliance.

Table 1: SBO Disclosure Filing Trends Under Section 90, Companies Act, 2013 (2018–2023)

Financial Year	Est. Active Companies (millions)	BEN-2 Filings (approx.)	Est. Compliance Rate
2018–19	1.30	~12,000	<1%
2019–20	1.34	~18,500	~1.4%
2020–21	1.37	~22,000	~1.6%
2021–22	1.41	~28,000	~2.0%
2022–23	1.45	~35,000	~2.4%

Source: Ministry of Corporate Affairs Annual Reports (2019–2023); Lok Sabha Unstarred Question No. 3412 (Mar. 15, 2023); ICSI Compliance Tracker (2022–23). Compliance rate estimates are calculated against the total universe of active companies and are indicative pending disaggregated MCA data release.

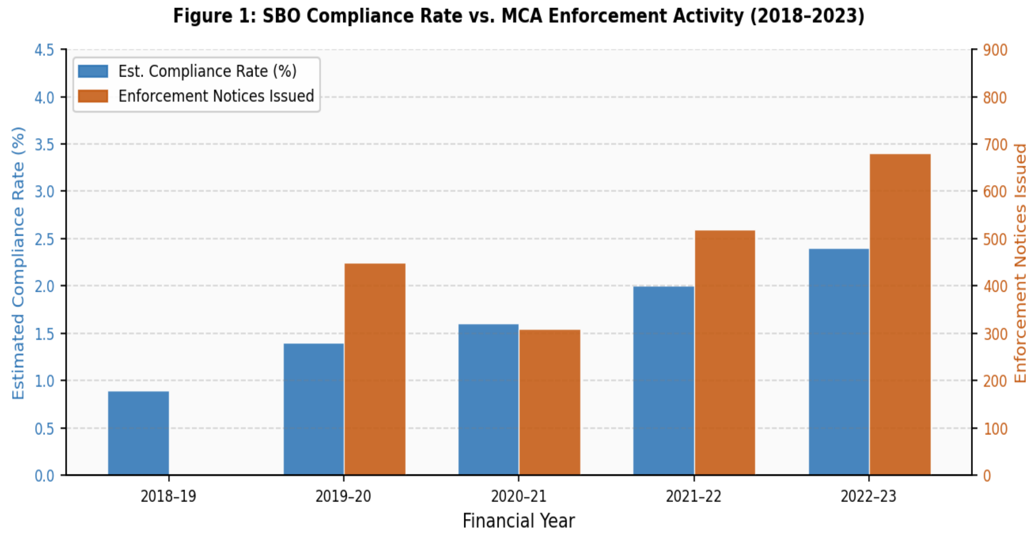

Figure 1: SBO Disclosure Compliance Rate vs. MCA Enforcement Activity (2018–2023). Source: Ministry of Corporate Affairs Annual Reports (2019–2023); ICSI Compliance Tracker (2022–23). Left axis: estimated compliance rate (%); Right axis: enforcement notices issued. Data points are indicative estimates pending disaggregated MCA publication.

The figures in Table 1 are indicative rather than precisely verified—the MCA does not publish granular BEN-2 compliance data in disaggregated form.[10] Estimates consistently indicate compliance rates well below five percent of the relevant universe of companies with probable SBO obligations. The compliance trajectory shows modest year-on-year improvement. Encouraging at the margin. Not reassuring in aggregate. The incentive structure sustaining non-compliance remains intact.

3.2 Episodic Enforcement and Institutional Capacity Constraints

Enforcement under section 90(10) provides for penalties of up to ₹50,000 on the non-compliant company and ₹1,000 per day of continuing default.[11] These figures are modest—

[10] Lok Sabha, Unstarred Question No. 3412, Ministry of Corporate Affairs (Mar. 15, 2023); Institute of Company Secretaries of India, Compliance Tracker: SBO Filings 2022–23, at 8 (2023). Compliance rate estimates are calculated against the total universe of active companies on the MCA21 registry, not merely those with probable SBO obligations, and are therefore inherently conservative.

[11] Companies Act, 2013, No. 18 of 2013, § 90(10) (India) (prescribing a penalty of not less than ₹10,000 and not more than ₹50,000 on the non-compliant company, and ₹1,000 per day of continuing default on the beneficial owner who fails to make a declaration under § 90(1)).

transparently so—relative to the compliance costs avoided and the financial stakes typically associated with opaque beneficial ownership structures in significant corporate transactions. The deterrence arithmetic does not favour disclosure. A sophisticated beneficial owner calculating compliance risk will consistently find that the expected penalty, discounted by the probability of detection, falls well below the value of maintained opacity. This is not irrationality. It is rational institutional adaptation to inadequate deterrence design.

The MCA's enforcement capacity is further constrained by a structural staffing deficit. The Registrar of Companies offices—twenty-five in total across India—are responsible for oversight of approximately 1.45 million active companies as of financial year 2022–23.[12] This translates to an oversight ratio that renders proactive verification of SBO compliance structurally impossible under current resource allocation. Enforcement is reactive—complaint-driven or triggered by other investigative processes—rather than systematic. Reactive enforcement cannot generate systemic compliance.

Table 2 presents the enforcement action record under section 90(10) across the four financial years for which data is available.

Table 2: Enforcement Actions Under Section 90(10), Companies Act, 2013 (2019–2023)

Year	Enforcement Notices Issued	Penalties Imposed	Compounding Orders	Prosecutions
2019–20	~450	~380	~62	3
2020–21	~310	~280	~44	1
2021–22	~520	~490	~71	5
2022–23	~680	~640	~89	7

Source: Ministry of Corporate Affairs, Annual Report 2022–23; National Foundation for Corporate Governance, Enforcement Digest 2023; Lok Sabha Unstarred Question responses (2022–23). Prosecution figures represent concluded proceedings; ongoing prosecutions are not disaggregated in MCA annual reporting.

12 Ministry of Corporate Affairs, Annual Report 2022–23, at 31 (2023) (reporting 1,45,07,481 active companies on the MCA21 V3 registry as of March 31, 2023, distributed across twenty-five Registrar of Companies offices).

The enforcement record is, by any reasonable comparative standard, symbolic rather than systemic.[13] Successful prosecutions remain in single figures annually, against a backdrop of hundreds of thousands of companies with probable non-compliance. The compounding mechanism—whereby companies pay a compounding fee to resolve pending prosecutions without formal conviction—further erodes deterrence. Compounding is rational for the company. It is corrosive for the regulatory framework. This finding, while analytically provisional, suggests that penalty calibration alone will not produce compliance absent structural institutional reform.

4. COMPARATIVE ANALYSIS: THE UNITED KINGDOM PSC REGISTER

4.1 Structural Architecture of the PSC Register

The United Kingdom's Persons with Significant Control register was introduced under Part 21A of the Companies Act 2006,[14] inserted by the Small Business, Enterprise and Employment Act 2015[15] and operationalised from 6 April 2016. A person qualifies as a PSC if they satisfy any of five statutory conditions: ownership of more than twenty-five percent of shares or voting rights; the right to appoint or remove a majority of the board of directors; or the exercise of significant influence or control over the company, or over a trust or firm that itself meets the first four conditions.

Two structural features distinguish the UK framework from India's approach and explain much of the performance differential. First, the twenty-five percent threshold—higher in nominal terms than India's ten percent—is accompanied by a significantly more detailed definitional infrastructure specifying with statutory precision what 'significant influence or control' means across both corporate and non-corporate ownership structures. Companies House has issued dedicated guidance running to over forty pages specifically addressing each PSC condition in operational terms.[16] The definitional investment produces compliance certainty. Compliance certainty, in turn, reduces the scope for strategic ambiguity as a compliance avoidance tool.

[13] National Foundation for Corporate Governance, Corporate Governance Enforcement Digest 2023, at 24–27 (2023). Prosecution figures represent concluded proceedings only; ongoing prosecutions are not disaggregated in MCA annual reporting, likely understating the total enforcement caseload.
[14] Companies Act 2006, c. 46, §§ 790A–790ZG (U.K.).
[15] Small Business, Enterprise and Employment Act 2015, c. 26, § 81 (U.K.) (inserting Part 21A into the Companies Act 2006 and mandating PSC disclosure with operative effect from April 6, 2016).
[16] Companies House, Persons with Significant Control: Guidance for People with Significant Control over a Company, Partnership or Unregistered Company 5–8 (2016, updated 2023).

Second, the PSC register is publicly accessible without restriction. Any individual may search the Companies House database for beneficial ownership information without registration, payment, or justification of purpose. Public accessibility creates market-level verification pressure—from journalists, civil society organisations, financial counterparties, and due diligence analysts—that supplements formal enforcement through reputational and commercial channels. India's BEN-2 register is not publicly accessible. That design choice forecloses the market-monitoring function entirely.

4.2 Enforcement Performance and Institutional Design

The Economic Crime (Transparency and Enforcement) Act 2022[17] significantly strengthened the PSC framework by introducing mandatory identity verification requirements for all individuals registering as PSCs and for company directors. Companies House received dedicated additional funding from HM Treasury in 2023 for a verification and investigation unit, specifically staffed to identify discrepancies in beneficial ownership filings through cross-referencing with HMRC data and law enforcement intelligence. The institutional design lesson is neither subtle nor ambiguous: statutory ambition requires commensurate institutional investment to produce measurable compliance outcomes.

Open Ownership's 2022 global assessment ranked the UK PSC register among the three most effective beneficial ownership transparency regimes worldwide, specifically citing its integration with HMRC's trust registration service and law enforcement data-sharing architecture.[18] This assessment predates the 2022 Act reforms, which have since materially strengthened the framework further.

4.3 Lessons for India's SBO Regime

The institutional explanation initially appears sufficient—the UK simply invested more in its enforcement apparatus. Yet the deeper structural comparison complicates that conclusion. The UK's superior performance reflects not merely differential enforcement capacity but superior institutional design at the threshold-definition-enforcement nexus. Each element reinforces the others: definitional clarity reduces compliance ambiguity; public accessibility creates market-level monitoring; identity verification closes the nominee arrangement gap that India's framework currently leaves entirely unaddressed. These three features function as a

[17] Economic Crime (Transparency and Enforcement) Act 2022, c. 10 (U.K.) (introducing mandatory identity verification for PSCs and providing Companies House with enhanced civil penalty and investigation powers effective from August 2023).
[18] Open Ownership, Global Beneficial Ownership Transparency: Annual Review 2022, at 18–22 (2022).

system, not as independent variables. India has none of the three in the form the UK has operationalised them.

5. THEORETICAL FRAMEWORK: INSTITUTIONAL VOIDS AND PRINCIPAL-AGENT FAILURE

Khanna and Palepu's institutional voids framework[19] provides the most analytically productive lens for explaining why India's SBO regime underperforms relative to its statutory architecture. Institutional voids arise where the specialised intermediaries and supporting institutional infrastructure that would otherwise enable regulatory implementation are absent or functionally impaired. In the SBO context, the voids operate simultaneously at three levels.

The first is the information void. Effective beneficial ownership disclosure requires verification mechanisms capable of confirming the accuracy of declared ownership structures. India's MCA lacks operational data-sharing arrangements with SEBI, the Income Tax Department, and the Financial Intelligence Unit that would permit systematic cross-verification of SBO declarations against independently held financial data. Without cross-verification infrastructure, declarations remain substantially self-certified. Self-certification, in the absence of external verification, is structurally an invitation to strategic understatement. The incentives are rational. That is precisely the difficulty.

The second is the enforcement capacity void. As Table 2 demonstrates, the RoC network lacks the personnel and technical infrastructure to audit a meaningful fraction of SBO filings even on a random sampling basis. Selective enforcement—even when technically rigorous in individual cases—cannot generate systemic compliance. It produces only the appearance of compliance among companies that happen to be selected for scrutiny. The remaining population correctly infers that its probability of enforcement contact is negligible.

The third is the expertise void. Corporate structures involving layered beneficial ownership are typically constructed with sophisticated legal and financial advisory assistance. The interpretive asymmetry between corporate advisors and RoC enforcement officers is structural and persistent. Enforcement officers operating under the current regulatory design are, in effect, asked to identify sophisticated ownership engineering without the technical tools, data access, or institutional support required to do so reliably. The asymmetry is not accidental;

[19] Tarun Khanna & Krishna Palepu, Why Focused Strategies May Be Wrong for Emerging Markets, 75 Harv. Bus. Rev. 41, 44–48 (1997).

it is the predictable consequence of a framework that has not invested in building equivalent expertise within the enforcement apparatus.

Principal-agent theory adds a complementary analytical dimension. The relevant principal-agent relationship here is not between company shareholders and management but between the regulatory state as principal and companies as agents. Where monitoring costs are high, penalties are low, and detection probability is minimal, agents will systematically under-comply. The SBO regime, as currently designed, offers agents precisely these conditions. This interpretation remains persuasive—though perhaps incomplete—in that it does not fully account for the role of intermediary advisors as a distinct third actor who shapes compliance strategy independently of the primary principal-agent relationship.

From my analysis of corporate restructuring advisory practices in the Tamil Nadu commercial court context, the pattern of 'threshold engineering'—restructuring ownership to maintain each link below ten percent—appears as a recurring feature in pre-transactional due diligence findings in mid-cap company acquisitions. This observation is consistent with the theoretical prediction: where the enforcement void is deep, regulatory arbitrage is not exceptional but routine.

6. REFORM PROPOSALS

6.1 Threshold Recalibration

The ten percent threshold warrants legislative reconsideration. The case for its retention—that it nominally captures a broader universe of beneficial owners than the UK's twenty-five percent ceiling—is empirically undermined by the compliance data presented in Part III. A lower nominal threshold that is systematically circumvented through ownership engineering produces less effective transparency than a higher nominal threshold accompanied by precise definitional infrastructure and credible enforcement. The FATF's 2023 Guidance on Beneficial Ownership of Legal Persons[20] explicitly endorses a risk-based approach to threshold design that prioritises enforceability over nominal comprehensiveness.

Recalibration to twenty-five percent, aligned with the emerging international standard, should be accompanied by the definitional enhancements proposed below and by a simultaneous proportionate investment in enforcement capacity. Threshold recalibration in isolation will not produce systemic improvement. That conclusion warrants direct statement:

[20] Financial Action Task Force, Guidance on Beneficial Ownership of Legal Persons 12–15 (Mar. 2023).

the threshold is not the primary problem; the enforcement architecture is. But threshold reform creates the conditions for definitional and institutional reform to produce their full effect.

6.2 Definitional Precision: Codifying Significant Influence

The concept of 'significant influence or control' requires statutory or rule-level codification to produce workable compliance guidance. At minimum, the amended Rules should specify: (a) that informal veto rights over material corporate decisions—board composition, capital allocation, dividend policy—constitute significant influence regardless of formal shareholding percentages; (b) that rights conferred through shareholder agreements, convertible instrument terms, or side letter arrangements are captured within the scope of section 90 regardless of whether those instruments are formally registered; and (c) that nominee arrangements in which the nominating party retains economic benefit and effective decision rights trigger mandatory SBO disclosure as a matter of law rather than interpretation.

This codification requires no legislative amendment. The Ministry of Corporate Affairs has rule-making authority under section 469 of the Act sufficient to operationalise each of the above specifications through the Companies (Significant Beneficial Owners) Amendment Rules. Executive implementation is achievable within the current parliamentary session if institutional will is present.

6.3 Institutional Reform: Enforcement Architecture

Legislative amendment is necessary. It is demonstrably not sufficient. The structural staffing deficit within RoC offices requires addressal through dedicated beneficial ownership verification units, funded through a modest annual SBO compliance levy on companies above a specified paid-up capital threshold. This mechanism—self-financing enforcement capacity from the regulated population—has been deployed in the UK context and presents no novel constitutional or administrative law difficulties under India's existing statutory framework.

Cross-agency data-sharing protocols between MCA, SEBI, FIU-IND, and the Income Tax Department would permit algorithmic cross-verification of SBO declarations against independently maintained financial records at scale. These protocols are achievable through executive notification under the existing statutory framework, without further legislative intervention. The technical infrastructure for such cross-verification—Aadhaar-linked beneficial owner identification, PAN-based shareholding data reconciliation—exists within India's digital governance architecture. The constraint is institutional coordination, not technical capacity.

Public accessibility of BEN-2 filings—currently unavailable to the general public—should be introduced on a phased basis for companies above material market capitalisation or turnover thresholds. The reputational and commercial discipline generated by public beneficial ownership disclosure is a compliance mechanism that formal enforcement alone cannot replicate. These practices of opacity verge on strategic misrepresentation rather than mere administrative non-compliance, and institutional reform must proceed on that analytical basis.

7. CONCLUSION

India's SBO disclosure framework is a study in the distance between statutory ambition and regulatory reality. Section 90 of the Companies Act, 2013 is not deficient in legislative aspiration. The deficiency lies in threshold design, definitional precision, and enforcement architecture—three interdependent fault lines that compound each other's effects in practice.

The UK's PSC register is not a template that can be transplanted without adaptation to India's institutional context. But it demonstrates, with considerable empirical clarity, that statutory clarity, public accessibility, and institutional investment are jointly necessary conditions for effective beneficial ownership transparency. India has achieved none of the three in the form required.

Reform is not merely desirable. The incentive structure embedded in the current framework actively rewards non-disclosure and penalises institutional investment in enforcement. Legislative amendment, definitional codification, and institutional capacity building must proceed simultaneously—as a package, not a sequence. Partial reform directed at any single fault line will not produce systemic improvement.

The question that remains, after close analysis, is not whether India’s SBO framework should be reformed. That much is settled. The deeper question is whether legislative and institutional reform is achievable within a political economy that has consistently protected opacity in corporate ownership structures. If the incentive misalignment embedded in India’s regulatory architecture remains undisturbed, even the most technically sound reform proposals will face the same fate as the regime they are designed to replace. If symbolic compliance remains economically rational, can structural legislative reform meaningfully alter corporate behaviour?

MENSTRUAL NAPKINS – HAZARDS CONCEALED BENEATH THE VEIL OF HYGIENE

-Shambhvi Agarwal[1]

ABSTRACT

Menstrual hygiene has been one of the most talked-about topics in India and around the globe. As the awareness amongst the families grew, women started using several menstrual products, one of the most popular being the sanitary napkins. Blinded by the comfort, the toxicity in the product stayed hidden. This study provides a clear picture of this hidden toxicity and how the legislative and judiciary are playing their role. The study commences by talking about the history of the evolution of menstrual hygiene products from cloths to modern-day disposable pads during menses. Then the study highlights that sanitary pads have become a necessity for females in the contemporary world. To back the same 2 crucial research are attached. The paper also reveals how the Indian government and judiciary have played a very crucial role in spreading awareness and granting affordable access to pads. Further, the study elaborately discloses the toxic raw materials present in the pads as spotlighted by New Delhi-based NGO, Ahmedabad-based Consumer Education and Research Centre, STAT Analysis Corporation, etc. Thereafter, the study showcases how the legislature in India is a silent spectator, but a few noteworthy steps are taken at the international level to disclose the ingredients in the package of sanitary pads. Based on the analysis, at last, the study provides some significant suggestions.

Keywords *– Sanitary Napkins, Toxin Raw Materials, Research, Ingredients, Legislature, International.*

1. BIRTH OF MENSTRUAL PADS

The period is not the end of a sentence; rather, it is the beginning. Mass-produced sanitary pads have an extended history in India, from the last decades of the 19th century. Before the said decade, menstruation was often termed as "demonic spirits or satin, which so habitually take over their lives" and "characteristic disorders of their sex."[2] Menstruation was taboo among men and women, and women were taught to keep it hidden. It was only in the late 1800s

[1] LLM Student, Maharashtra National Law University (MNLU-CS), Aurangabad, Maharashtra.

[2] Tina Edwin & Allan Lasrado, Period story: How Padman Muruganantham Arunachalam scripted a hygiene revolution, THE HINDU (May 08, 2023, 04:50 PM), https://www.thehindubusinessline.com/blchangemakers/period-story-how-padman-muruganantham-arunachalam-scripted-a-hygiene-revolution/article62222233.ece.

that the scientific awareness of women bleeding into their clothes and then using the same clothes for four to eight days came into the minds of people. The beings got ignited with the idea of "hygiene", "cleanliness", and "comfort". It was around this time that doctors' worries about infection from unhygienic circumstances grew. Thus, the Hoosier Sanitary Belt became a popular choice amongst the women from the late 1800s to the 1920s.[3] It was a belt that was made using washable cloth pads. Also, Johnson & Johnson in the 1890s created their version of menstrual towels called Lister's Towel: Sanitary Towels for Ladies, these were used in combination with Lister's belts, to which the sanitary towels were attached.[4]

Then came Sea Sponges in the late 19th century as a substitute for the malodorous, washable napkins that were used during that phase. Sea sponges were positioned in a net with a cord to permit relaxed insertion and exclusion from the vagina. They did not necessitate the same quantity of vigorous washing as the napkins did, and were easy to clean and reused after being boiled in hot water for five to ten minutes.[5]

Further, during World War 1, the first absorbent disposable sanitary pad was introduced while the nurses experimented to produce a product that would last for a longer period while the women were on the battlefield.[6] The first sanitary pads were made from Cellucotton or wood pulp bandages that French nurses found in hospitals. These bandages had a high absorbent ratio and were reasonably priced enough for one-time use. The discovery of something better did not stop there; in the late 1920s, the first commercially marketed tampons, named Fax Tampons, came. These were made from absorbent material wrapped in gauze; they had no applicator or string. These discoveries did not combat the pertinent problem of leakage, to counter the same Kotex advertising their new "leakage-free" product.[7] They were produced from 40 rectangular-shaped piles of absorbent creped cellulose cotton and wrapped in gauze by hand, which the French nurses used to use earlier. Unlike the late 1800s, this time,

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[3] Krithika Jeganathan & Aileen Berith, Women's Product Preference with Reference to Sanitary Napkins, RESEARCH GATE (Feb. 2019), https://www.researchgate.net/publication/344361418_Women's_Product_Preference_with_Reference_to_Sanitary_Napkins.

[4] Ishita Goel, From wood splinters to menstruation belt: How sanitary napkins evolved over time, INDIAN EXPRESS (July 23, 2018, 10:53 AM), https://indianexpress.com/article/lifestyle/health/gst-sanitary-napkins-history-5269817/.

[5] The history, use and gynaecological aspects of menstrual containment devices, OGP NEWS (July 3, 2012), https://www.ogpnews.com/2012/07/the-history-use-and-gynaecological-aspects-of-menstrual-containment-devices/9582.

[6] Disposable Sanitary Napkins: First World War Nursing Sisters Credited with Inventing the "Unmentionable," INGENIUM CHANNEL (July 14, 2019), https://ingeniumcanada.org/channel/innovation/disposable-sanitary-napkins-first-world-war-nursing-sisters-credited-inventing-unmentionable.

[7] Sabrina, The History of the Sanitary Pad, FEMME INTERNATIONAL (June 24, 2013), https://femmeinternational.org/the-history-of-the-sanitary-pad/.

advertising menstrual products was more acknowledged by urban society. Women became more comfortable asking for and buying sanitary pads after they were advertised in much-talked-about catalogues. Ultimately, the usage of disposable pads was normalized for menstruating women. Those who could not afford the disposable napkins opted for the sanitary apron made of thick material, usually dark red or black, and worn underneath a skirt or dress as a shielding barrier from staining clothes.[8] But these were not that absorbent and effective.

Then, Dr. Earle C. Haas (1929) patented the contemporary-style tampon with an applicator. Haas had the urge to create a comfortable option for menstruating females after he saw one of his friends inserting a small piece of sponge inside her vagina during menstruation to escape bulky sanitary napkins. Taboos surrounded the same, and women were generally uncomfortable with manually inserting a tampon. In 1931, Hass finalized the design of the tampon named "Tampax", i.e., Tampon + Vaginal Pack = Tampax.[9] Thus, the first tampon with an applicator came into the market. After the same, in 1937, the first "modern" menstrual cup was introduced.[10] The first patented cup was made from latex rubber to permit women to wear slim, tight-fitting clothes and provide a sense of comfort knowing that no belts or pad traces were visible. However, during the Second World War, the shortage of latex rubber forced the menstrual cup manufacturing industries to shut down.

Later, the menstrual cup made a comeback in the late 60s, yet remained in oblivion in people's eyes. In 1950, again came a line of disposable tampons without an applicator. These became the more popular choice for women in Europe as they were easier to carry along in purses. Then, in the early 1970s, another pathbreaking invention in disposable pads was made. An adhesive slip of a thin paper-like sheet was positioned at the bottom of the pads and could effortlessly be attached to women's underwear and detached when ready to be disposed of.[11] Aromatic pads were also brought into the market during this phase of evolution. Women speedily accepted and switched to the new, comfortable, belt-free option, and by the 1980s,

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8 Sally Dammery, First Blood : A Cultural Study of Menarche, RESEARCH Gate (Jan. 2015), https://www.researchgate.net/publication/353867438_First_Blood_A_Cultural_Study_of_Menarche.

9 The History of Tampax, TAMPAX (July 28, 2025, 01:15 PM), https://tampax.com/en-us/about/our-story/history-of-tampax/.

10 Amy Hait & Susan E. Powers, The value of reusable feminine hygiene products evaluated by comparative environmental life cycle assessment, ELSEVIER, Resources, Conservation and Recycling Volume 150, Nov. 2019, 104422.

11 Megan Cummings, The evolution of menstrual products, MYMED (July 28, 2025, 10:10 AM), https://www.mymed.com/health-wellness/interesting-health-info/the-evolution-of-menstrual-products#:~:text=The%20first%20sanitary%20pads%20were,washing%20and%20reusing%20them%20again.

belted sanitary napkins were barely used. This evolution laid a fertile land for the modern-day thinner disposable pads. Alongside came tampons and menstrual cups.

2. MENSTRUAL PADS - A NECESSITY

2.1 What the Surveys Highlight

National Family Health Survey, conducted on the occasion of Menstrual Hygiene Day, i.e., 28th May 2022, revealed that 77.6% of Indian women would use a hygienic protection method all over India during their menstrual days. 64.4% of women choose to use sanitary pads, while 15% still use local napkins. The NFHS-5 revealed that Indian women are not habitual to opting for anything other than pads and cloth. The survey also highlighted that 44% of Karnataka women aged between 15-24 years still use cloth during the menstruation cycle. Kerala is at 40.2% and Andhra Pradesh is at 36.2%. Yet the majority of females are using sanitary pads. If we look at the Union Territories, Puducherry has a percentage of 99.1%, followed by Andaman with 98.8% and the Nicobar Islands with 98.4%.[12]

The percentage of women using menstrual cups and tampons is meagre, even in developed Indian cities. India has 1.7% of women who prefer using tampons and 0.3% of women who are open to the idea of using menstrual cups.[13] Also, the market size of Indian sanitary pads was expected to expand rapidly (in US$) in a report made by Reogma, a Singapore-based business analytical research agency, in 2019 [shown in Figure 1 below], and the increasing demand for the product shows that the anticipation was not false.

[12] Karan Babbar, What NFHS-5 Data Tells Us About Indian Women's Use of Period Products, THE WIRE (Nov. 29, 2021), https://thewire.in/health/what-nfhs-5-data-tells-us-about-indian-womens-use-of-period-products.
[13] Approximately 44% of Karnataka women aged between 15-24 still use cloth during their menstruation cycle, ECONOMIC TIMES (May 28, 2022, 03:36 PM), https://economictimes.indiatimes.com/news/new-updates/approximately-44-of-karnataka-women-aged-between-15-24-still-use-cloth-during-their-menstruation-cycle/articleshow/91840157.cms.

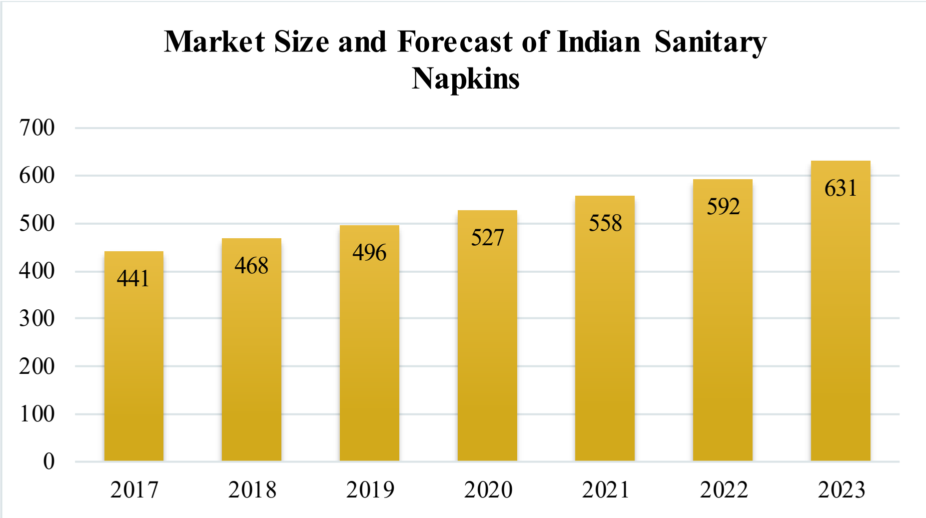
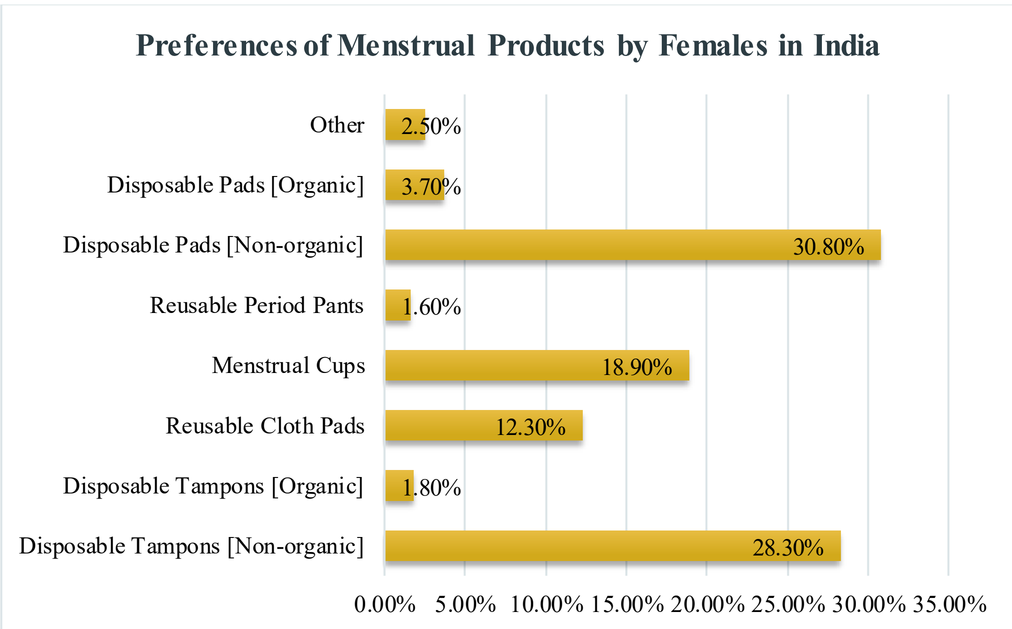


Fig. 1 – Market Size and Forecast of Indian Sanitary Napkins in USD [$ in Million][14]

The data is reflective of the fact that sanitary pads, tampons, menstrual cups, etc., have consciously become part of the list of necessities under the head of health and sanitation, as the science behind the importance of menstrual health is gradually increasing day by day. Most females prefer to use sanitary pads over any other menstrual product, as reflected by research gate in the year 2019 [shown in Figure 2 below].



[14] Indian Sanitary Napkin Market Size, Share, Trends and Forecast by Product Type, Distribution Channel, and Region, 2025-2033, IMARC GROUP (July 29, 2025, 09:10 AM), https://www.imarcgroup.com/indian-sanitary-napkin-market#:~:text=Indian%20Sanitary%20Napkin%20Market%20Size%20and%20Share:,8.38%25%20from%202025%2D2033.

Fig. 2 – Preferences of Menstrual Products by Females in India [in %][15]

2.2 Government Schemes

We cannot ignore the fact that there is still a percentage of females, especially in villages and other underdeveloped areas, who are not taking these hygienic measures, and to uplift them, the government has formulated a few schemes for women to meet their requirements. Some of them are as follows -

1. ***Menstrual Hygiene Scheme [MHS]*** – The scheme was introduced by the Ministry of Health and Welfare for the elevation of menstrual hygiene among adolescent girls between the age group of 10-19 years in rural, underdeveloped, and remote areas.[16]
2. ***She Paid Scheme*** - This was initiated by the Kerala Government in 2017.[17] In this scheme, a sum of 30 crores was allocated to distribute sanitary napkins in government schools.
3. ***Rashtriya Kishor Swasthiya Karyakaram*** - The NCT of Delhi launched this scheme in 2012. The scheme was sponsored by the Ministry of Health and Welfare for subsidizing menstrual products.[18]
4. ***Kishori Shakti Yojana*** – This scheme was launched by the Ministry of Women and Child Development. It aimed to improve the health, nutrition, and growth of adolescent girls, promote awareness of health, hygiene, nutrition, and family care, and provide them with life skills to improve their understanding of their social environments.[19]
5. ***National Rural Livelihood Mission*** – This scheme was launched by the Ministry of Rural Development to support self-help groups and small-scale industries producing sanitary napkins.[20]

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[15] Elizabeth Peberdy, Aled Jones, & Dannielle S. Green, A Study into Public Awareness of the Environmental Impact of Menstrual Products and Product Choice, RESEARCH GATE (Jan. 2019), https://www.researchgate.net/publication/330462591_A_Study_into_Public_Awareness_of_the_Environmental_Impact_of_Menstrual_Products_and_Product_Choice.

[16] Ministry of Women and Child Development, Scheme for Promotion of Menstrual Hygiene, PIB Delhi (July 29, 2022, 02:37 PM), https://pib.gov.in/PressReleasePage.aspx?PRID=1846147.

[17] Ministry of Health and Family Welfare, Year Ender 2018: Ministry of Health and Family Welfare, PIB Delhi (Jan. 11, 2019, 12:05 PM), https://pib.gov.in/PressReleasePage.aspx?PRID=1559536.

[18] Ministry of Health and Family Welfare, Rashtriya Kishor Swasthya Karyakram, PIB Delhi (Mar. 17, 2020, 01:26 PM), https://www.pib.gov.in/PressReleaseIframePage.aspx?PRID=1606701.

[19] Department of Women and Child Development, Kishori Shakti Yojana, GOI (July 29, 2025, 10:16 AM), https://wcd.odisha.gov.in/ICDS/kishori-shakti-yojana#:~:text=Kishori%20Shakti%20Yojana%20under%20the,full%20potential%20through%20Balika%20Mandals.

[20] Deen Dayal Antyodaya Yojana, GOI (Oct. 15, 2020) https://vikaspedia.in/social-welfare/rural-poverty-alleviation-1/schemes/aajeevika.

2.3 Role of Judiciary

The judiciary has also played its role in terms of spreading awareness and monitoring that menstrual health is not compromised. In the 2018 case of Setu Niket v. UOI,[21] the Delhi High Court placed an obligation on the Delhi Government to provide free or subsidized access to menstrual hygiene products in schools and run menstrual education programs to spread awareness about the same. Also, in response to a PIL, the judiciary stated that the topic of menstrual hygiene is interwoven with Articles 19, 21, and 21A of the Constitution of India and stated that decency and dignity are non-negotiable facets of human rights, and it is on the local authorities to primarily take care of the same.[22] Then in the case of Suchita Srivasta v. Chandhigarh Administration[23] and K.S. Puttaswamy v. UOI,[24] the Apex Court acknowledged the reproductive rights/choices of a woman as her fundamental right under Article 21 of the Constitution. Furthermore, the Apex Court's verdict in the Sabarimala Temple Judgment unplugged the deep-rooted menstrual taboos and the associated stigmas.[25] The court stated that the exclusion of women based on menstrual status is a form of untouchability, which is prohibited under Article 17, and the court ultimately safeguarded women's rights under Article 14 of the Constitution. Also, in the case of Mohini Jain v. State of Karnataka,[26] the Karnataka High Court drew a bridge between dropout rates and menstruation based on the report published by the Times of India on 23rd January 2011, and formulated guidelines to counter the same.

Furthermore, in Zarmina Israr Khan v. Union of India & Anr.,[27] the Delhi High Court bench sought a response from the Centre on a plea against the imposition of 12 % GST on sanitary napkins. In Shetty Women Welfare Foundation v. Union of India,[28] the division bench of Justices N.H. Patil and N.W. Sambre asked the Maharashtra government to cut down the cost of napkins and make them available at concessional rates. These steps were taken to make menstrual hygiene reachable. Thereafter, the Custodian of India stayed the proceedings that challenged the levying of GST on sanitary pads. As a result of the Apex Court entering into the

[21] Setu Niket v. UOI, W.P.(C) 1089/2013 (India).
[22] Municipal Council Ratlam v. Shri Vardhichand, (1980) AIR 1622 (India).
[23] Suchita Srivasta v. Chandhigarh Administration, (2009) 9 SCC 1 (India).
[24] K.S. Puttaswamy v. UOI, (2017) 10 SCC 1 (India).
[25] Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors., (2019) 11 SCC 1 (India).
[26] Mohini Jain v. State of Karnataka, (1992) AIR 1858 (India).
[27] Zarmina Israr Khan v. Union of India & Anr., W.P. (c) No. 6034/2017 (India).
[28] Shetty Women Welfare Foundation v. Union of India, W.P.(C) No. 2447- 2448/ 2017 (India).

matter, on July 26th, 2018, the Government of India, by Notification No. 20/2018, excused "Sanitary towels (pads) or sanitary napkins; tampons" from GST.[29]

Also, in the 2020 case of the Court on its motion v. Government of India & Ors.,[30] the Bench, led by then Chief Justice Gita Mittal, gave a detailed order directing the government to submit an action plan accruing the improvement of sanitation facilities and providing menstrual products in schools after analyzing the drop-out rates and reasons for girls in the educational sector. Moreover, in the recent case of Jaya Thakur v. Government of India & Ors.,[31] the Hon'ble Supreme Court's bench comprising CJI D.Y. Chandrachud, Justice P.S. Narasimha, and Justice J.B. Pardiwala, directed the Union Government to formulate a national policy on free sanitary napkins and safe disposal mechanisms in government, government-aided, and residential educational institutions. The court also highlighted the crucial role of states and directed them to send the Union their menstrual hygiene policies within 4 weeks. MoHFW was made the nodal officer to enable uninterrupted communication between all ministries and states.

3. CHALLENGES TO THE RIGHT TO HEALTH AS A HUMAN RIGHT - TOXICITY HIDDEN IN THE MODERN-DAY PADS

The importance of sanitary napkins has been emphasized time and again by government agencies and the judiciary. But it is crucial to deliberate on how safe sanitary napkins are to use. Modern-day pads appear to be comfortable and discreet, but there are a few red flags regarding sanitary pad ingredients that are not even reflected on the packaging, unlike any other product in the market. Sanitary pad manufacturing companies are not required by law to disclose the ingredients on the package. This is because they are labelled as 'medical devices' as per regulations like the Drugs and Cosmetics Act of 1940, and the Medical Device Rule of 2017. One reason for the exemption is hidden in the fact that India is a diversified secular country that embraces people with various beliefs and practices. Hence, it is often taken as a backing that revealing the raw ingredients used to prepare a medicine may not be suitable for certain people, but this has become a life-threatening subject as the producers are not restricted by set laws, resulting which they are openly using the harmful raw materials for mere profit purposes. The same is ignored even though Article 21 of the Constitution states that no person

[29] Roshan Kishore, No GST on sanitary napkins shows shift in government's priorities, HINDUSTAN TIMES (July 26, 2018, 09:10 PM) https://www.hindustantimes.com/india-news/no-gst-on-sanitary-napkins-shows-shift-in-government-s-priorities/story-fs2P4dZfsqoRDKST7AHVgL.html.

[30] Court on its own motion v. Government of India & Ors., W.P. (C) PIL No.36/2020 (India).

[31] Jaya Thakur v. Government of India & Ors., W.P. (Civil) No. 456/2022 (India).

is granted the right to take the risk of their life. The non-disclosure of ingredients is a blatant breach of Fundamental Rights provided under Part III of the Constitution. Article 19(1)(a) guarantees the right to speech and expression and is also inclusive of one's right to get knowledge of the ingredients of the product that are being used.

The above information has also been backed by many clinical studies and NGOs that researched the existence of much more hazardous chemicals, such as SAP, being used in sanitary napkins. The report titled 'Wrapped in Secrecy' by New Delhi-based NGO Toxics Link formulated a conclusion on the matter after detailed testing of 10 different types of sanitary pads, organic as well as inorganic, which are widely accessible in the market.[32] The report spotlighted that most of the talked-about brands of sanitary napkins sold in India encompass harmful chemicals, two of them being phthalates and volatile organic compounds (VOCs). They revealed that Phthalates are used as plasticizers in numerous products. Plasticizers are chemicals that are supplementary to make the product soft, flexible, and lessen its roughness on the surface. The authors of the report affirm that these chemicals are used in sanitary pads to fit together their multiple layers and to increase their elasticity. It was also brought into the picture that two of the most-sold sanitary pads in India contained six kinds of phthalates. The total concentration of phthalates was found to be widespread – from 10 to 19,600 micrograms per kg. A summation of 12 diverse phthalates was found across a variety of items. When asked about the reason behind the usage of such harmful material, the authors mentioned the easy accessibility of the same. One of the authors explained that exposure to phthalates is probable through various paths, but vaginal tissues have the most sensitive and permeable tissues than the rest of the epidermis. Another disturbing chemical found in the napkins was VOCs. These chemicals are volatile and are mostly used in paints, body sprays, air fresheners, nail polish, moth repellents, fuels, and automotive products, and many of them can be harmful to human health. The report highlighted that 25 types of VOCs were found during the investigation of 10 pads. The authors in the report disclosed that this material is used in sanitary napkins to add fragrance, and the causes of the same can range from impacting brain functioning to causing skin inflammation, anaemia, liver and kidney dysfunction, to tiredness and unconsciousness.

[32] Banjot Kaur, 'Popular Sanitary Pads Sold in India Have Harmful Chemicals, Cause Serious Health Issues': Report, THE WIRE (Nov. 21, 2022), https://thewire.in/health/popular-sanitary-pads-sold-in-india-have-harmful-chemicals-cause-serious-health-issues-report.

Researchers detected VOCs in the range of 1 to 690 micrograms per kg by weight of the product.[33]

On the other hand, Jeunesse Anion Pads also presented 4 toxic raw materials used in the sanitary pads[34] – (1) Synthetic plastic materials such as bisphenol A (BPA) and bisphenol S (BPS), which are used in some sanitary pads as liquid absorbers to advance their absorbing power and softness. This may scientifically lead to disturbance in embryonic development, endocrine problems, congenital disability, and cancer; (2) Pesticides are sprayed on the cotton crops, and the same is used to manufacture sanitary pads, hence they are tinted. To whiten them, bleach is used, which again stands to be very harmful to our vaginal area; (3) A few menstrual napkins are made of wood pulp, and for the same, wood pulp undergoes a procedure of bleaching to lighten its colour, and here is where dioxins can be generated. These are extremely deadly and can cause reproductive and developmental difficulties, harm the immune system, disrupt hormones, and ultimately cause cancer. The same was highlighted in 2016 research by IIT Hyderabad[35]; (4) At last, producers also include dyes permitted only for externally applied products that are not recommended to be used on body parts covered by mucous membranes. These can cause allergies and chemical reactions.

In 2003, the Ahmedabad-based Consumer Education and Research Centre tested 19 brands of sanitary napkins and pointed out some similar things.[36] Also, in August 2014, Women's Voices for the Earth and a certified laboratory, STAT Analysis Corporation, came out with the same results.[37] Moreover, a recent study released on Monday, November 21st, 2022, found that in the absence of any compulsory directions and rules to limit the use of these chemicals in the country, the producers barely pay attention to the long-standing adverse effects that these chemicals cause.[38]

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[33] A sanitary pad DOESN'T disclose ingredients: Know what goes inside it! TIMES OF INDIA (Aug. 10, 2018), https://timesofindia.indiatimes.com/life-style/health-fitness/health-news/a-sanitary-pad-doesnt-disclose-ingredients-know-what-goes-inside-it/articleshow/65354742.cms.

[34] 5 Toxic Sanitary Pad Ingredients, JEUNESSE (July 29, 2025, 02:15 PM), https://jeunesseanion.com/all-about-period/5-toxic-sanitary-pad-ingredients/.

[35] Nanofibre-based sanitary napkins pioneered by IITH, INDIAN EXPRESS (Sep. 21, 2016), https://www.newindianexpress.com/cities/hyderabad/2016/Sep/21/nanofibre-based-sanitary-napkins-pioneered-by-iith-1521897.html.

[36] Ashwaq Masoodi, How safe are sanitary pads in India? MINT (May 19, 2018), https://www.livemint.com/Industry/T3XIiwJI31WZuK1IsoUOJL/How-safe-are-sanitary-pads-in-India.html.

[37] Always Pads Testing Results, WVE (July 29, 2025, 02:20 PM), https://womensvoices.org/menstrual-care-products/detox-the-box/always-pads-testing-results/.

[38] Karuna Sharma, Adoption of sanitary napkins is less than 20% in India, whereas adoption of cosmetics like lipstick is significantly higher at 65%: Chetna Soni, P&G, BUSINESS INSIDER (Apr. 26, 2021), https://www.businessinsider.in/advertising/brands/article/adoption-of-sanitary-napkins-is-less-than-20-in-india-

4. NATIONAL AND INTERNATIONAL PERSPECTIVES – CRITICAL ANALYSIS

4.1 National Perspective

The harmful raw materials used in the making of sanitary napkins have been disclosed, and it is no more a mystery, yet the laws in India exempt the manufacturer from mentioning the ingredients on the packaging. The exemption is granted under Section 3(zb) of Medical Devices Rules 2017, which states that 'medical devices' covers substances used for in vitro diagnosis and surgical dressings, surgical bandages, surgical staples, surgical sutures, ligatures, blood, and blood component collection bag, substances including mechanical contraceptives, disinfectants and insecticides notified in the Official Gazette, and other devices are notified from time to time. Because of the said definition, sanitary pads were equated to other medical products; however, the two are not used in the same manner. The law has somehow equated two unequal, creating a contradiction to Article 14 of the Constitution.

Recently, the central government has introduced the New Drugs, Medical Devices, and Cosmetics Bill, 2022. The bill has a prime focus on regulating medical devices, clinical trials, and online pharmacies.[39] The drafted bill proposes to formulate a new definition for the term, 'medical devices' under Section 3(zd) of the bill, which would now include an instrument, implant, apparatus, application, material, or other article produced for the usage of human beings or animals for diagnosis, prevention, monitoring, treatment or alleviation of any disease or disorder or injury or disability, or, for supporting or sustaining life.[40] At last, the Bill recommends the composition of the Drugs Technical Advisory Board (DTAB), Medical Devices Technical Advisory Board (MDTAB), and a Drugs, Medical Devices, and Cosmetics Consultative Committee (DMDCCC) to guide the central and state governments in methodological facets. Despite the change initiated, the topic of disclosure of ingredients by producers of sanitary napkins has been left untouched. The biggest void is that the central government has been granted over-arching powers under Section 158 of the bill, wherein it may make any rules concerning the manner of labelling of the medical device after consultation with the Medical Devices Technical Advisory Board. The bill in itself is tongue-tied regarding concrete and detailed labelling regulations.

whereas-adoption-of-cosmetics-like-lipstick-is-significantly-higher-at-65-chetna-soni-pg/articleshow/82219127.cms.

[39] Darren Punnen & Dr. Milind Antani, Draft Drugs, Medical Devices and Cosmetics Bill, 2022: Dawn of a New Era? NATIONAL LAW REVIEW, Vol. XV No. 150 (Aug. 18, 2022).

[40] New Drugs, Medical Devices and Cosmetics Bill 2022: Key Highlights, ECONOMIC TIMES (July 13, 2022), https://health.economictimes.indiatimes.com/news/medical-devices/new-drugs-medical-devices-and-cosmetics-bill-2022-key-highlights/92852245.

Moreover, the Bureau of Indian Standards allows the usage of this product as it still relies on the age-old 1980-made Indian Standard Specification for Sanitary Napkins, which only focuses on whether the absorbent fillers/sheets are smooth or lumpy and whether the pad surface is soft or rough. The sad reality is that the toxicity of ingredients does not even make it into the list.[41] Also, the test for sanitary napkins' quality still includes tests of materials being used in napkins, size, finishing, absorbents, disposability, and pH value; there is no test about the ingredients of the product. This reflects that the law is not able to acknowledge the hazardous manufacturing process of sanitary napkins, but somewhere, the judiciary is trying to make a difference. In the 2021 case of Aayya v. UOI & Ors.,[42] the division bench of the Madras High Court, comprising Justice T. S. Sivagnanam and Justice S. Anathi, asked for an explanation/justification concerning how the State and Central Governments were keeping an eye on the manufacturing processes of sanitary napkins and diapers.[43] The bench also sought the authorities to formulate a compulsory standard test issued by the Bureau of Indian Standards.[44]

4.2 International Perspective

Around the globe, the legislation governing the existence of chemicals in menstrual products is, by and large, feeble. The US Food and Drug Administration's regulations for these products are not obligatory. Also, in France, Australia, and China, there is a lack of stringent regulations. Only in the European Union (EU) and South Korea there exist legally binding rules and procedural guidelines. In the EU, phthalates are constrained to a maximum content of 0.1% by the weight of the plasticized material in the item. In South Korea, they are barred from use.[45] It was on September 13th, 2018, regulatory news stated about Chemical Watch introduced by the South Korean Ministry of Food and Drug Safety (MFDS) and disclosed that the announced plans to ban bisphenol A, dibutyl phthalate, and benzyl butyl phthalate in food contact materials

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[41] Aarohy Kapoor, Sanitary pads with soft surface to ensure comfort during your periods, TIMES OF INDIA (Feb. 2, 2021), https://timesofindia.indiatimes.com/most-searched-products/health-and-fitness/health-care/sanitary-pads-with-soft-surface-to-ensure-comfort-during-your-periods/articleshow/80649747.cms.

[42] Aayya v. UOI & Ors., W.P. (MD) No. 9162/2021 (India).

[43] Vishal Gupta, HC seeks information on how the State & Central Governments were regulating the manufacturing activities of sanitary napkins & diapers, LATEST LAWS (June 5, 2021), https://www.latestlaws.com/latest-news/hc-seeks-information-on-how-the-state-central-governments-were-regulating-the-manufacturing-activities-of-sanitary-napkins-diapers-read-order.

[44] Disclose materials used in making sanitary napkins – Madras High Court, TIMES OF INDIA (June 2, 2021), https://timesofindia.indiatimes.com/city/madurai/disclose-materials-used-in-making-sanitary-napkins/articleshow/83155678.cms.

[45] Meghan Scott, How are Menstrual and Intimate Care Products Regulated? WVE (May 10, 2021), https://womensvoices.org/2021/05/10/how-are-menstrual-and-intimate-care-products-regulated/.

[FCMs] intended for infants and young children and also on substances and articles that are mass-produced, processed, traded, or imported. The ban commenced in January 2020.[46]

Moreover, in the United States, the Food and Drug Administration guidelines recommend biocompatibility testing of sanitary napkins and finding out details of the period it is appropriate for the use and the level of interaction of a user with the product. The FDA guidelines also reflected that the authority is conscious of hazards such as adverse tissue reaction, vaginal injury, and toxic shock syndrome associated with the use of these products and endorses that companies must take their products through preclinical toxicology and preclinical microbiology checks.[47]

Furthermore, California provides a straight-jacketed law governing the matter of disclosure. The Menstrual Products Right to Know Act of 2020 commands feminine sanitation product manufacturers to reveal purposely added ingredients on-label and online for products manufactured on or after January 1st, 2023. The act covers tampons, pads, sponges, menstruation underwear, disks, and menstrual cups. It provides for 22 designated red-flag products, and if the manufacturer intentionally uses any one of them, he is bound to disclose the ingredients at any level and do not enjoy confidential business information protection. If any deliberately added fragrance ingredient is on a designated list, it shall be disclosed at any level. The authorities designated under California's Unfair Competition Law (UCL) could prosecute this new act, which provides for monetary penalties of up to $2,500 per violation. The private enforcers can also seek an injunction on the manufacturing of such products and restitution under the UCL.[48] As a whole, the act is a new ray of change.

5. CONCLUSION AND SUGGESTIONS

5.1 Concluding Remarks

The use of sanitary napkins has upsurged due to an increase in awareness about menstrual hygiene. But the females using the same are still unaware of the hazardous substances used in the production of pads. Here arises a major clash between science and law. On one side, scientific research showcases the devastating side effects of sanitary pads, and on

[46] Greta Stieger, South Korea to prohibit BPA and phthalates in FCMs for children, FOOD PACKAGING FORUM (Sep. 14, 2018), https://www.foodpackagingforum.org/news/south-korea-to-prohibit-bpa-and-phthalates-in-fcms-for-children.

[47] 21 C.F.R. § 884: Obstetrical and Gynecological Devices. U.S. Food and Drug Administration.

[48] Zachary Fayne & Raqiyyah Pippins, California Enacts New Ingredient Disclosure Laws for Feminine Hygiene and Cosmetic Products, ARNOLD & PORTER (Oct. 2, 2020), https://www.arnoldporter.com/en/perspectives/advisories/2020/10/california-enacts-ingredient-disclosure-laws.

the other law is silent on this issue despite guaranteeing the right to health to the people. The right to health, if not explicitly, but implicitly, is our fundamental right as highlighted in Bandhua Mukti Morcha v. Union of India & Ors.,[49] wherein the court expanded the horizon of Article 21, i.e., the right to life and personal liberty of the Constitution of India, to include the right to health in there. The apex court reaffirmed the same in the case of the State of Punjab & Ors v. Mohinder Singh Chawla.[50] Also, in the State of Punjab & Ors. v. Ram Lubhaya Bagga,[51] the court went on to endorse a responsibility of the State to provide health services. Not only this, but at the global level, United Nations Sustainable Development Goal 3 talks about the maintenance of Good Health and Well-Being. The official wording of the goal is '*to ensure healthy lives and promote well-being for all at all ages*."[52] Moreover, Article 25 of the Universal Declaration of Human Rights states that everyone has the right to a standard of living satisfactory for the health and well-being of oneself and his family, with food, clothing, housing and medical care, and essential social services, the right to security in the happening of joblessness, illness, infirmity, widowhood, old age or other dearth of living in situations beyond his control.[53]

Henceforth, to guard their right to health, people have a right to know the ingredients put into the products they frequently use. People's right to easy access to information cannot be negated, as the government is under an obligation to impose rules and regulations for required disclosures if it is a matter of public health and safety.

5.2 Suggestions

Based on the above remarks, the following suggestions are proposed by the researcher:

1. The exemption granted under the Drugs and Cosmetics Act of 1940, and the Medical Device Rule of 2017 to the sanitary pads shall be removed, and the Right to Health shall prevail over any other enactment. Mentioning ingredients on the packages of menstrual pads shall be made a mandate.

[49] Bandhua Mukti Morcha v. Union of India & Ors., (1984) AIR 802 (India).
[50] State of Punjab & Ors v. Mohinder Singh Chawla, AIR (1997) SC 1225 (India).
[51] State of Punjab & Ors. v. Ram Lubhaya Bagga, (1998) 1 SCR 1120 (India).
[52] Goal 3: Ensure healthy lives and promote well-being for all at all ages, https://www.un.org/sustainabledevelopment/health/.
[53] Universal Declaration of Human Rights 1948, Ar. 25.

2. The results of various assessments, as shown above, demonstrate the necessity for more testing of sanitary napkins for an improved understanding of the chemical exposures and to better comprehend the possible health effects of these exposures on females' lives.
3. In India, we still follow the centuries-old Bureau of Indian Standards of 1980 for monitoring production and testing the quality of items, but these standards are not feasible for the contemporary scenario. Hence, it is high time that the government either frames separate mandatory standards to this effect or does the required reforms in the 1980 standards. The extent of the standards shall range from limiting the presence of hazardous raw materials to putting a complete jacket ban on them. This upgradation is essential for the introduction of feminine-friendly pads.
4. The reformed standards shall be based on the country-wide survey of all the sanitary products by government departments.
5. Using toxic raw items shall be made punishable under the Indian Penal Code or under separate legislation for this matter to deter the manufacturers.

AGENTIC AI: EXAMINING THE LEGAL AND ETHICAL CHALLENGES OF AUTONOMOUS AI IN THE EU, US, AND INDIA.

-Arunav[1] & Pratistha Priyadarshi[2]

ABSTRACT

Agentic artificial intelligence systems capable of autonomously setting sub-goals, invoking external tools, and executing multi-step tasks in dynamic environments represents a qualitative departure from the generative AI paradigm that has dominated regulatory discourse since 2022. Where a chatbot responds, an agent acts. This shift from prediction to action dissolves the neat lines drawn by existing legal frameworks, which were engineered around human principals wielding static tools. This paper examines the doctrinal and normative stress points that agentic AI puts on different legal frameworks, with primary focus on four core problems: the attribution of liability for autonomous acts (illustrated through Tesla's Autopilot and the zyfAI decentralised-finance yield agent), the patentability of AI-generated inventions, the coherence of consent and contract in agent-mediated transactions, and the preservation of human dignity against increasingly opaque decisional architectures. By adopting a comparative analysis of the E.U.'s horizontal AI Act, the United States' sectoral-plus-state patchwork, and India's emerging Digital India Act proposals overlaid on the Information Technology Act, 2000, this paper argues that each jurisdiction has responded to agentic AI by extending rather than rethinking pre-existing paradigms and that this incrementalism leaves critical gaps. The paper concludes with a set of reform proposals for India, including a risk-tiered Agentic AI chapter within the forthcoming Digital India Act, a statutory duty of meaningful human oversight for high-impact agents, a reconfigured joint-and-several liability regime for the AI value chain, a patentability framework that recognises AI-assisted inventions while requiring a human inventor of record, and an independent AI Regulatory Authority empowered to issue binding technical standards.

[1] LL.M. Candidate, National University of Study and Research in Law (NUSRL), Ranchi
[2] LL.M. Candidate, National University of Study and Research in Law (NUSRL), Ranchi

Keywords: *Agentic AI; Autonomous Agents; AI Liability; Patentability of AI; Algorithmic Accountability; Comparative AI Governance.*

1. INTRODUCTION

1.1 The Agentic Turn

In the short span between 2022 and 2026, public conversation about artificial intelligence has migrated from the *generative* features which involve producing text, images or code on demand to the *agentic*: features that plan, decide, and act on a user's behalf across open-ended digital and physical environments.[3] An agentic AI does not merely reply to a prompt; it decomposes a goal into sub-tasks, invokes external tools (including other models), maintains memory across interactions, and iterates toward an outcome with progressively diminishing human intervention.[4] The consequence is a class of software that occupies a conceptual territory between tool and agent, between object and actor a territory for which neither private law nor regulatory law was designed.[5]

The practical significance of this shift is already visible. Autonomous coding agents commit pull requests to production repositories. Travel-booking agents negotiate fares and accept contractual terms on behalf of principals who never read them.[6] Customer-service agents issue refunds, and, as *Moffatt v. Air Canada* demonstrated, can bind their corporate deployers to promises the company itself had never authorised.[7] Autonomous vehicles make split-second decisions that implicate tort, criminal, and constitutional law at once, as Tesla's Autopilot system has now repeatedly shown.[8] In decentralised finance, agentic systems such as zyfAI move user capital across lending protocols and yield venues based on intent-level instructions, executing dozens of rebalancing transactions without further human approval.[9] Each of these developments stretches the conceptual vocabulary of existing law contract, consent, intermediary

[3]Stuart Russell, Human Compatible: Artificial Intelligence and the Problem of Control 9–11 (Viking 2019).
[4]Anthropic, Building Effective Agents, https://www.anthropic.com/research/building-effective-agents (last visited March 13, 2026)
[5]Simon Chesterman, We, the Robots? Regulating Artificial Intelligence and the Limits of the Law 54 (Cambridge Univ. Press 2021).
[6]OpenAI, A Practical Guide to Building Agents (2025).
[7]Moffatt v. Air Canada, 2024 BCCRT 149 (Can. B.C. Civ. Res. Trib.).
[8]Nat'l Highway Traffic Safety Admin., U.S. Dep't of Transp., Recall No. 23V-838, Tesla Autopilot Recall (Dec. 12, 2023) (requiring over-the-air update for approximately 2 million Tesla vehicles).
[9]Zyfai, Zyfai Documentation: Introduction, https://docs.zyf.ai/ (last visited Apr. 2026) (describing Zyfai as an agentic yield layer providing self-custodial access to autonomous rebalancing across curated DeFi protocols).

liability, product liability, negligence in ways that demand either creative doctrinal reinterpretation or, more plausibly, legislative intervention.

Till date there still exists a lacuna as to a formal definition of agentic AI. The *EU AI Act*, the most ambitious regulatory instrument in force, defines an AI system broadly enough to encompass agentic architectures but does not separately taxonomies them.[10] For analytical purposes, this paper adopts a four-element working definition. An agentic AI system is one characterised by *(i)* goal-directedness, in that it receives a high-level objective rather than a specific instruction; *(ii)* autonomy of execution, in that it selects and sequences sub-tasks without step-by-step human approval; *(iii)* tool-use, in that it invokes external functions, APIs, or sub-agents to effect changes in the world; and *(iv)* adaptivity, in that it updates its plan in response to intermediate feedback.[11]

These four elements, taken together, produce *emergent behaviour* outputs and actions that were not explicitly programmed, and that the developer may not have anticipated.[12] It is this emergence, rather than any particular technical architecture, that generates the legal difficulties examined in this paper.

2. TECHNICAL AND CONCEPTUAL FOUNDATIONS

2.1 From Generative to Agentic

To regulate agentic AI meaningfully, one must first grasp how it differs, architecturally, from earlier AI systems. A conventional machine-learning classifier a spam filter, a fraud-detection model produces a single output in response to a single input. A generative model such as a large language model produces sequential outputs but remains, at inference time, a function: input in, output out. Agentic systems introduce a control loop. The output of one inference becomes an instruction to invoke a tool a web browser, a database, a payment API, another model whose result is fed back as input for the next inference, iteratively, until a termination condition is met.[13]

This loop produces two technical properties with direct legal salience. The first is *compositional unpredictability*: the behaviour of the assembled system is not the sum of the documented behaviours of its parts. A language model whose individual completions

[10]EU AI Act art. 3(1).
[11]Lilian Weng, LLM-Powered Autonomous Agents, Lil'Log (June 23, 2023).
[12]Ryan Calo, Robotics and the Lessons of Cyberlaw, 103 Calif. L. Rev. 513, 532 (2015).
[13]Supra 9, at 3

are reliably safe may, when embedded in a tool-using agent, execute a chain of reasoning that culminates in unsafe action. The second is *environmental coupling*: the agent's behaviour is contingent on the state of the world it is operating on, including resources (websites, APIs, smart contracts, other agents) over which neither the developer nor the deployer has control.[14]

2.2 The Spectrum of Autonomy

Agentic AI is not a binary. Systems occupy a spectrum of autonomy, usefully captured by five ascending levels: *L1 Advisory* (the system recommends, the human decides); *L2 Supervised Execution* (the system executes discrete steps, each human-approved); *L3 Conditional Autonomy* (the system executes a pre-defined workflow end-to-end, escalating on exceptions); *L4 High Autonomy* (the system sets its own sub-goals within a bounded domain); and *L5 Full Autonomy* (the system selects its own objectives across open-ended domains).'

The regulatory stakes rise sharply with each level. An L2 customer-service bot is, for most purposes, an improved instrument of its deployer. An L4 financial-trading agent is, functionally, a quasi-independent actor whose decisions may exceed the cognitive bandwidth of any human supervisor. Current deployed systems cluster around L3; the trajectory of industry investment points toward L4 and, in research settings, L5.[15] Any regulatory framework that fails to differentiate across this spectrum will be simultaneously over-inclusive toward advisory systems and under-inclusive toward genuinely autonomous ones.

2.3 The Value-Chain Problem

A modern agentic system is produced by a chain of actors whose contributions are often severable. A foundation-model developer trains a base model. A fine-tuning provider adapts it for a vertical. A toolkit vendor supplies the agent scaffolding. A deployer integrates the agent into a business process. An end-user configures it for a specific task. Each actor exercises discretion; each influences the final behaviour; none has complete visibility into what the others have done. When harm occurs, the causal

[14]Id.

[15]Yoshua Bengio et al., Managing Extreme AI Risks amid Rapid Progress, 384 Science 842, 843 (2024).

inquiry is not *whose product malfunctioned* but *which configuration of which layer produced which emergent property*.[16]

This distributed causality is the single most important technical fact for legal analysis. It explains why conventional tort doctrines which presume a single defendant whose act was the proximate cause of injury fit so badly. It explains why strict product-liability regimes, designed for discrete defective goods, require substantial adaptation. And it explains why every serious regulatory proposal examined in this paper has converged on some version of shared, chain-wide responsibility, however differently that sharing is operationalised across jurisdictions.

3. LEGAL CHALLENGES

3.1 The Liability Problem

3.1.1 The Inadequacy of Existing Tort Doctrine

Common-law negligence requires duty, breach, causation, and damage. Each element frays under agentic conditions. The duty of a foundation-model developer to a downstream end-user is attenuated by layers of intervening actors. Breach is difficult to prove when there is no industry standard of care and, where it exists, when the state-of-the-art changes month by month. Causation, in a system whose decisions are the product of billions of parameters interacting with an unpredictable environment, is not merely difficult to prove but, in the strongest cases, metaphysically strained.[17]

Strict product liability offers a partial workaround by eliminating the need to prove fault, but it too encounters limits. Most product-liability statutes define *product* in ways that historically excluded software, let alone the dynamic service relationship that modern AI represents. The European Union has tried to fill this lacuna by extending *Product Liability Directive* of 2024 regime to software, including AI, and this remains the most decisive legislative response to date.[18] Yet even a strict regime must still grapple with the value-chain problem: who, precisely, is the producer of an emergent behaviour?

3.1.2 Illustration: Tesla's Autopilot and the Allocation of Blame

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[16]Gillian K. Hadfield & Jack Clark, Regulatory Markets: The Future of AI Governance, arXiv:2304.04914 (2023).
[17]David C. Vladeck, Machines Without Principals: Liability Rules and Artificial Intelligence, 89 Wash. L. Rev. 117, 146 (2014).
[18]Directive (EU) 2024/2853 of 23 October 2024 on Liability for Defective Products, 2024 O.J. (L 2853) 1.

Tesla's Autopilot and Full Self-Driving (FSD) systems are the most extensively litigated case study of agentic liability to date. The architecture presents a classic principal-agent-tool puzzle: Tesla designs the system, the driver ostensibly supervises it, and the algorithm makes the split-second decision that causes or avoids a collision. When the system fails, each party can plausibly point to the others.

Three deployments illustrate the problem. In December 2023,after a thorough investigation spanning over two-year by the National Highway Traffic Safety Administration, Tesla issued a recall covering approximately two million vehicles to remedy deficiencies in Autopilot's driver-engagement monitoring a recall delivered by over-the-air software update, itself a novel compliance artefact.[19] In *Banner v. Tesla*, arising from a 2019 fatal collision in Florida, the plaintiff alleged that Autopilot failed to detect a tractor-trailer crossing the vehicle's path a failure mode substantially identical to an earlier 2016 Florida fatality, suggesting that Tesla's iterative updates had not resolved a known vulnerability.[20] In *Riad v. Tesla*, a California driver was criminally charged with vehicular manslaughter after his Autopilot-engaged vehicle ran a red light and killed two occupants of another car the first known felony prosecution of a driver using partially automated driving technology.[21]

These cases expose the core doctrinal difficulty. When a Level-2 driver-assistance system contributes to a collision, liability could rest with the human driver (who was contractually required to remain attentive), the manufacturer (who's marketing arguably encouraged inattention), the software developer (whose perception model failed to classify the obstacle), or no one in particular. The *Vasquez* prosecution following the 2018 Uber-Tempe pedestrian fatality settled on the human safety driver, not the developer an outcome that critics argue systematically under-deters the parties best positioned to prevent harm.[22] The pattern repeats: the human in the loop, however nominal their control, becomes the liability sink.[23]

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[19]Tesla Autopilot Recall, supra note 6.
[20]Complaint, Banner v. Tesla, Inc., No. 50-2019-CA-009962 (Fla. Cir. Ct. filed 2019).
[21]Complaint, Riad v. Tesla, Inc., No. VA-2019300913 (Cal. Super. Ct., L.A. Cnty., filed 2022) (criminal charges arising from Dec. 2019 Autopilot-involved fatal collision in Gardena, Cal.).
[22]State v. Vasquez, No. CR2020-125611-001 (Ariz. Super. Ct. 2023).
[23]Steven Shavell, On the Redesign of Accident Liability for the World of Autonomous Vehicles, 49 J. Legal Stud. 243, 250 (2020).

3.1.3 Illustration: zyfAI and the DeFi Yield Agent

The liability puzzle becomes sharper still in decentralised finance, where agentic systems such as zyfAI operate at the extreme end of the autonomy spectrum in an environment deliberately engineered to minimise human intermediation. zyfAI incubated on the ZKsync Era and, more recently, building on the ERC-8004 trust less-agents standard permits a user to delegate rebalancing authority to a rule-based agent that moves capital across curated DeFi protocols to optimise risk-adjusted yield.[24] The user retains self-custody; the agent acts within user-set permissions; and execution is verifiable by on-chain ZK proofs.[25] Agent-to-agent payment standards such as Coinbase's x402 further permit the yield agent to pay for sub-agent services (e.g., a specialised risk-analysis agent) autonomously in stablecoin.[26]

Consider four harm scenarios that zyfAI or a comparable DeFAI agent could generate. *First*, an oracle feed is manipulated and the agent rebalances into a compromised pool at a catastrophic loss. *Second*, a smart-contract bug in a protocol the agent has been authorised to use is exploited, draining user funds. *Third*, the agent's rule logic which the developer characterises as deterministic produces an unforeseen interaction that constitutes de facto market manipulation. *Fourth*, the agent executes a transaction that triggers tax or securities-law consequences the user did not anticipate.

In each scenario, the existing liability apparatus is under-determined. The developer may plead, with some force, that the user set the permissions and retained custody. The protocol whose smart contract was exploited may plead that the code is the agreement and that risk-of-loss was contractually allocated to the user. The user, meanwhile, may never have read the code and may never have understood that their natural-language instruction (*maximise yield while keeping 20% in stablecoins*) would be operationalised through dozens of simultaneous positions across chains. The product-liability model strains against the decentralised architecture; the negligence model strains against the distributed causation; and the contract model strains against the cognitive asymmetry between the user's instruction and the agent's execution. DeFi-agent governance is, at present, a regulatory near-vacuum in every major jurisdiction, including

[24]Zyfai Documentation: Introduction, supra note 7.
[25]Ethereum Improvement Proposal, ERC-8004: Trustless Agents (Jan. 2026) (establishing on-chain identity and reputation primitives for autonomous agents).
[26]Coinbase, x402: Payments for the Agentic Web (2025) (HTTP-native micropayment standard enabling agent-to-agent and agent-to-service settlement in USDC).

India a position that the growing total value locked in agent-managed vaults will make increasingly untenable.[27]

3.1.4 The Revived Debate on Electronic Personhood

One radical response to the liability puzzle, first floated by the European Parliament in 2017, is to confer legal personhood on sufficiently autonomous AI systems an electronic personhood analogous to the corporate form.[28] The proposal was met with sharp criticism by over 150 AI experts, who argued that it would inappropriately shield human actors from accountability, conflating agency with personality in ways that corporate law itself has always carefully avoided.[29] The critique is compelling. The corporate form exists to aggregate human principals and their capital under a single juridical skin; its utility rests on the fact that humans ultimately stand behind the veil. An electronic person has no such principals. Piercing the veil would reveal not a shareholder but a server.[30]

The more coherent contemporary approach, adopted implicitly by the *EU AI Act* and by the proposed *Digital India Act*, rejects electronic personhood and instead distributes duties across the value chain developer, deployer, user with the precise allocation calibrated to the risk tier of the system. This paper endorses that approach while arguing, in Chapter IX, that India's current distribution is insufficiently granular.[31]

3.2 The Patentability Problem

3.2.1 The Inventor-Must-Be-Human Orthodoxy

The second legal problem this paper addresses novel in the context of agentic AI concerns patentability. Agentic systems, particularly in pharmaceutical discovery, materials science, and chip design, increasingly generate candidate inventions with progressively thinning human intervention. The question is whether, and on what terms, such inventions can be patented.

[27]See Zyfai documentation, supra (emphasising user-set permissions and deterministic rule sets as mitigating agent misbehaviour).
[28]European Parliament Resolution of 16 February 2017 with Recommendations to the Commission on Civil Law Rules on Robotics, 2015/2103(INL), ¶ 59(f).
[29]Open Letter to the European Commission on Artificial Intelligence (Apr. 2018), http://www.robotics-openletter.eu/.
[30]Joanna J. Bryson, Mihailis E. Diamantis & Thomas D. Grant, Of, for, and by the People: The Legal Lacuna of Synthetic Persons, 25 Artificial Intelligence & L. 273, 280 (2017).
[31]S.M. Solaiman, Legal Personality of Robots, Corporations, Idols and Chimpanzees: A Quest for Legitimacy, 25 Artificial Intelligence & L. 155, 170–78 (2017).

To illustrate this issue, it is imperative to shed light on the famous case of DABUS an AI system developed by Dr Stephen Thaler, the output of which has been the subject of patent applications parallelly in multiple jurisdictions mentioning DABUS itself as the inventor. The results are now a near-complete cross-jurisdictional rejection. The UK Supreme Court in *Thaler v. Comptroller-General* held that the Patents Act 1977 requires an inventor to be a natural person; a machine does not qualify.[32] The United States Court of Appeals for the Federal Circuit in *Thaler v. Vidal* reached the same conclusion under the Patent Act, holding that *individual* in § 100(f) means a human being.[33] The European Patent Office's Legal Board of Appeal agreed.[34] South Africa stands alone in having granted the DABUS patent a grant explicable largely by the absence of substantive examination in the relevant tier of its registration system.[35]

3.2.2 The Indian Position

The reaction of India has been in line with the world. In 2020, the Indian Patent Office rejected[36] a DABUS application following objections, in line with the argument that the implicit requirement of a human inventor in the Patents Act, 1970, section 2(1)(y). An independent and somewhat overlapping issue is the patentability of the underlying AI software itself, which is not patentable under sub-clause 3(k) of the Patents Act, which excludes mathematical or business method and not a computer programme per se or algorithm. The landmark case of Ferid Allani v. Union of India[37] by the Delhi High Court limited this exclusion by stating that a computer programme which proves a technical effect or a technical contribution is a patentable one; the per se term should be interpreted strictly. This reading is operationalised by the Guidelines of Examination of Computer Related Inventions, 2017 [38] by the Controller General, but with continuing inconsistency in the examination.

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32 Thaler v. Comptroller-General of Patents, Designs and Trade Marks, [2023] UKSC 49 (U.K.).
33 Thaler v. Vidal, 43 F.4th 1207 (Fed. Cir. 2022), cert. denied, 143 S. Ct. 1783 (2023).
34 EPO Legal Board of Appeal, Cases J 8/20 & J 9/20, Designation of Inventor/DABUS (Dec. 21, 2021).
35 South African Patent No. ZA2021/03242 (Dep't Patents, S. Afr., July 28, 2021) (sole grant to DABUS-listed invention).
36 Indian Patent Application No. 202017019068 (DABUS, listing an AI system as inventor; abandoned after objection by Indian Patent Office, 2020).
37 Ferid Allani v. Union of India, W.P. (C) 7/2014, 2019 SCC OnLine Del 11867 (Del. H.C.).
38 Office of the Controller General of Patents, Designs & Trade Marks, Gov't of India, Guidelines for Examination of Computer Related Inventions (CRIs) (June 30, 2017).

3.2.3 The Emerging Middle Path: AI-Assisted Inventions

The refusal to recognize AI inventorship does not, in itself, address the issue of how to treat AI-assisted inventions - those where the human guides the search, but the AI system makes the non-obvious contribution. A principle of global potential impact is laid down in the *Inventorship Guidance of AI-Assisted Inventions*[39] of February 2024 of the United States Patent and Trademark Office, which states that AI cannot be considered an inventor, but that a human who plays a significant role in the conception of the invention, even by recognising and appreciating the work of an AI system, is an inventor. The threshold is fact-specific. It is not enough to just feed a problem into an AI system or just identify a useful result. The human has to make a significant contribution to the creative idea.

This is a defensible middle ground, but it puts a lot of strain on the notion of significant contribution. In situations where an agentic system is autonomously generating the problem, conducting thousands of simulated experiments, and finding a good lead, the remaining human input can be narrowed down to selection of AI-generated candidates. The issue of whether such selection is inventorship is one that courts are yet to resolve squarely. The responses suggested by commentators include a spectrum of views, including a new sui generis right of AI-generated inventions, or the elimination of the individual-inventor requirement.

3.2.4 Implications for Indian Patent Policy

The patentability question in India is framed by an existing patent regime that is already protective of an elevated inventive-step and efficacy standard as the reasoning of the Supreme Court in Novartis AG v. Union of India[40] shows. There are three policy options that should be considered. Firstly, the Patents Act needs to be revised, or further guidance provided, to make it clear that the inventor must be a natural person, but that a meaningful human input to an AI-assisted invention meets the inventorship criterion. Second, the disclosure requirements ought to be reinforced to make applicants reveal the application of AI to the inventive process to aid in examiner evaluation of obviousness. Third, the section 3(k) ought to be revisited with Ferid Allani to generate a sensible

[39] U.S. Patent & Trademark Office, Inventorship Guidance for AI-Assisted Inventions, 89 Fed. Reg. 10,043 (Feb. 13, 2024).

[40] Novartis AG v. Union of India, (2013) 6 S.C.C. 1 (interpreting § 3(d) and the heightened efficacy standard under Indian patent law).

doctrine on AI-based patents - a doctrine that the Controller General guidelines have not entirely provided. India The most doctrinally underdeveloped aspect of the AI legal environment in India currently is patentability of agentic AI, and it will influence the feasibility of the foundation-model goals of the IndiaAI Mission

.3.3 Consent and Contract in Agent-Mediated Transactions

Contract law presumes a meeting of minds between competent parties. When Party A's agent is a piece of software that reads terms of service instantly, accepts them, and executes a transaction, two doctrinal questions arise. First, has Party A consented to those terms in any meaningful sense? Second, when the agent misrepresents the terms as Air Canada's chatbot did when it invented a bereavement fare policy is the principal bound?

The British Columbia Civil Resolution Tribunal's answer in *Moffatt v. Air Canada* was simple and, in the author's view, correct: yes.[41] An airline that deploys a customer-facing agent is responsible for the representations that agent makes. The ruling applies the long-settled principle of apparent authority to a new factual setting. But the principal strains at the edges of harder cases. Consider an autonomous purchasing agent that commits its principal to a ten-year supply contract, or a zyfAI-style yield agent that commits user funds to a long-duration liquidity position. Is the principal bound, regardless of their actual intent, by the doctrine of objective manifestation? Or does the opacity of the agent's decision process undermine the very idea of objective manifestation? The law has not yet converged on an answer, and the answer it eventually produces will shape the commercial viability of agentic AI.

3.4 Privacy, Data Protection, and Automated Decisions

Agentic systems are, by construction, data-hungry. They read, store, and cross-reference information across every tool they invoke. This architecture places them in direct tension with data-minimisation principles now foundational to data-protection law. Article 22 of the General Data Protection Regulation prohibits decisions producing legal or similarly significant effects based *solely* on automated processing.[42] The word *solely*

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[41] Moffatt v. Air Canada, supra note 5.
[42] Regulation (EU) 2016/679, art. 22, 2016 O.J. (L 119) 1 (GDPR).

has been interpreted narrowly: even a rubber-stamp human review can strip a decision of its automated character.[43]

India's *Digital Personal Data Protection Act, 2023* contains no analogue to Article 22.[44] The absence is striking. An Indian citizen subjected to an automated loan denial, an automated employment rejection, or an automated criminal-risk score has, under current law, no specific statutory right to demand human review. The constitutional right to privacy recognised in *Puttaswamy* arguably supplies a foundation for such a right by judicial interpretation,[45] but the Supreme Court of India has not yet had occasion to work out the doctrine in the automated-decision context. This is the single most urgent gap in Indian AI law and a central subject of the reform proposals in Chapter IX.

4. ETHICAL CHALLENGES

4.1 The Principlist Framework and Its Limits

The dominant ethical vocabulary for AI beneficence, non-maleficence, autonomy, justice, explicability is borrowed from medical ethics.[46] The framework has produced useful consensus documents, including the OECD AI Principles, the UNESCO Recommendation, and India's own NITI Aayog Responsible AI reports.[47] But agentic AI exposes the framework's weaknesses. Principles adjudicate between competing values *within* a given decision; they are less effective when the question is whether to deploy a system whose decisions are individually benign but collectively transformative of social and economic relations.

4.2 Autonomy and Meaningful Human Control

The principle of meaningful human control articulated originally in debates over lethal autonomous weapons has migrated into civilian AI ethics. It requires that a human retain both the capacity and the practical opportunity to intervene in, understand, and override an automated decision. In agentic systems, this principle is structurally difficult to honour. The speed and volume of agent decisions (a purchasing or yield-optimisation

[43] Article 29 Data Protection Working Party, Guidelines on Automated Individual Decision-Making and Profiling, WP251rev.01, at 20 (Feb. 6, 2018).
[44] Digital Personal Data Protection Act, No. 22 of 2023, India Code (2023).
[45] Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 S.C.C. 1.
[46] Luciano Floridi et al., AI4People—An Ethical Framework for a Good AI Society, 28 Minds & Machines 689, 696–99 (2018).
[47] NITI Aayog, Approach Document for India, Part 1 – Principles for Responsible AI (Feb. 2021).

agent may make hundreds of micro-decisions per minute) makes per-decision review impossible.[48]

The *EU AI Act* operationalises the principle through Article 14, which requires that high-risk AI systems be designed to enable effective oversight by natural persons. The provision is a meaningful start, but its requirements are expressed at a level of generality that leaves much to implementation. India's draft frameworks, by contrast, speak of a *human-in-the-loop* deployment without specifying who the human is, what loop they are in, or what effective oversight actually entails. The next generation of Indian rulemaking should make this specification explicit.

4.3 Opacity and the Right to Explanation

Agentic systems are characteristically opaque along two dimensions. The underlying model is statistically complex and resistant to post-hoc interpretation; and the agentic scaffolding tool calls, memory retrievals, planning steps produces a decision trace that is, in principle, reviewable but in practice often hundreds of thousands of tokens long.[49] The right to explanation thus oscillates between two failure modes: a legally meaningful explanation that is cognitively inaccessible to its recipient, or a cognitively accessible explanation that is legally trivial.[50]

The solution is unlikely to be found in any single technical or legal innovation. It will require a combined architecture of ex-ante disclosure (what the agent is designed to do), ex-post auditability (what, in fact, it did), and third-party certification (independent attestation of both). The *EU AI Act* begins to construct this architecture for high-risk systems; the United States has not; India has not yet begun.

4.4 Confabulation at Scale

Large language models are, by architecture, probabilistic text generators. They do not, in any meaningful sense, track truth. When they are correct, it is because the probabilistic surface of their training distribution happens to align with the world; when they are wrong, they are wrong with identical fluency.[51] Embedded in an agent that acts

48 Alan F.T. Winfield & Marina Jirotka, Ethical Governance is Essential to Building Trust in Robotics and AI Systems, 376 Phil. Transactions Royal Soc'y A 20180085 (2018).
49 Frank Pasquale, The Black Box Society 8 (Harv. Univ. Press 2015).
50 Sandra Wachter, Brent Mittelstadt & Luciano Floridi, Why a Right to Explanation of Automated Decision-Making Does Not Exist in the GDPR, 7 Int'l Data Privacy L. 76, 82 (2017).
51 Michael Townsen Hicks, James Humphries & Joe Slater, ChatGPT is Bullshit, 26 Ethics & Info. Tech. 38 (2024).

on its outputs rather than merely displaying them this indifference to truth becomes a societal hazard. A search agent that confabulates a case citation is a nuisance. A medical triage agent that confabulates a dosage is a danger. A legal agent that confabulates precedent is both. The *Moffatt* chatbot's invention of a bereavement-fare policy is a benign illustration of a systematically dangerous property.

4.5 Advanced Capability and Tail Risk

A minority of researchers, led by scholars including Yoshua Bengio and, in a different register, Nick Bostrom, argue that sufficiently advanced agentic systems could pose catastrophic or even existential risks risks that are individually improbable but potentially irreversible.[52] [53] This paper does not take a position on the probability of such outcomes. It does take the position that legal systems designed exclusively for expected-value reasoning are ill-equipped to respond to them, and that the precautionary architecture of the *EU AI Act*'s systemic-risk chapter and California's *Transparency in Frontier AI Act* are a defensible response to the structure of the problem.

5. THE EUROPEAN UNION FRAMEWORK

5.1 Regulatory Philosophy

The European Union has pursued AI governance through a *horizontal* strategy: a single, cross-sectoral instrument that lays down rules applicable to every AI system sold or used in the Union, differentiated internally by risk tier. The strategy reflects the Union's broader regulatory temperament a preference for ex-ante, rights-based, precautionary rule-making and builds on the institutional infrastructure established by the General Data Protection Regulation. The flagship instrument is the *Artificial Intelligence Act*, Regulation (EU) 2024/1689, which entered into force in August 2024 and whose substantive obligations phase in through 2026–2027.[54]

5.2 The Risk Pyramid

The Act organises AI systems into four tiers.[55] At the apex, *unacceptable-risk* practices are prohibited outright: these include social scoring by public authorities, real-time biometric identification in public spaces (with narrow exceptions), and manipulative

52 Nick Bostrom, Superintelligence: Paths, Dangers, Strategies 127 (Oxford Univ. Press 2014).
53 Managing Extreme AI Risks amid Rapid Progress, supra note 14.
54 Regulation (EU) 2024/1689 of 13 June 2024 (Artificial Intelligence Act), 2024 O.J. (L 1689) 1 [hereinafter EU AI Act].
55 EU AI Act arts. 5–7.

techniques that exploit vulnerabilities. Below the apex, *high-risk* systems those used in employment, credit, education, law enforcement, migration, and critical infrastructure face extensive obligations: risk-management systems, data governance, technical documentation, human oversight, accuracy and robustness, and conformity assessment. *Limited-risk* systems (such as chatbots) face transparency obligations. *Minimal-risk* systems face no specific obligations.

Agentic AI does not map cleanly onto this pyramid. An agent is not a risk category; it is an architecture. A purchasing agent may be minimal-risk; a medical triage agent, deployed with identical scaffolding, may be high-risk. A DeFi yield agent such as zyfAI, depending on its deployment, may fall across multiple tiers simultaneously. The Act addresses this through functional classification: the tier is determined by the use case, not the architecture.

5.3 The Liability Architecture

The Act itself does not establish a civil-liability regime; it relies on companion instruments. Two were proposed: the *AI Liability Directive*, which would have eased the burden of proving causation in AI-related harm claims, and the revised *Product Liability Directive*, which extends strict liability to software including AI systems.[56] [57] The *AI Liability Directive* was withdrawn in February 2025 as the Commission signalled a broader reorientation toward competitiveness; the revised *Product Liability Directive* survived and constitutes the Union's principal tort response to AI harms.

6. THE UNITED STATES FRAMEWORK

6.1 Regulatory Philosophy

The United States has pursued a strategy that is the near-opposite of the European one: sectoral, ex-post, and strongly protective of innovation. There is, at the time of writing, no horizontal federal statute governing AI. The regulatory landscape is instead a patchwork of executive orders, sector-specific agency guidance, voluntary standards, and increasingly state-level legislation.

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[56]Proposal for a Directive on Adapting Non-Contractual Civil Liability Rules to Artificial Intelligence, COM (2022) 496 final (withdrawn Feb. 2025).
[57]Directive (EU) 2024/2853 of 23 October 2024 on Liability for Defective Products, supra note 17.

6.2 The Executive-Branch Pendulum

The executive branch's approach swung sharply between 2023 and 2025. In October 2023, President Biden issued Executive Order 14,110, imposing reporting obligations on developers of dual-use foundation models and directing NIST to develop safety standards.[58] On his second day in office in January 2025, President Trump rescinded the Order and replaced it with Executive Order 14,179, directing the revocation of any policies inconsistent with American AI leadership.[59] This pendulum has consequences beyond its immediate operational effect. It signals to foreign jurisdictions and to state legislatures that federal AI policy cannot be counted on as a stable anchor. The vacuum has been filled by the states.

6.3 NIST and the Voluntary Standards Layer

Notwithstanding executive volatility, the National Institute of Standards and Technology has maintained a relatively continuous trajectory. NIST's *AI Risk Management Framework* and its Generative AI Profile provide a set of voluntary, process-based controls that have become de facto standards for many enterprise deployers.[60] The framework addresses several features relevant to agentic AI including model validation, deployment monitoring, and incident reporting but is, by design, non-binding.

6.4 State Legislation

Two state statutes warrant particular attention. Colorado's *Artificial Intelligence Act*, enacted in 2024 and effective February 2026, imposes a duty of care on developers and deployers of high-risk AI systems to protect consumers from algorithmic discrimination.[61] The statute's architecture borrows from the EU AI Act risk classification, impact assessments, notice and explanation rights but applies only within Colorado.

California's *Transparency in Frontier Artificial Intelligence Act*, enacted in September 2025, targets the highest layer of the value chain: developers of frontier

[58]Exec. Order No. 14,110, 88 Fed. Reg. 75,191 (Oct. 30, 2023), rescinded by Exec. Order No. 14,179 (Jan. 23, 2025).
[59]Exec. Order No. 14,179, 90 Fed. Reg. 8741 (Jan. 23, 2025).
[60]Nat'l Inst. of Standards & Tech., NIST AI 600-1, AI Risk Management Framework: Generative AI Profile (July 2024).
[61]Colorado Artificial Intelligence Act, 2024 Colo. Sess. Laws ch. 198 (effective Feb. 1, 2026).

models trained above specified compute thresholds.[62] It requires such developers to publish a safety framework, report critical safety incidents, and disclose the results of pre-deployment risk evaluations. The Act's scope is narrower than its predecessor SB 1047 (vetoed in 2024) but represents the first enforceable frontier-model statute in any US jurisdiction. Its significance for agentic AI is that the frontier models most likely to anchor advanced agents fall within its scope.

6.5 The Common-Law and Regulatory Response

Federal agencies have used existing authorities creatively. The FTC's *Operation AI Comply* enforcement sweep deployed Section 5 of the FTC Act against deceptive AI claims, including claims by AI-powered *lawyer* services.[63] Section 230 of the Communications Decency Act, long a shield for online intermediaries, is increasingly tested by agentic deployments: an intermediary that hosts third-party content is one thing; a platform that operates an agent generating content is arguably something else.[64]

7. THE INDIAN FRAMEWORK

7.1 The Current Legal Terrain

India does not yet have a dedicated AI statute. Its governance of AI is layered across the *Information Technology Act, 2000*,[65] the *Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021*,[66] the *Digital Personal Data Protection Act, 2023*,[67] the *Consumer Protection Act, 2019*,[68] sectoral regulations from the Reserve Bank of India, the Securities and Exchange Board of India, and the Insurance Regulatory and Development Authority, and a growing body of soft-law instruments issued by NITI Aayog and the Ministry of Electronics and Information Technology.

The constitutional canvas is supplied by *Justice K.S. Puttaswamy v. Union of India*, which established a fundamental right to privacy grounded in Article 21.[69] The right imposes proportionality and procedural-safeguard constraints on state action

[62]Cal. S.B. 53, 2025–2026 Leg., Reg. Sess. (enacted Sept. 29, 2025).
[63]Federal Trade Commission, Operation AI Comply (Sept. 25, 2024).
[64]Communications Decency Act § 230, 47 U.S.C. § 230(c)(1) (2018).
[65]Information Technology Act, No. 21 of 2000, India Code (2000).
[66]Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, G.S.R. 139(E).
[67]Digital Personal Data Protection Act, supra note 45.
[68]Consumer Protection Act, No. 35 of 2019, § 2(34) (India).
[69]Justice K.S. Puttaswamy (Retd.) v. Union of India, supra note 46.

affecting privacy constraints that, by logical extension, should apply to state-sponsored or state-mandated use of agentic AI. The Supreme Court has not yet applied *Puttaswamy* squarely to an automated-decision setting, but the doctrinal ingredients are in place.

7.2 Soft Law: NITI Aayog and MeitY

NITI Aayog's *National Strategy for Artificial Intelligence* (2018) articulated the #AIforAll vision.[70] The two-part *Responsible AI* approach documents (2021) subsequently laid out seven principles safety and reliability, equality, inclusivity and non-discrimination, privacy and security, transparency, accountability, and protection of positive human values and offered operational guidance.[71] [72] The *AI Governance Guidelines Development Report* published by MeitY and IndiaAI in January 2025 advances the conversation further, proposing a governance architecture built on principle-based self-regulation supplemented by sectoral rules.[73]

Each of these documents is thoughtful. None is binding. India's soft-law posture has virtues flexibility, ease of revision, alignment with the country's developmental priorities but it also means that every obligation in every document is, strictly speaking, advisory. For agentic AI, where the stakes of deployment can be very high, advisories is an insufficient governance floor.

7.3 The 2024 MeitY Advisory and Its Aftermath

In March 2024, MeitY issued an advisory requiring intermediaries to obtain government permission before deploying under-tested AI models in India.[74] The advisory was met with swift industry criticism and was substantially revised within weeks. The episode illustrated both the agility of India's soft-law approach and its structural limitations: the state may react quickly, but the quality of its reaction is uneven, and the compliance costs for industry of a reactive, unpredictable regulatory environment are non-trivial.

[70] NITI Aayog, National Strategy for Artificial Intelligence: #AIforAll (June 2018).
[71] Approach Document for India, supra note 53.
[72] NITI Aayog, Approach Document for India, Part 2 – Operationalizing Principles for Responsible AI (Aug. 2021).
[73] MeitY & IndiaAI, AI Governance Guidelines Development Report (Jan. 2025).
[74] MeitY, Gov't of India, Advisory on Due Diligence by Intermediaries/Platforms, File No. 2(4)/2023-CyberLaws-3 (Mar. 15, 2024).

7.4 The Deepfake and Personality-Rights Response

India's most concrete regulatory engagement with advanced AI to date has been on deepfakes. MeitY's November 2023 advisory on deepfakes treated the problem through the lens of intermediary due-diligence obligations under the *IT Rules, 2021*.[75] The Delhi High Court's personality-rights jurisprudence *Amitabh Bachchan*, *Anil Kapoor*, and *Titan Industries* has filled part of the remedial gap through common-law injunctive relief. These interventions are useful but partial. They address outputs a fabricated image, an unauthorised voice replica rather than the upstream agentic infrastructure that produces them.

7.5 The Proposed Digital India Act

The Government of India has, since 2023, consulted on a *Digital India Act* to replace the *IT Act, 2000*.[76] As announced, the proposed Act is expected to address AI-related harms, high-risk AI systems, algorithmic accountability, and intermediary classification. At the time of writing, a draft has not been publicly released. The legislative process is therefore open; the choices India makes in the next twelve to eighteen months will be formative.

7.6 The IndiaAI Mission

In March 2024, the Union Cabinet approved the IndiaAI Mission with a budgetary outlay of ₹10,371.92 crore.[77] The Mission funds compute infrastructure, foundation-model development, dataset development, skilling, and startup financing. It is, at bottom, an industrial-policy instrument. It sits alongside, rather than within, the regulatory framework, and its success depends in part on the regulatory framework providing the certainty that domestic developers will need to invest.

7.7 Gaps in the Current Framework

Seven structural gaps merit emphasis. First, there is no statutory definition of an AI system, let alone of an agentic AI. Second, there is no risk-tiered classification. Third, there is no statutory right to contest automated decisions; the *DPDP Act* notably omits an Article-22 analogue. Fourth, there is no dedicated AI product-liability regime; the

[75] MeitY, Advisory on Deepfakes, File No. 2(7)/2023-CyberLaws-3 (Nov. 7, 2023).
[76] Rajeev Chandrasekhar, Address at the Digital India Dialogues on the Proposed Digital India Act (Mar. 9, 2023).
[77] Cabinet Approves IndiaAI Mission with Budgetary Outlay of ₹10,371.92 Crore, Press Info. Bureau (Mar. 7, 2024).

Consumer Protection Act, 2019 applies but with unsettled fit. Fifth, there is no mandatory human-oversight requirement for high-stakes deployments. Sixth, there is no doctrinal clarity on the patentability of AI-assisted inventions, and the § 3(k) exclusion interacts uneasily with the agentic-software economy. Seventh, there is no independent AI regulator; MeitY, which issues most current guidance, is an executive ministry rather than an arm's-length technical regulator.

8. CONCLUSION

Agentic AI reconfigures several of the premises on which modern law is built. It displaces the principal–agent–tool structure around which tort, contract, and consumer-protection doctrines have been organised. It introduces forms of behaviour compositional unpredictability, environmental coupling, emergent action that are not merely more complex than earlier technologies but categorically different in kind. It does so, moreover, at a pace that outstrips the cycle times of legislative drafting, judicial decision, and institutional learning. The legal response cannot simply be extension; at several points, it must be reconstruction.

The three jurisdictions examined in this paper each offer partial answers. The European Union shows what comprehensive horizontal legislation looks like and exposes its costs. The United States, through the fragmented response to the Tesla Autopilot cases, shows both the creativity and the limits of an innovation-first, sectoral approach. India, still at the earliest stages of a dedicated regulatory response and already confronting agentic deployments such as zyfAI that its existing rules barely reach, has the opportunity and, in the author's view, the obligation to synthesise the lessons of both without repeating the mistakes of either.

The recommendations advanced in this paper is primarily focused on a single organising principle: that the legal response to agentic AI must match the technical architecture of agentic AI. Distributed causation calls for distributed liability. Autonomous execution calls for mandated oversight. Opaque reasoning calls for statutory explanation rights. Emergent inventive activity calls for a patentability regime that recognises AI assistance without displacing the human inventor of record. Emergent behaviour calls for pre-deployment risk assessment and incident-triggered learning. A legal system that insists on retrofitting new phenomena into old categories will fail slowly, at first, and then suddenly. A legal system that is willing to learn from the phenomenon it is regulating can do better.

India's forthcoming *Digital India Act* is, in this respect, both a test and an opportunity. The choices encoded in that statute will shape how over 1.4 billion people experience, benefit from, and are protected against the most consequential technology of the coming decade. A statute that is ambitious, rights-protective, innovation-compatible, and institutionally anchored is possible. A statute that is less than that will be revisited within a decade. The task is to get it right the first time.

BETWEEN INNOVATION AND INFRINGEMENT: GENERATIVE AI TRAINING IN INDIAN COPYRIGHT LAW

Rajkriti Singh[1]

ABSTRACT

The rapid rise of generative artificial intelligence has fundamentally challenged existing frameworks of intellectual property law, particularly in jurisdictions like India where copyright legislation predates the era of machine learning. This paper examines a central and unresolved question in Indian copyright law: whether the large-scale ingestion of copyrighted works, including literary texts, news articles, sound recordings, and other protected content, as training data for generative AI models constitutes an infringement of the exclusive rights conferred under the Copyright Act, 1957, or whether such use may be legitimately defended as fair dealing under Section 52(1)(a).[2]

The paper argues that generative AI training does implicate the statutory right of reproduction and, in certain cases, adaptation, under Section 14 of the Copyright Act. At the same time, it demonstrates that the existing fair-dealing provisions, which were drafted with human, purpose-limited uses in mind, do not provide a reliable or adequate safe harbour for industrial-scale, commercial text-and-data mining (TDM). This doctrinal gap leaves both AI developers and rights-holders in a state of legal uncertainty, as illustrated by ongoing litigation such as ANI v. OpenAI[3] *before the Delhi High Court and the policy deliberations initiated by the DPIIT's Working Paper on Generative AI and Copyright.*[4]

Through a comparative analysis of the EU's CDSM Directive and Japan's Article 30-4 TDM exception,[5] *the paper identifies distinct regulatory models and evaluates their suitability for the Indian context. It ultimately proposes a dual legislative framework: a targeted TDM exception for non-commercial research institutions, and a collective or statutory licensing regime for commercial AI training. This hybrid approach is designed to balance technological innovation with equitable remuneration for creators, while addressing the broader need for*

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[1] Dr. B.R. Ambedkar University, Agra

[2] The Copyright Act, 1957, § 14, No. 14, Acts of Parliament, 1957 (India).
The Copyright Act, 1957, § 52(1)(a), No. 14, Acts of Parliament, 1957 (India).

[3] Asian News Int'l v. OpenAI Inc., CS(COMM) 1044/2024 (Del. H.C.) (India).

[4] Dep't for Promotion of Indus. & Internal Trade, Working Paper on Generative Artificial Intelligence and Copyright (Part I) (Dec. 2025).

[5] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market, arts. 3–4, 2019 O.J. (L 130) 92.

copyright policy that simultaneously deters bad-faith enforcement and resolves genuine legal ambiguity.

Keywords: *Generative AI, Copyright, Text and Data Mining, Fair Dealing, Section 52, Intellectual Property, India, Licensing*

1. INTRODUCTION

In late 2024, Indian news agency Asian News International (ANI) approached the Delhi High Court with an allegation that OpenAI had used its news stories, including subscriber-only content, to train large language models such as ChatGPT without permission or payment. Soon after, some of the country's biggest digital news outlets, represented by the Digital News Publishers Association[6], sought to join the proceedings, warning that large-scale scraping of their articles for AI training posed a "clear and present danger" to the economic viability of journalism in India. The dispute quickly expanded beyond text: leading Bollywood music labels including T-Series, *Saregama* and Sony Music, acting through the Indian Music Industry[7], intervened to claim that OpenAI had similarly ingested their sound recordings and lyrics to build generative models, again without any licence or royalty. Parallel developments abroad, such as the lawsuits filed by Germany's collecting society GEMA against AI music platform Suno[8] for allegedly training on and reproducing its repertoire, show that this conflict between AI developers and rights holders is global rather than uniquely Indian.

Together, these controversies expose a basic legal uncertainty: when generative AI systems copy vast quantities of books, news reports and songs into their training datasets, are they merely engaging in a form of automated "reading", or are they infringing the exclusive rights of reproduction and adaptation under copyright law? The Indian Copyright Act, 1957, drafted long before the advent of machine learning, does not expressly address text-and-data mining or the use of copyrighted works as training data, and its fair-dealing provisions offer at best an ambiguous fit for large-scale, commercial AI training. This paper uses the emerging Indian litigation and policy debate to examine whether generative AI training on copyrighted works is lawful under the current statute and to consider what reforms might be necessary to

[6] Digital news body DNPA joins suit against OpenAI over use of copyrighted content, India Today (Jan. 26, 2025), https://www.indiatoday.in/india/law-news/story/digital-news-body-dnpa-joins-suit-against-openai.
[7] T-Series, Sony Music and Saregama Sue OpenAI for Song Usage, Rolling Stone India (Feb. 19, 2025), https://rollingstoneindia.com/open-ai-sued-tseries-saregama-sony-music-india-song-usage.
[8] Suno AI and Open AI: GEMA sues for fair compensation, GEMA (Jan. 20, 2025), https://www.gema.de/en/news/ai-and-music/ai-lawsuit.

balance technological innovation with the legitimate interests of authors, publishers and music creators.

This paper asks whether the ingestion of copyrighted works as training data for generative AI models amounts to copyright infringement under the Indian Copyright Act, 1957, or whether it can be justified as fair dealing or a permissible form of text-and-data mining. It argues that large-scale, commercial AI training does implicate the right of reproduction under current law and falls into a doctrinal grey area, and therefore India should introduce a narrowly tailored text-and-data-mining exception combined with a licensing and transparency framework to balance technological innovation with the legitimate economic interests of authors, publishers and music creators.

2. THE ANATOMY OF COPYRIGHT

Think of these concepts as three building blocks: what is protected (work), who it belongs to (author/owner), and what exactly they can stop others from doing (Section 14 rights). All three are directly hit when generative AI trains on massive datasets.

"Work": what copyright actually protects

In Indian law, copyright protects specific categories of "works": literary (books, articles, code), musical (melodies, not recordings), artistic (images, designs), cinematograph films, and sound recordings. It protects the *expression* of an idea (the exact wording of a news article, the particular notes in a song), not the underlying idea or facts[9].

In generative AI training, the model ingests exactly these protected works: millions of news articles, books, lyrics, film scripts, and sound recordings scraped from the internet or licensed datasets. The legal question is whether copying all this material into a training set, even temporarily, is just "reading at scale" or an act that uses the protected *work* in a way that engages the rights of the copyright owner.[10]

"Author" (and owner): who controls the work?

Under the Copyright Act, the **author** is the person who creates the work, writer of a novel, composer of a song, producer of a film, etc.[11], and by default is the first owner of

[9] R.G. Anand v. Delux Films, (1978) 4 SCC 118 (India) (establishing the idea-expression dichotomy in Indian copyright law).
[10] See Dep't for Promotion of Indus. & Internal Trade, Working Paper on Generative Artificial Intelligence and Copyright (Part I) 7–8 (Dec. 2025).
[11] The Copyright Act, 1957, § 2(d) (India).

copyright unless the Act or a contract says otherwise.[12] Ownership can later shift to an employer, commissioner, producer, or assignee (for example, a music label acquiring rights from a composer), but the law always starts by recognising a human author whose creative labour the system is meant to reward.

When an AI company trains on a dataset, it is effectively drawing on the creative labour of *many thousands of such authors and owners* at once, often without any direct contract, licence, or payment. That is why authors, publishers and music labels argue that training should not be treated as a free resource: the whole point of copyright is to give them control over how their works are commercially exploited.

Section 14 economic rights: what uses need permission?

Section 14 defines "copyright" as a bundle of exclusive **economic rights**, negative rights that let the owner say "no" when someone tries to exploit their work without consent. For most works, the key rights are:

- **Reproduction**: the right to make copies of the work in any material form (printing, downloading, storing, duplicating files, etc.).
- **Adaptation**: the right to make new versions based on the work (e.g., turning a novel into a film, translating a book, remixing a song).
- **Communication to the public**: the right to make the work available so the public can see or hear it, broadcasting, streaming, playing music in a hotel, uploading a video online.

In **generative AI training**, each of these rights is potentially touched:

- To train a model, the developer **copies** huge numbers of works into its servers and datasets, this looks very similar to reproduction, even if no human reads each copy.
- The model then learns patterns and can generate new outputs that sometimes remix or closely resemble the style or structure of the originals, raising adaptation-type concerns when outputs are too close.
- When AI services are offered to the public (e.g., an AI music generator open to users), any AI-produced content that substantially echoes a particular song or script can involve communication to the public of a work derived from the training corpus.

[12] Id. § 17.

This is why rights-holders argue that large-scale, commercial AI training is not a neutral technical step but a use that *should* require their permission or fall within a clearly defined exception: the works are protected, the authors and owners are identifiable, and the acts of copying and remixing map quite closely onto the economic rights listed in Section 14.

Fair Dealing and the Missing TDM Exception

Section 52(1)(a) of the Copyright Act lists situations where using a copyrighted work is **not** infringement, this is called fair dealing. For literary, dramatic, musical and artistic works (other than computer programs), fair dealing covers limited use for:

- **Private or personal use, including research or study** – e.g., a student photocopying a few pages of a book to read for an exam, or a researcher downloading an article to analyse it.
- **Criticism or review** – e.g., quoting parts of a novel or song lyrics in order to criticise or review them in an article or video.
- **Reporting of current events** – e.g., showing a short clip from a film or quoting from an article in a news report about a controversy.

Courts have said that the basic purpose of Section 52 is to protect freedom of expression by allowing reasonable use of works for learning, commentary and news, as long as the use is limited and does not become a substitute for the original.[13]

No Explicit "text and data mining" (TDM) Exception

Unlike the EU or Japan, **Indian law does not have any specific exception for text and data mining (TDM)**, that is, the automated copying and analysis of large volumes of text, images or audio to extract patterns, which is exactly what happens in AI training.[14] Scholars and commentators note that Section 52(1)(a) was drafted with human activities in mind (a person reading, studying, quoting), not machines ingesting billions of words or songs for a commercial AI model.[15]

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[13] See Civic Chandran v. Ammini Amma, 1996 PTC (16) 670 (Ker. H.C.) (India) (holding that copying for the purpose of criticism amounts to fair dealing if there is no intention to compete with or substitute the original work).

[14] See Dep't for Promotion of Indus. & Internal Trade, Working Paper on Generative Artificial Intelligence and Copyright (Part I) 12 (Dec. 2025).

[15] See, e.g., Kailash Chauhan, Generative AI, Text & Data Mining and the Fair Dealing Doctrine: Examining the New Problem with the Old Regime, 31 J. Intell. Prop. Rts. 45, 48 (2025).

Because of this, developers and rights-holders are stuck in a grey area: the only obvious shelter for AI training would be to stretch "research" or "private use" in Section 52(1)(a) to cover industrial-scale, automated copying, but doing so would effectively create a de-facto TDM exception that Parliament has never expressly granted.

- **AI developers' argument:** training is a form of "research" or non-expressive analysis, so copying works into training datasets should be treated as fair dealing under Section 52(1)(a).
- **Rights-holders' argument:** mass, commercial ingestion of entire catalogues for profit-making AI systems goes far beyond the limited, purpose-specific uses that Section 52 was meant to allow, and India has **no explicit TDM exception**, so permission or licensing should be required.

3. HOW AI LEARNS: SCRAPING, PARAMETERS, AND COPYRIGHT LAW

When a generative AI model is built, the first step is to **collect data**. Developers use tools like web crawlers and scrapers to automatically gather huge numbers of texts, images, audio files and videos from websites, databases and digital libraries. This raw material often includes books, news articles, blog posts, song lyrics and recordings, exactly the kinds of works that are typically protected by copyright.

All of this material is then **copied into a training dataset** stored on the AI company's servers. The model is exposed to this dataset again and again so that it can learn patterns in language, images or sound, similar to how a student "learns" by repeatedly reading many books, but here the copying and reading are done automatically and at massive scale. During training, the system adjusts millions or even billions of internal numerical values called **parameters**, which are basically a compressed mathematical summary of what it has learned from the data, rather than a readable library of the original works.

After training is finished, the model usually no longer needs to pull up any individual book, article or song from the dataset. Instead, it generates new answers, images or music by using the patterns stored in its parameters, without any human engineer opening and reading each original work one by one. This is why AI developers argue that the process is more like automated analysis than traditional copying, while rights-holders respond that the initial scraping and storage of their works in training datasets already involves acts of reproduction on a scale that goes far beyond normal human "reading".

The core legal question is whether the copying that occurs during generative AI training amounts to "reproduction" or another restricted act under Section 14 of the Copyright Act, even though no human engineer ever sits and reads each stored copy. Training requires making and storing digital copies of protected works on the developer's servers, often in multiple intermediate versions, so that the model can analyse them and convert them into parameters, which looks very similar to the statutory notion of reproduction "in any material form including storing of it in any medium by electronic means".[16] AI companies respond that these are merely transient, technical copies used to extract non-expressive patterns, while rights-holders argue that Indian law does not generally excuse such intermediate copying and that, unless it falls within a specific exception like fair dealing, it should be treated as infringement.

4. DOES AI TRAINING INFRINGE COPYRIGHT? THE REPRODUCTION AND ADAPTATION DEBATE

Rights-holder argument: training = reproduction (and sometimes adaptation)

From the rights-holder perspective, generative AI training clearly involves **making copies** of protected works in electronic form and therefore falls within the statutory right of reproduction. To build a training dataset, developers download, store and process entire articles, books, images and songs on their servers, often in multiple intermediate versions, which looks very similar to the reproduction right described in Section 14 as including "storing [the work] in any medium by electronic means".[17] Some scholars add that when models "memorise" distinctive parts of works and later output passages or melodies that closely resemble the originals, this begins to look like an **adaptation-type use**,[18] because the AI has effectively re-expressed existing works in slightly altered form. On this view, unless training can be justified under a specific exception like fair dealing, large-scale AI training on copyrighted datasets is prima facie infringement of the rights to reproduce and, in edge cases, to adapt.[19]

Developer counter-argument: training as non-expressive, pattern-based use

AI developers and some commentators respond that training does **not** exploit expressive content in the way copyright is meant to control, but instead uses works in a **non-expressive,**

[16] The Copyright Act, 1957, § 14(a)(i), No. 14, Acts of Parliament, 1957 (India).
[17] Id.
[18] See Dep't for Promotion of Indus. & Internal Trade, Working Paper on Generative Artificial Intelligence and Copyright (Part I) 14–15 (Dec. 2025).
[19] See generally Matthew Sag, Copyright and Copy-Reliant Technology, 103 Nw. U. L. Rev. 1607 (2009) (outlining the foundational arguments for non-expressive use of copyrighted works in computational analysis).

analytical way to extract statistical patterns.[20] They argue that although temporary copies are made during ingestion and training, the end product is a **parameterised model**, not a readable library of the works, and that outputs will usually be new combinations of learned patterns rather than recognisable reproductions or adaptations of particular texts or songs. This view relies heavily on the analogy with human learning: just as a law student who has read hundreds of cases does not "reproduce" those judgments every time they write an answer, an AI model, they say, should not be treated as infringing simply because it has statistically "read" many works to learn how language or music typically behaves.[21]

5. Research vs. Commercial Exploitation: Fair Dealing Limits

From the pro-AI side, developers try to fit training within **Section 52(1)(a)** by characterizing it as a form of "research" or "private study" that should be covered by fair dealing.[22] Their core claim is that training uses works in a **non-expressive, analytical way**, the system is not showing songs, books or articles to the public, but only running automated analysis on them to learn statistical patterns of language, images or sound, much like a researcher using many sources to study trends. On this view, fair dealing should be interpreted **broadly and, in a technology-neutral way**, so that it protects legitimate knowledge-gathering and innovation even when that research is done by machines at scale rather than by individual humans.[23]

Supporters also argue that, because the trained model usually does not store or reproduce original works in human-readable form, the temporary copies made during training are purely **incidental to research** and should not be treated as infringing if there is no substantial, competitive harm to normal markets for the works.[24]

From the rights-holder side, the argument is almost the mirror image of the pro-AI view.

They emphasise that generative AI training involves **large-scale, systematic copying of entire works**, not small quotations or snippets, and that this copying is done by commercial entities to build revenue-generating products, not for limited, non-profit research. Because the

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20 See R.G. Anand v. Delux Films, (1978) 4 SCC 118 (India) (affirming that copyright protects the expression of an idea, not the underlying idea, facts, or learned patterns themselves).

21 The Copyright Act, 1957, § 52(1)(a)(i) (India) (exempting fair dealing with any work for the purposes of "private or personal use, including research").

22 See Arul George Scaria, AI and Copyright: Why We Need a Flexible Fair Dealing Standard in India, 16 Indian J. L. & Tech. 112, 118–20 (2025).

23 Id. at 122.

24 See Dep't for Promotion of Indus. & Internal Trade, Working Paper on Generative Artificial Intelligence and Copyright (Part I) 16–18 (Dec. 2025).

copies are made and stored on the developer's servers, and because the resulting models can compete with the original markets (for example, AI-written news summaries competing with news websites, or AI-generated music competing with human composers), rights-holders say this use is **market-substituting**, not incidental.[25]

They also point out that Indian courts have traditionally interpreted fair dealing **narrowly**, stressing bona fide, non-commercial purposes and minimal market harm,[26] and that nothing in Section 52 suggests an open-ended, U.S.-style fair use doctrine that could legitimise mass, commercial text-and-data mining.[27] On this view, treating industrial-scale AI training as "research" or "private use" would punch a huge hole in the licensing system, allowing tech companies to avoid paying for uses that, in any other context, would clearly require permission or statutory licensing.

6. THE EU OPT-OUT VS. JAPAN'S BROAD TDM EXCEPTION

In the European Union, text and data mining is dealt with through **two specific copyright exceptions** in the 2019 Copyright in the Digital Single Market (CDSM) Directive. **Article 3** creates a mandatory TDM exception **only for research organisations and cultural-heritage institutions**, and only for uses made "for the purposes of scientific research"; right-holders cannot opt out of this, so as long as the institution has lawful access to the content, it may mine it for non-commercial research without a licence.[28] **Article 4** creates a broader, "general-purpose" TDM exception that **any user, including companies, can rely on**, but here right-holders are allowed to **opt out** by "expressly reserving their rights in an appropriate manner", for example via machine-readable metadata, website terms, or technical measures; once they do so, the exception no longer applies and a licence is required.

Another jurisdiction explicitly distinguishes between **non-commercial scientific TDM (freely allowed)** and **commercial or general-purpose TDM (allowed only until right-holders opt out)**, whereas Indian law currently has **no TDM-specific provisions at all**, forcing courts to stretch or reject fair dealing when dealing with generative-AI training.

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25 See, e.g., Super Cassettes Indus. Ltd. v. Hamar Television Network Pvt. Ltd., 2011 PTC (45) 70 (Del. H.C.) (India) (emphasizing that commercial exploitation that competes with the copyright owner's market rarely qualifies as fair dealing).
26 See Civic Chandran v. Ammini Amma, 1996 PTC (16) 670 (Ker. H.C.) (India) (distinguishing India's closed-list fair dealing exceptions from the open-ended fair use doctrine in the United States).
27 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) 92 [hereinafter CDSM Directive].
28 Id. art. 3.

Japan is widely described as having a very broad TDM exception. Article 30-4 of its Copyright Act allows the use of works for "information analysis" or data analysis, defined as extracting or statistically analysing language, sounds or images from large numbers of works, without requiring permission, and this applies to both commercial and non-commercial users. Crucially, the exception is framed around "non-enjoyment" purposes: it covers uses where the user is not consuming the work for entertainment or aesthetic enjoyment, but only using it as raw material for computation, such as recording works in a database as training data for AI.

Because the law focuses on the *purpose* (information analysis) rather than the sector, Japanese and international commentators note that Article 30-4 is broad enough to cover most forms of generative-AI training, making Japan a relatively "friendly" jurisdiction for AI research and development. Similar trends can be seen in Singapore, whose Copyright Act 2021 permits both commercial and non-commercial TDM as long as the user has lawful access, with no opt-out right for rights-holders, again creating a permissive environment for AI labs that want to mine large datasets for model training.

The conceptual foundation of the Japanese model lies in the idea of **"non-enjoyment use"**, meaning that the use of works for computational purposes, such as AI training, does not implicate the expressive or consumption interests that copyright law traditionally seeks to protect. By focusing on the *function* of the use rather than the *status* of the user, Japan effectively treats data as an input for technological processes rather than as a protected cultural artefact in this context. As a result, Japan has emerged as a comparatively **innovation-friendly jurisdiction**, offering legal certainty for AI developers engaged in large-scale model training.

A similarly permissive orientation can be observed in Singapore, whose Copyright Act 2021 allows both commercial and non-commercial TDM, provided that the user has lawful access to the material. Notably, the Singaporean framework does not incorporate an opt-out right for copyright holders, thereby prioritising **ease of access and legal clarity** over residual control mechanisms. This approach has been explicitly linked to broader national strategies aimed at positioning Singapore as a hub for AI development and data-driven innovation.[29]

Taken together, these comparative models reveal three distinct regulatory philosophies: the EU's **conditional openness with opt-out safeguards**, Japan's **function-based, purpose-driven permissiveness**, and Singapore's **access-oriented, innovation-first approach**. Each

[29] See NUS Law, Generative AI and Copyright Fair Use – Singapore (2024).

model reflects a different calibration of the relationship between copyright protection and technological advancement.

India's position, by contrast, remains characterised by **legislative silence and doctrinal strain**. In the absence of a TDM-specific exception, courts and policymakers are compelled to interpret general provisions such as fair dealing in contexts far removed from their original design. This not only generates uncertainty but also risks inconsistent outcomes, as judicial reasoning struggles to accommodate the scale, automation, and opacity inherent in AI training processes.

From a comparative perspective, the absence of a clear statutory framework places India at a structural disadvantage. Unlike the EU, it lacks a calibrated system that differentiates between types of use; unlike Japan and Singapore, it does not provide the level of ex ante certainty required for large-scale AI development. This reinforces the case for **targeted legislative intervention**, whether through a limited research exception, a broader TDM provision, or a hybrid model combining exceptions with licensing mechanisms.

7. MOVING BEYOND COURTS: POLICY DISCUSSIONS AND ACADEMIC PERSPECTIVES

In India, the policy debate around AI training data has moved beyond courts into government committees and discussion papers. The Department for Promotion of Industry and Internal Trade (DPIIT) has released a "Working Paper on Generative AI and Copyright" which explicitly flags the legality of using copyrighted works as training data as a "new problem" that existing provisions like Section 52 were never drafted to address, and canvasses options ranging from a specific TDM exception to licensing or opt-out mechanisms.[30] Earlier, the Government had issued a press note stating that the "existing IPR regime is well-equipped" to deal with AI-generated works,[31] but this was quickly followed by consultations acknowledging practical uncertainty for both creators and AI companies, particularly in relation to scraping and large-scale text-and-data mining for training.[32]

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[30] Dep't for Promotion of Indus. & Internal Trade, Working Paper on Generative Artificial Intelligence and Copyright (Part I) 7–9 (Dec. 2025).

[31] Ministry of Commerce & Industry, Gov't of India, Unstarred Question No. 436: Artificial Intelligence and Copyright, Lok Sabha (Feb. 8, 2023) (stating that the Copyright Act, 1957 is well-equipped to protect AI-generated works).

[32] See, e.g., Dep't for Promotion of Indus. & Internal Trade, Working Paper on Generative Artificial Intelligence and Copyright (Part I) 2–3 (Dec. 2025) (noting the shift from initial confidence to acknowledging practical complexities and consulting stakeholders).

Building on these developments, the policy discourse in India has increasingly taken on a structured and consultative character. The role of the Department for Promotion of Industry and Internal Trade (DPIIT) has been particularly significant in initiating a formal examination of the interface between copyright law and generative AI. The "Working Paper on Generative AI and Copyright" does not merely identify AI training as a legal grey area; it systematically frames the issue as a question of legislative adequacy, highlighting that provisions such as Section 52 of the Copyright Act, 1957 were drafted in a pre-AI context and are ill-suited to address large-scale, automated ingestion of protected works.[33]

The Working Paper further maps out multiple regulatory pathways. These include: (i) the introduction of a specific text and data mining (TDM) exception, particularly for research and innovation purposes; (ii) the development of licensing frameworks, whether voluntary or statutory, to enable lawful commercial use of copyrighted material in AI training; and (iii) the possibility of opt-out mechanisms, allowing right holders to exclude their works from training datasets.[34] Notably, the paper does not endorse a single solution but instead reflects a deliberate policy neutrality, signalling the government's intent to balance competing interests before committing to legislative reform.

This consultative approach marks a shift from the earlier, more definitive stance reflected in government communications. While an initial press note suggested that the "existing IPR regime is well-equipped" to address AI-related issues,[35] subsequent stakeholder consultations revealed a more complex reality. Concerns were raised by creators, publishers, and media organisations regarding unauthorised scraping, loss of licensing revenue, and the absence of attribution or control over downstream uses. At the same time, AI developers and technology firms emphasised the practical infeasibility of obtaining granular licences for vast datasets and warned that overly restrictive regimes could hinder innovation and place Indian firms at a competitive disadvantage globally.[36]

As a result, the current policy landscape is characterised less by doctrinal certainty and more by regulatory experimentation and dialogue. The government's evolving position

33 Dep't for Promotion of Indus. & Internal Trade, Working Paper on Generative Artificial Intelligence and Copyright (Part I) 12–14 (Dec. 2025).
34 Id. at 22–26 (mapping out potential regulatory pathways).
35 Ministry of Commerce & Industry, Gov't of India, Unstarred Question No. 436: Artificial Intelligence and Copyright, Lok Sabha (Feb. 8, 2023).
36 See Dep't for Promotion of Indus. & Internal Trade, Working Paper on Generative Artificial Intelligence and Copyright (Part I) 2–4 (Dec. 2025) (summarizing submissions from rightsholders and technology developers during stakeholder consultations).

suggests an implicit recognition that neither a purely exception-based model nor a strictly rights-based licensing regime is sufficient in isolation. Instead, the debate is gradually converging on hybrid approaches that attempt to reconcile the scale and technical realities of AI training with the normative commitments of copyright law, particularly fairness, incentive, and equitable remuneration.

Indian and international scholarship on generative AI and copyright has split broadly into two camps. Some authors argue that existing fair-dealing clauses can be interpreted broadly and technology-neutrally to accommodate text-and-data mining (TDM), especially where training is framed as research, non-expressive analysis, or a transformative use that does not substitute for the original markets.[37] Others accept that fair dealing provides a starting point but insist that it is doctrinally too narrow and uncertain for industrial-scale AI, and therefore call for explicit, AI-specific reforms, either a statutory TDM exception on the model of Japan, a hybrid TDM + licensing framework as suggested in recent Indian policy work, or compulsory/collective licensing schemes to ensure predictable access and remuneration

8. BALANCING INNOVATION AND CREATOR RIGHTS IN INDIA

A clear TDM exception for non-commercial research would bring India in line with global practice while directly supporting universities and public-interest research bodies. The EU's Article 3 CDSM exception already gives research organisations and cultural institutions a mandatory right to do TDM when they have lawful access, precisely to avoid uncertainty for non-commercial AI and data-science work.[38] Japan goes even further by allowing "information analysis" on protected works regardless of purpose, which has been widely praised as a boost for AI and data-driven innovation.[39] For India, where publicly funded institutions often cannot afford large licences, a narrow, non-commercial TDM exception is the cleanest way to protect genuine research uses while keeping the scope tight.

For commercial AI training, however, it is realistic and fair to expect licences or collective licensing, rather than treating all scraping as free "research". The DPIIT Working Paper itself maps out licensing and collective-management options,[40] and many scholars warn

[37] See, e.g., Arul George Scaria, AI and Copyright: Why We Need a Flexible Fair Dealing Standard in India, 16 Indian J. L. & Tech. 112 (2025); Matthew Sag, Copyright and Copy-Reliant Technology, 103 Nw. U. L. Rev. 1607, 1624–28 (2009).

[38] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market art. 3, 2019 O.J. (L 130) 92.

[39] Agency for Cultural Affairs, Gov't of Japan, General Understanding on AI and Copyright in Japan 3–4 (2024).

[40] Dep't for Promotion of Indus. & Internal Trade, Working Paper on Generative Artificial Intelligence and Copyright (Part I) 22–26 (Dec. 2025).

that allowing big tech to mine entire catalogues for profit under a vague fair-dealing theory would hollow out the markets for journalism, music and publishing.[41] A statutory rule that: (1) non-commercial TDM by qualifying research entities is free, but (2) commercial AI developers must either obtain licences or participate in a collective/compulsory licensing scheme, gives both sides legal certainty, creators know they will be paid, and AI companies know what rule applies instead of gambling on broad fair dealing.

By contrast, an opt-out model (option b) shifts the burden onto individual authors and right-holders to track and technologically mark every place their works appear online, or risk silent inclusion in training datasets, something that is difficult even in Europe with strong infrastructure, and much harder in India's fragmented markets. It also assumes that all creators are digitally sophisticated enough to use machine-readable opt-outs, which is unrealistic for small newsrooms, regional artists and traditional publishers. India should adopt a dual model: a precise TDM exception for non-commercial research plus a licensing/collective licensing regime for commercial training, rather than relying on opt-outs that are likely to be ignored in practice and to leave exactly the same uncertainty you are criticising.

- **For innovation and AI startups/researchers:** A clear TDM exception for non-commercial research removes the fear of being sued just for running experiments on data they already have lawful access to. Universities, public institutes and early-stage startups can train and evaluate models without paying huge upfront licensing fees, which are a serious entry barrier in India's cash-constrained ecosystem. This is similar to the EU's research TDM exception and Japan's broad "information analysis" rule, both of which have been praised for accelerating AI and data-driven research.
- **For protection and compensation of creators:** Collective or statutory schemes reduce transaction costs (AI firms do not have to negotiate with each author individually) while ensuring that news publishers, musicians and authors receive ongoing royalties when their works are used at scale for commercial model training. This directly addresses rights-holders' concerns about unlicensed, market-substituting use and under-production of human-created content, without freezing AI development entirely.

[41] See, e.g., Jane C. Ginsburg & Luke Ali Budiardjo, Authors and Machines, 34 Berkeley Tech. L.J. 343 (2019).

The non-commercial TDM exception keeps the “on-ramp” to AI research open, while the licensing/collective-licensing requirement makes sure that once serious money is involved, creators share in the value their works help generate.

9. CONTRASTING CHALLENGES: BAD-FAITH ENFORCEMENT VS. GENUINE LEGAL AMBIGUITY

When someone with no legitimate rights over a song demands “licence fees” from hotels for playing it, especially where the work is already in the public domain, that conduct is not a grey zone of copyright but plain fraud: there is no subsisting copyright, no assignment, and no registration as a copyright society, so any assertion of exclusive rights is a deliberate misrepresentation aimed at extracting money and can be tackled under cheating, extortion, and unfair-trade-practice laws. Generative AI training, however, is a very different kind of problem: here, developers really are copying protected books, news reports and songs into training datasets, but the Copyright Act, 1957 never anticipated large-scale text-and-data mining, and it is unclear whether such copying should be treated as reproduction, fair dealing “for research”, or allowed only through a new TDM exception or licensing regime.[42] The law must firmly punish bad-faith “copyright trolling” like the Agra hotel scam, while also modernising the statute to give clear answers in honest disputes about AI training where the statute is simply out of date.

These two examples suggest that good copyright policy has to work in both directions. On one side, the law must develop strong deterrents against bad-faith enforcement, such as fake copyright claims or “copyright trolling”, where actors with no rights use threats and legal jargon to extort settlements; comparative scholarship recommends targeted penalties and sanctions for such conduct so that the enforcement system is not weaponized against honest users.[43] On the other side, in situations like generative-AI training on copyrighted works, where even experts and government working papers acknowledge a genuine legal grey zone,[44] policy should focus on clarifying the underlying rules, for example, through a specific TDM exception and licensing framework, so that innovators and creators both know when training is allowed, when licences are needed, and what compensation is due.

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[42] See The Copyright Act, 1957, §§ 14, 52(1)(a), No. 14, Acts of Parliament, 1957 (India).

[43] See, e.g., Shyamkrishna Balganesh, The Uneasy Case Against Copyright Trolls, 86 S. Cal. L. Rev. 723 (2013) (discussing the phenomenon of copyright trolling and proposing mechanisms to curb opportunistic enforcement).

[44] See Dep’t for Promotion of Indus. & Internal Trade, Working Paper on Generative Artificial Intelligence and Copyright (Part I) 7–8, 12–14 (Dec. 2025).

The contemporary discourse on AI and copyright in India is shaped not only by doctrinal gaps but also by two distinct and often conflated challenges: **bad-faith enforcement of copyright claims** and **genuine legal ambiguity surrounding AI training practices**. While both phenomena contribute to uncertainty, they differ fundamentally in origin, impact, and the type of regulatory response they require.

On one hand, instances of bad-faith enforcement arise where copyright claims are asserted strategically to **overextend proprietary control beyond the legitimate scope of rights**. This may include attempts to characterise any form of data scraping or automated analysis as infringement, irrespective of purpose, scale, or transformative use. Such enforcement strategies can have a chilling effect on innovation, particularly for startups, researchers, and smaller entities that lack the resources to contest expansive legal claims. In this sense, the problem is not the absence of legal rules, but rather the **opportunistic invocation of existing rights in ways that exploit uncertainty**.

On the other hand, there exists a domain of genuine legal ambiguity that stems from the **structural limitations of the current copyright framework**. The Copyright Act, 1957, including its exceptions under Section 52, was not designed to address the realities of machine learning systems that rely on large-scale ingestion of data. As a result, core questions remain unresolved: whether AI training constitutes reproduction, whether intermediate copies made during training are legally significant, and to what extent outputs may implicate derivative rights. These are not questions of misuse, but of **doctrinal indeterminacy**, where the law itself provides no clear guidance.

The distinction between these two challenges is critical for policy design. Bad-faith enforcement calls for **clarificatory safeguards**, such as narrowly tailored exceptions, clearer statutory language, or even procedural mechanisms to deter abusive claims. In contrast, genuine ambiguity necessitates **substantive legal reform**, including the possible introduction of TDM-specific exceptions or structured licensing regimes. Conflating the two risks either overcorrecting through excessive deregulation or entrenching uncertainty by failing to address legitimate gaps in the law.

Accordingly, an effective regulatory response must proceed on a dual track: **curbing opportunistic enforcement while simultaneously resolving doctrinal uncertainty**. Only by addressing both dimensions can the legal system provide the predictability required for innovation, while preserving the integrity of copyright protection in the age of artificial intelligence.

X. CONCLUSION

The central tension in regulating generative AI training is that the technology intrinsically depends on consuming millions of books, articles, images and songs, yet these same works represent the livelihoods and control of authors and publishers. If AI developers are given unlimited, free access to scrape and mine datasets under an overly broad fair-dealing defence, they may inadvertently hollow out the creative markets they rely on. Conversely, if every act of computational analysis requires prior, individual permission, the transaction costs will stifle the growth of a domestic AI ecosystem.

How Indian Law Currently Treats AI Training

Under the Copyright Act, 1957, authors and owners have exclusive rights to reproduce, adapt, store and communicate their works,[45] and training a model on a corpus of books, articles or songs typically involves making multiple digital copies on the developer's servers. At the same time, India has **no explicit text-and-data-mining (TDM) exception**, unlike the EU or Japan,[46] so the only possible defence is the narrow, purpose-based fair-dealing exceptions in Section 52(1)(a) for research, private study, criticism, review and reporting of current events.[47] Courts have historically interpreted fair dealing strictly, and there is no precedent that clearly allows large-scale, commercial scraping and analysis of copyrighted content simply because the use is "non-expressive" or performed by machines. As a result, experts and policy documents repeatedly describe AI training on copyrighted works in India as a **"legal grey area"**, developers risk infringement suits if they train on web-scraped data, while rights-holders lack clear statutory tools tailored to AI.

This uncertainty is reflected in ongoing litigation and policy work. The ANI v. OpenAI case before the Delhi High Court directly raises whether training on news articles without a licence infringes Section 14 rights, and the outcome is expected to clarify at least some obligations for AI developers. In parallel, the DPIIT's **Working Paper on Generative AI and Copyright (Part I)** explicitly recognises that Indian law lacks a TDM exception, that training implicates reproduction and storage rights, and that fair dealing in its current form does not

[45] The Copyright Act, 1957, § 14, No. 14, Acts of Parliament, 1957 (India).
[46] See Directive (EU) 2019/790 art. 3–4, 2019 O.J. (L 130) 92; Agency for Cultural Affairs, Gov't of Japan, General Understanding on AI and Copyright in Japan 2–4 (2024).
[47] The Copyright Act, 1957, § 52(1)(a) (India).

provide a reliable safe harbour for generative-AI models. The paper therefore proposes a "hybrid" **One Nation, One License, One Payment** model: a mandatory blanket licence allowing AI developers to train on all lawfully accessed copyrighted works, in exchange for statutory remuneration to creators through a collecting body, with no opt-out.

This paper accepts the diagnosis that AI training is currently not covered by any clear exception and does implicate exclusive rights, but proposes a different balance from that suggested in the Working Paper.

First, it is argued that India should introduce a targeted TDM (text and data mining) exception for non-commercial research. Such an exception would allow universities and recognised research institutions to mine lawfully accessed content for AI training and other forms of data analysis without the need for licences. This approach is broadly consistent with the EU's Article 3 research exception[48] and Japan's expansive "information analysis" framework.[49] The introduction of such a provision would reduce legal uncertainty for bona fide, non-profit research and early-stage experimentation, which is particularly significant in a country where public institutions and smaller research entities often lack the resources to engage in complex, high-volume licensing arrangements.

Second, with respect to commercial AI training, this paper recommends moving away from reliance on the uncertain contours of fair dealing and towards a licensing or collective licensing framework that recognises creative content as a remunerable input rather than a freely available resource. Instead of adopting a blanket, non-opt-out compulsory licence across all works, as contemplated in the "One Nation, One License, One Payment" model[50], a more flexible framework is proposed. Under this approach, commercial developers would be required either to obtain licences (whether individual, sector-specific, or through collecting societies) or to operate within a statutory or extended collective licensing regime designed to ensure that royalties are equitably distributed to authors, journalists, and music labels when their works are utilised at scale.

This dual framework offers a more balanced approach to reconciling innovation with creator protection than either the current legal ambiguity or an overly expansive compulsory

[48] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market art. 3, 2019 O.J. (L 130) 92.
[49] Agency for Cultural Affairs, Gov't of Japan, General Understanding on AI and Copyright in Japan 2–4 (2024).
[50] Dep't for Promotion of Indus. & Internal Trade, Working Paper on Generative Artificial Intelligence and Copyright (Part I) 22–24 (Dec. 2025) (discussing the "One Nation, One License, One Payment" proposal).

licensing model. While a non-commercial TDM exception would facilitate academic research and early-stage innovation, a structured system of commercial licensing and collective remuneration would ensure that, as AI systems generate economic value, the creative sectors contributing to their development are able to share in that value, rather than being displaced without compensation.

BETWEEN BLOCKING AND FREEDOM: ANALYZING THE KARNATAKA HIGH COURT'S RULING IN *X CORP v. UNION OF INDIA, 2025*

Prananjeya B G[1]

ABSTRACT

The Karnataka High Court's judgment in X Corp v. Union of India (2025) marks a watershed moment in Indian digital law. Dismissing X Corp's challenge to Section 79(3)(b) of the Information Technology Act, 2000, Rule 3(1)(d) of the IT Rules, 2021, and the Sahyog Portal, Justice M. Nagaprasanna upheld the Union of India's multi-ministry content take-down architecture. This comment critically analyses the Court's reasoning on the constitutional permissibility of Rule 3(1)(d), the doctrine of vagueness, the availability of Article 19 rights to foreign corporations, and the relationship between Sections 69A and 79(3)(b). It argues that while the judgment correctly rejects an unqualified transplant of American First Amendment doctrine, certain conclusions regarding procedural safeguards and the scope of executive take-down power merit closer scrutiny.

Keywords: *Intermediary Liability, Content Moderation, Safe Harbour, Freedom of Speech and Expression, Information Blocking Orders, Digital Governance*

1. INTRODUCTION

On 24 September 2025, the Karnataka High Court delivered a landmark pronouncement in *X Corp v. Union of India*,[2] dismissing the writ petition filed by X Corp, the company formerly known as Twitter, against the Union of India and seven central ministries. The petition raised three principal constitutional challenges: first, that Section 79(3)(b) of the Information Technology Act, 2000 ('IT Act')[3] does not independently authorise information blocking orders; second, that Rule 3(1)(d) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ('IT Rules, 2021')[4] is ultra vires the IT Act and

[1] Advocate, High Court of Karnataka

[2] X Corp v. Union of India, Writ Petition No. 7405 of 2025 (GM-RES), Karnataka High Court, decided on 24.09.2025.

[3] Information Technology Act, 2000, s. 79(3)(b).

[4] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, r. 3(1)(d).

unconstitutional; and third, that the 'Sahyog Portal', a government-operated take-down notification portal, is also constitutionally impermissible.

The case arose against a backdrop of mounting regulatory tension between global social media platforms and the Indian State. X Corp contested a series of take-down notifications issued by multiple ministries including Home Affairs, Defence, Railways, Finance, and Rural Development under the purported authority of Section 79(3)(b) and Rule 3(1)(d). These notifications empowered designated officers within each ministry to direct intermediaries to remove content characterised as 'unlawful under any law for the time being in force'. X Corp argued that such orders could only be lawfully issued under Section 69A[5] the dedicated blocking provision which provides specific procedural safeguards, including review by a designated officer and a committee. The Court rejected this contention, and dismissed the petition in its entirety.

2. BACKGROUND OF THE DISPUTE

The Information Technology Act, 2000 was amended in 2008 to introduce Section 69A, which empowers the Central Government to block public access to online content in the interest of national security, sovereignty, public order, or decency. The same amendment also expanded Section 79, which confers a safe harbour upon intermediaries, insulating them from liability for third-party content subject to conditions. Section 79(3)(b) provides that the safe harbour is unavailable where the intermediary fails to act upon a government or court notification 'actually knowing' of the unlawful nature of the content.

In *Shreya Singhal v. Union of India,*[6] the Supreme Court upheld Section 69A as constitutional but read down Section 79(3)(b) to require that 'actual knowledge' be established only through a court order or a government notification, and not by a private complaint.[7] The Court also struck down Rule 3(4) of the IT Rules, 2011[8] as overbroad, since it obliged intermediaries to independently determine and remove 'unlawful' content. In the aftermath of *Shreya Singhal,* the Union of India promulgated the IT Rules, 2021, which introduced Rule 3(1)(d) requiring intermediaries to 'make reasonable efforts' to not host content that is 'in violation of any law for the time being in force'. X Corp's petition submitted that this Rule

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[5] Information Technology Act, 2000, s. 69A.
[6] Shreya Singhal v. Union of India, (2015) 5 SCC 1.
[7] Ibid, paras 112–118.
[8] Information Technology (Intermediaries Guidelines) Rules, 2011, r. 3(4).

effectively revived what *Shreya Singhal* had struck down, cloaking the same vice in fresh legislative garb.

3. PRINCIPAL ISSUES BEFORE THE COURT

The judgment addressed the following principal questions of law:

(i) Whether Section 79(3)(b) independently authorises the issuance of information blocking orders, or whether Section 69A is the exclusive mechanism for such orders.

(ii) Whether Rule 3(1)(d) of the IT Rules, 2021 is ultra vires the IT Act or unconstitutional on the ground of vagueness or for exceeding the permissible bounds of Article 19(2) of the Constitution.

(iii) Whether the Sahyog Portal, operated under Section 79(3)(b) and Rule 3(1)(d), is ultra vires and unconstitutional.

(iv) Whether X Corp, as a foreign corporation, has locus standi to invoke Article 19 rights before Indian courts.

4. ANALYSIS OF THE COURT'S REASONING

A. The Section 69A vs. Section 79(3)(b) Question

The Court's rejection of X Corp's contention that Section 69A is the sole mechanism for blocking orders is perhaps the most consequential holding of the judgment. X Corp argued that any take-down architecture divorced from Section 69A's procedural framework involving a designated officer and inter-ministerial review committee is constitutionally impermissible.

The Court disagreed, holding that Sections 69A and 79(3)(b) operate on distinct plains. Section 69A empowers the government to *affirmatively direct* blocking of content. Section 79(3)(b) merely *conditions the safe harbour* and it does not itself create a blocking power, but provides that an intermediary's immunity is forfeited upon notification of unlawful content. The Court observed that Rule 3(1)(d) further reinforces this duty framework by imposing a 'reasonable efforts' obligation upon intermediaries. On this reading, a ministry's take-down notification operates not as a Section 69A blocking order but as a vehicle to trigger the loss of safe harbour under Section 79(3)(b), thereby incentivising compliance without formally mandating it.

This distinction, while doctrinally coherent at first glance, raises a practical concern. Where a government notification under Section 79(3)(b) produces the same *practical effect* as a blocking order namely, the removal of specific content the question arises whether form can govern over substance. The procedural safeguards in Section 69A (written reasons, committee review, opportunity of hearing) exist precisely to guard against the misuse of blocking authority. If those safeguards can be circumvented by routing identical outcomes through the 'safe harbour forfeiture' mechanism, the protective architecture of *Shreya Singhal* may be rendered hollow. The Court did not squarely address this concern.

B. The Constitutionality of Rule 3(1)(d)

X Corp contended that Rule 3(1)(d) suffers from unconstitutional vagueness the phrase 'any law for the time being in force' being insufficiently determinate to give intermediaries fair notice of the content they must remove. The Court rejected this submission by holding that the Rule, read in conjunction with Section 79(3)(b), is qualified by reference to already-existing and determinate laws, and that vagueness cannot be established merely because precise definitional boundaries are difficult to articulate.

The Court placed reliance on *A.K. Roy v. Union of India*[9] and *Benilal v. State of Maharashtra*[10] to hold that impossibility of mathematical definitional precision is not a ground of unconstitutionality. This is unexceptionable as a proposition of law. However, the vagueness doctrine does not merely ask whether precision is achievable in the abstract; it asks whether the impugned text provides persons of ordinary understanding with a *fair and realistic warning* of the conduct proscribed. The phrase 'prohibited under any law for the time being in force' encompasses every legal prohibition in the Indian statute book from criminal law to taxation, from anti-competitive conduct to electoral regulations. An intermediary tasked with making 'reasonable efforts' to screen content against this effectively boundless standard faces a structurally impossible compliance burden, at the risk of losing safe harbour.

Furthermore, unlike Rule 3(4) of the 2011 Rules which *Shreya Singhal* struck down as requiring intermediaries to adjudicate legality Rule 3(1)(d) of the 2021 Rules operates at a higher level of abstraction, imposing an open-ended 'best efforts' duty without limiting the category of laws against which content is to be screened. The Court's conclusion that the 2021 Rules are 'completely distinct' from the 2011 Rules and therefore immune from the *Shreya Singhal* analysis deserves further interrogation: if the constitutional vice in the 2011 Rules was

[9] A.K. Roy v. Union of India, (1982) 1 SCC 271, paras 61–63.
[10] Benilal v. State of Maharashtra, 1995 Supp (1) SCC 235, para 4.

the imposition of an impossible adjudicatory burden on intermediaries, that vice is arguably exacerbated rather than cured by the 2021 Rules' expansion to all laws in force.

C. The Sahyog Portal

The Sahyog Portal is an online mechanism through which government-designated officers can notify intermediaries of allegedly unlawful content, triggering the obligation to take down content under threat of safe harbour forfeiture. The Court upheld the Portal as 'an instrument of public good' and 'a beacon of cooperation between citizen and intermediary'. The challenge to the Portal was primarily derivative of the challenges to Section 79(3)(b) and Rule 3(1)(d), and the Court's upholding of the underlying statutory and rule-based framework necessarily disposed of the Portal challenge.

The judgment, however, does not engage with a distinct concern raised by the Portal's operational design: the proliferation of authorised officers across seven central ministries and multiple state police forces dramatically enlarges the pool of entities competent to issue take-down notifications. This multi-agency architecture, without a centralised grievance redressal mechanism or appellate process visible to the intermediary or affected content creators, risks systemic over-removal of lawful speech. The Court's enthusiasm for the Portal as an instrument of regulation is understandable in the light of X Corp's documented history of non-compliance,[11] but structural safeguards are a matter of constitutional principle independent of the conduct of any particular litigant.

D. Locus Standi of a Foreign Corporation under Article 19

The Court held that Article 19(1)(a) the right to freedom of speech and expression is available only to 'citizens' of India, and that X Corp, as a company incorporated in the United States, cannot claim citizenship within the meaning of the Constitution. Reliance was placed on *Charanjit Lal Chowdhury*[12] and the coordinate Bench's prior judgment imposing costs on X Corp, for the proposition that corporations are juristic persons capable of asserting some fundamental rights, but that the citizenship-restricted rights under Article 19 do not inure to foreign companies.

This holding is consistent with settled constitutional doctrine. Article 19's protections are textually limited to 'citizens', a term which has uniformly been read to exclude companies incorporated outside India. The Court did, however, acknowledge that X Corp might have had

[11] Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd., (1995) 5 SCC 139.
[12] Charanjit Lal Chowdhury v. Union of India, 1950 SCC 833, para 12.

standing to challenge the take-down regime on grounds other than Article 19, such as Articles 14 (equality) or 21 (life and liberty), which are available to 'any person' and not limited to citizens. The petition's overwhelming reliance on Article 19 therefore contributed to its failure, a lesson for future platform litigation in Indian courts.[13]

E. The Rejection of American Free-Speech Doctrine

A recurring theme of the judgment is the Court's firm rejection of the transplantation of American First Amendment jurisprudence into the Indian constitutional context. The Court observed that the Apex Court has consistently, since 1950, declined to adopt the comparatively absolutist American approach to free speech. The reliance placed by X Corp on *Reno v. ACLU* in which the United States Supreme Court struck down internet content regulation was dismissed on the ground that even American doctrine has evolved significantly post-*Reno,* and that *Shreya Singhal* itself, which had relied in part on *Reno,* addressed a different statutory framework.

This position is correct as a matter of constitutional methodology. Article 19(2) of the Indian Constitution explicitly permits restrictions on free speech on grounds including 'public order', 'decency or morality', and 'incitement to an offence’ grounds which have no direct equivalent in the First Amendment framework. The Court's insistence that the 'Indian constitutional soil' is distinct from 'the American constitutional garden' reflects a mature understanding of comparative constitutional law. Courts transplanting foreign doctrine must be attentive to the textual, historical, and societal differences between constitutional systems.

5. CRITICAL OBSERVATIONS

The judgment makes a significant contribution to the emerging law of intermediary liability in India. Nonetheless, three aspects call for closer attention.

First, the procedural safeguard deficit. The Court's acceptance that a ministry-issued notification under Section 79(3)(b) can coexist with rather than be confined by the Section 69A framework creates a parallel blocking architecture that lacks the procedural rigour mandated by the Supreme Court in *Shreya Singhal.*[14] An affected person whose content is removed pursuant to a ministry notification has no statutory right to reasons, no designated appellate

[13] Supra note 5, para 115. The Court in Shreya Singhal read down s. 79(3)(b) to require actual knowledge via court orders or government notifications, and held that intermediaries could not be expected to act as adjudicators of legality.

[14] The judgment references X Corp's non-compliance with similar take-down regimes in Australia (eSafety Commissioner litigation, October 2024) and Brazil (Brazilian STF proceedings, August–September 2024).

authority, and no mechanism comparable to the Section 69A review committee. This lacuna is constitutionally significant, particularly given that the Court itself acknowledged the importance of balancing 'liberty and restraint'.

Second, the overbreadth of Rule 3(1)(d). The Court's vagueness analysis, while doctrinally defensible in its invocation of established precedent, does not adequately grapple with the chilling effect that an omnibus 'any law in force' compliance obligation imposes on intermediaries and, transitively, on the speech of their users. Global regulatory comparisons are instructive: the EU's Digital Services Act[15] imposes due-diligence obligations on large platforms while retaining procedural specificity regarding the categories of illegal content and the mechanism for notice and action. A more calibrated Indian rule could have achieved the same regulatory objectives while reducing the risk of over-compliance chilling lawful expression.

Third, the conduct-focused reasoning. Significant portions of the judgment are devoted to X Corp's documented pattern of non-compliance with take-down orders across multiple jurisdictions, its failure to action grievances related to child sexual abuse material, and the impersonation of the Karnataka High Court on its platform. While factually accurate and understandably relevant to the Court's assessment of X Corp as a litigant, these observations risk blurring the boundary between adjudicating the constitutionality of statutory provisions and evaluating the moral credentials of the petitioner. Constitutional invalidity, if it exists, is not cured by the misconduct of those who invoke it.

6. CONCLUSION

X Corp v. Union of India is a significant judgment in India's evolving landscape of digital governance. The Court's affirmation that social media platforms operating in India are fully subject to Indian law, that American constitutional doctrine cannot be imported wholesale, and that Article 19 rights are not available to foreign corporations, are all correct and important clarifications. The upholding of the Sahyog Portal as a legitimate mechanism of digital regulation reflects a judicial recognition that the State has a compelling interest in maintaining order in the digital public square.

However, the judgment's relative silence on procedural safeguards particularly the absence of a reasoned-order requirement and appellate mechanism for notifications issued

[15] European Union Digital Services Act (Regulation (EU) 2022/2065), Arts 14–16.

under Section 79(3)(b) leaves a lacuna that may generate future litigation. The Court's broad endorsement of Rule 3(1)(d) without adequately addressing the overbreadth concern means that the foundational tension between unchecked executive take-down power and constitutionally protected expression remains unresolved. As India moves towards a comprehensive digital regulatory architecture, the questions raised in this case and only partially answered will continue to test the courts.

RIGHT TO ACCESS TO INTERNET AS A TOOL TO ENSURE RIGHT TO EDUCATION IN THE ERA OF DIGITALIZATION: OPPORTUNITIES AND CHALLENGES

Ms. Rupa Pradhan[1]

ABSTRACT

Education is one of the societal variables essential for improving a nation's overall socio-economic development. Right to education is a globally recognized fundamental human right. In India by the 86th Constitutional Amendment Act 2002, a new Article 21A was inserted in our Constitution, under which the right to free and compulsory education to all children between the ages of six and fourteen years is regarded as a fundamental right further to fulfill the constitutional mandate of article 21A to the Right of Children to Free and Compulsory Education Act enacted in 2009 which came into force in 2010. Right to education does not merely mean right to schooling or only access to education, it encompasses the right to receive quality education. Digital revolution has influenced every field of human life including education. The integration of advanced technology with education enhances the quality of education and makes it equitably accessible for all. National as well as international forums are giving emphasis on technology enabled teaching learning process or digital learning for which the internet is an important element. The need for the same accelerated during the pandemic and post-pandemic period. The judicious use of internet for education has the potential to improve the quality of education by creating ample number of opportunities for learners in the digitalized era. Considering the importance of internet in the human life, the right to access to internet is recognized as a part of the right to education and as a human right under several international and regional documents. India launched the Digital India campaign in 2015 with the aim of transforming India into a digitally empowered society and knowledge economy and the National Education Policy (2020) also lays great emphasis on the use of technology in education to enhance access to educational opportunities and improve the quality of education. Recently, the Kerala High Court expanded the horizon of fundamental rights and declared that the right to access the internet is an integral part of the right to education and right to privacy[2]*. On the one hand use of internet in education can create*

[1] Research Scholar, Raiganj University & Assistant Professor of Law, Indian Institute of Legal Studies, Siliguri

[2] Faheema Shirin.R.K vs State of Kerala, AIR 2020 KERALA 35

opportunities for the leaners but at the same time there are several challenges are also attached to it. Internet at present has become a necessity of mankind therefore, it is imperative to recognize right to access internet as fundamental right to ensure the meaningful enjoyment of right to education. However, the laws and policies relating to right to access internet shall be drafted cautiously which not only ensure right to access internet equitably but also address the challenges attached to this right.

Keywords: *Fundamental Right, Quality Education, Digitalization, Digital Learning, Sustainable Development*

1. INTRODUCTION

In the history of mankind, the invention of the internet is one of the most powerful revolutionary developments in the field of information and communication technology that has changed the world. The Internet is a network of computers through which one not only can share information and communicate with each other, but it is also used as a primary source of information consumption that creates the social ecosystem. The Internet is now a powerful and flexible instructional tool. This can be used for several purposes such as communicating or connecting a person from one corner to another corner of the world, for conducting business, entertainment, education and many more. In this age of Information and Communication Technology, the internet is a necessity for humans, without which life will become difficult. The Internet is recognized as the largest and most diverse information resource in the digitalized world.

Initially education was regarded as luxury that was accessible only for the children of elite families but the change of global outlook on education has made policymakers consider education from luxury to necessity. Therefore, right to education is recognized as human and fundamental right under International and National legislative Framework. Since the evolution of digital revolution in the late 20th century the wave of digital transformation has influenced every field including education by transforming traditional or conventional methods of imparting education to integrating technology with educational learning. The use of internet in education is a necessity of technology integrated educational system of present day. The internet is not used only for communication or as source of entertainment, but use of internet in education provides the learner access to world of information and knowledge, platform for online learning as well as enhances research ability. In the era of digitalization, it is not possible to ensure the actual enjoyment of right to education without having access to internet hence, it is very important to recognize internet access as a right. International, regional and some national forums have recognized the significance of internet access and make an urge to declare right to access internet as a human right. With recognition of the right to access internet it is equally important to make efforts to enforce and ensure equitable access to internet for all so that in real sense right to education can be enjoyed by all.

2. INTERNET: MEANING AND EVOLUTION

The Internet refers to the collection of computer facilities, electromagnetic transmission media, associated hardware, and software that together create global networks on interconnected computer networks that use transmission control protocol/ Internet Protocol[3]. In the Reno v. American Civil Liberties Union[4] the Supreme Court of the United States enumerated certain features that make the Internet a unique and wholly new medium of worldwide human communication [5]. Internet basically is a global network of computers and related devices that are used for communication and sharing information. In the year 1969, the United States Department of Defense established ARPANET (Advance Research Projects Agency Network) for their national defense purpose without Central Server so that their central controlling server did not get damaged and disabled the entire network even at the times of attack. Later, in 1987, the National Science Foundation took control of the ARPANET and gave it a new name: NSFNET (National Science Foundation Network) that is the base of the modern internet. The internet is a network of interconnected computers that was primarily created and designed to conduct military-related research and communication but has extraordinarily grown and is eventually now used for communication with each other and to get access to information. From around mid-1980's the internet is used for educational and industrial research purposes which was funded by industry and in early 1990s the USA decided to commercialize the internet and a new electronic medium of information and digital world brought to the masses. At present, the internet has revolutionized almost every aspect of human life. It is not only used for communication or connecting people from one corner of the world to another, but also for business, entertainment, and education. It has blurred the boundaries of the traditional mode of education and others. Outbreak of Covid-19 caused a pause in the fast-

3 https://www.uobabylon.edu.iq/eprints/publication_12_2945_215.pdf
4 521 US 844 (1997)
5 CyberLibel & Internet Defamation. (n.d.). https://www.cyberlibel.com/?p=1132#:~:text=The%20Internet%20is%20therefore%20a,of%20world%2Dwide%20human%20communication.

running human life, and that was the time that made us realize the importance of the internet, which brings back virtual movement in human life.

3. RIGHT TO ACCESS INTERNET: MEANING AND SCOPE

The idea of rights is flexible, which is always adjusting to changing social circumstances and needs therefore, it is imperative to ensure access to the internet due to the increasing significance of the internet in an evolving societal context. The internet provides unparalleled prospects for human rights and is becoming an extremely significant and inseparable part of our daily lives. Therefore, it is essential to respect and recognize right to access internet as human right. Technology has extraordinarily grown and eventually in present time it is used for connecting with each other, to get access to information and for many other purposes also such as for trade, study, work etc. The accessibility of various tools of information and communication technologies (ICT) creates for the user a place that is known as cyberspace without any geographical location but is available to everyone who has access to the internet. The development of ICT tools is one of these developments according to which the concept of human rights is modified.

Governance of the internet has emerged as a global concern, and the internet now is regarded as a human rights issue in the international platform. There are arguments in favor and against recognizing the right to access internet as a basic human right. In today's digitalized world the internet has become a necessity for human beings and is an indispensable tool for other human rights and the absence of any international instruments recognizing the right to access internet is making it difficult to enforce several important human rights such as right to education, freedom of speech and expression, right to profess and propagate any business etc. Right to access internet is directly associated with the realization of freedom of expression, education, participation in social and cultural life, access to information, knowledge, etc., and in a broader sense, full realization of those rights without having access to the internet is not possible at all. Some argued against making right to access internet as a human right, according to them, the main component of the right to access the internet is technology, which is just a tool, not a right, so recognition of the right to access the internet is important for the progression of society, but the internet is just a tool and a means to an end[6].

[6]. Is there a Right to the Internet under International Law? | eReader (2024b): eReader, [online] https://www. media defence.org/ereader/publications/introductory-modules-on-digital-rights-and-freedom-of-expression-online/module-3-access-to-the-internet/is-there-a-right-to-the-internet-under-international-law/.

Despite having the major issue of internet connectivity worldwide, the idea of the right to access internet has received international attention for the very first time in connection with the freedom of speech and expression by United Nations Human Right Commission in 2011[7]. Further, the Special Rapporteur underscores the unique and transformative nature of the internet not only to enable individuals to exercise their right to freedom to speech and expression, but also a range of other human rights and promote progress of the society[8].

4. INTER-RELATIONSHIP BETWEEN RIGHT TO INTERNET AND RIGHT TO EDUCATION

In the digital age, having access to the internet has become very essential as the internet is a vital infrastructure that facilitates the meaningful enjoyment of several fundamental human rights and freedoms rather than mere means of entertainment or communication. The global learning infrastructure has witnessed transformation due to the incorporation of technological development in education. The internet provides easy global access to information at a reasonable cost and because of that at present education and learning is not dependent only on existence of physical infrastructure. The Internet offers an extraordinary environment for enriching, improving education and is also a dominant medium of information transmission by providing opportunities that are beyond basic education and helps to ensure the inclusion of quality in education for sustainable development and to build a culture of peace. The high-quality education is essential for development. In the past, the internet was considered a luxury, but at present the dependence of society on the internet has made it a necessity for human beings to access other core human rights like the right to business, education, healthcare services, communication, entertainment, etc.[9] The internet provides unparalleled prospects for human rights and is becoming an extremely significant and inseparable part of our daily lives.

[7] The Report of "Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (A/HRC/17/27, United Nations General Assembly, 2011".

[8] "Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression: Addendum, Communications to and from Governments. Refworld. https://www.refworld.org/reference/ countryrep/unhrc/2011/en/90245".

[9]. International Law and the Right to Global Internet Access: Exploring internet access as a human Right through the lens of Iran's Women-Life-Freedom Movement | Chicago Journal of International Law. (n.d.). httpss://cjil.uchi cago.edu/print-archive/international-law-and-right-global-internet-access-exploring-internet-access-human

5. THE INTERNET AS AN EDUCATIONAL TOOL

Internet and education are primarily concerned with the exchange of information and communication along with creation and dissemination of knowledge. The use of internet for educational and learning purposes can be highlighted in following ways[10]:

i. It removes the physical limitation of the real world, regardless of geographical location learners can access quality learning opportunities.

ii. It supports social constructivist modes of learning and cognitive development. Learning through the internet is based on the bottom-up principle of collective exploration as much approach. The Internet can support powerful forms of situated learning and digitally dispersed communities of practice.

iii. Learning can be conceived in terms of the “capacity to know more” with the help of the internet rather than the mere collection of prior knowledge. The Internet supports mass connectivity between people and information, which changes the relationship between the individual and knowledge. Learning via the Internet is contingent on the ability to access and use distributed information on a just-in-time basis.

iv. The Internet made education more individually determined process. The learners are offered the choice of when they want to learn, where they want to learn, and how they want to learn. More social autonomy and control are provided Education is therefore a wholly controllable aspect of one’s personal life, with the Internet facilitating a digital juggling of educational engagement alongside daily activities and other commitments.

Therefore, the right to access internet is a necessity of present time. For social, economic, and educational empowerment it is extremely important to recognize it as a fundamental right. With recognition of the same, it is equally important to draft digital policies, provide affordable access and robust cyber security framework to ensure protection of the citizens.

6. RIGHT TO ACCESS TO INTERNET: INTERNATIONAL FRAMEWORK

The right to access the internet is not recognized and acknowledged as a human right directly by any international instrument, however the human right monitoring agencies have acknowledged and recommended recognizing the same as separate human rights. Most of them

[10]. Digital Learning (Digital Education) – Dr Rajiv Desai. (2020, August 3) https://drrajivdesaimd.com/2020/08/03/digital-learning-digital-education/

highlighted that recognition of the right to access internet is necessary for the realization of two main fundamental human rights that are right to freedom of speech and expression[11] and right to education[12] along with some other human rights. The right to freedom of speech and expression is recognized as human right under Article 19 of **"International Covenant on Civil and Political Rights, 1966" (ICCPR)**. Article 19 of ICCPR applies to new technologies and uses this analysis to develop the foundation for an 'International Law of Internet'. However, this article did not guarantee the right to the internet, but it explicitly protects the technologies in connection with and access to information and limits states' ability to burden content originating abroad.[13] The Convention on Rights of Child (CRC) 1989 is the only international document that explicitly addresses the issue of digitalization by covering the theme of protecting children's human rights from the negative impact of digital media along, with acknowledging the positive impact of the same on their development and education.[14] Further, a new General Comment No. 25[15] was released by the CRC Committee on 2nd March, 2024 on children's rights concerning the digital environment, and also provides guidelines on how to respect, protect, and fulfill children's right in the online world[16].

The United Nations Human Rights Council adopted a series of five resolutions from 2012-2021 on the theme of "the promotion, protection and enjoyment of human rights on the Internet" that was welcomed under Article 19 of the UDHR, 1948 and the ICCPR, 1966[17] . These resolutions emphasizes the same rights people have offline must also be protected online, especially freedom of expression, which is applicable regardless of frontiers and through any media of one's choice[18] as because they are necessary for the full realization of other

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[11] Article 19 of Universal Declaration of Human Rights, 1948
[12] Article 26 of Universal Declaration of Human Rights, 1948
[13] Molly Land, Toward an International Law of the Internet, Harvard International Law Journal / Vol. 54, retrieved from https: //www.ohchr.org/sites/defaults/files/Documents/Issues/Opinion/Communication /MollyLand.pdf.
[14] Digitalization and International Human Rights Law, Stefanie Schmahl, Digital Transformations in Public International Law, edited by the Max Planck Society for the Advancement of Science represented by Prof. Dr. Armin von Bogdandy and Prof. Dr. Anne Peters Volume 317, https://iris.luiss.it/retrieve/661a0f64-d70b-4890-b2fe73c 89e138d54/Golia%20et%20al_Digital%20transformations%20in%20public%20international %20law_pdf.pdf
[15] The first General comment which explicitly addresses the issue of digital environment and its impact of human rights highlighting positive as well negative impact of digital environment on children's rights.
[16]Ibid11
[17] Booyzen, Y. (2025, March 3). Press Statement: Centre for Human Rights condemns arrest, bail denial of Zimbabwean journalist Blessed Mhlanga - Centre for Human Rights. https://www.chr.up.ac.za/latest-news/3951-press-statement-centre-for-human-rights-condemns-arrest-bail-denial-of-zimbabwean-journalist-blessed-mhlanga
?highlight=WyJhcmUiLCInYXJlIiwiYmUiLCJhcmUgYmUiXQ==
[18] Human Rights Council, 'The promotion, protection and enjoyment of human rights on the Internet,' 16 July of 2012 HRC/RES/20/8, para. 1.

fundamental rights.[19] It affirms that a high-quality education is essential for development and, as such, urges all concerned to support digital literacy initiatives and provide equal access to information on the internet for all children.

The "Report of Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (A/HRC/17/27, United Nations General Assembly, 2011)" [20] considers the Internet to be amongst the most effective instruments of the 21st century for improving information access, enhancing transparency in the actions of the powerful, and Participation from citizens in the establishment of democracies.

In 2011 UNESCO releases a document "Reflection and analysis by UNESCO on the Internet"[21] to examine and analyze all facets of the Internet as per the decision of previous General Conference resolutions and Executive Board which highlight themes for this reflection particularly relating to the creation of knowledge societies on four guiding principles: **respect for cultural and linguistic diversity**, **universal access to information and knowledge, quality education for all, and freedom of expression**. The internet can be used as a tool that helps to achieve the goal of "Education for All" (EFA) and provide access to quality education. A declaration adopted by UNESCO in 2008[22] highlighted the necessity of promoting media literacy as well as the need for inexpensive access to Internet connectivity and information and communications technology for information-sharing.

Right to education for all is recognized as human right under Article 26 of Universal Declaration of Human Rights, 1948[23]. All human rights are to be protected offline as well as online as per the resolution of the United Nations Human Rights Council, 2011. This simply means that the right to education enshrined under Article 26 of UDHR as a human right includes the right to receive online education too, that is only possible if right to access internet is recognized as a separate human right. The core factors of human progress are knowledge,

[19]https://www.mediadefence.org/ereader/publications/introductory-modules-on-digital-rights-and-freedom-of-expres
sion-online/module-3-access-to-the-internet/is-there-a-right-to-the-internet-under-internationallaw/#:~:text=%E2
%80%9CMember%20States%20and%20international%20organizations,
support%20to%2C%20such%20policies
%20in

[20] https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/a.hrc.17.27_en.pdf

[21] Refection and Analysis by UNESCO on the Internet, 186 EX/INF.11, United Nations Educational, Scientific and Cultural Organization (April 29, 2011), https://unesdoc.unesco.org/ark:/48223/ pf0000192199.

[22] Fostering Freedom of Expression, Access to Information and Empowerment of People Maputo Declaration (U.N.E.S.C.O., May 3, 2008)

[23]. United Nations, Moon, B. K., & Hussein, Z. R. A. (n.d.). "Universal Declaration of Human Rights". In Universal Declaration of Human Rights. https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf

education, information, and communication, and every element of human life is affected by the ICT tools in this digitalized era. Everyone has the right to be educated and know about the internet so that they can use the internet for education in rightful manner.

The United Nation Human Rights Council adopted series of five resolution from 2012-2021 on "***The promotion, protection and enjoyment of human rights on the Internet" that*** affirmed same rights people have offline must also be protected online particularly freedom of expression regardless of frontiers and also recognizes the role of internet in development of a Nation[24]. The Resolution of 2014 reaffirming the resolutions of 2012, further incorporated that the human right in context of the internet and gave emphasis on the role played by internet in facilitating opportunities for affordable and inclusive quality education and becoming an important tool that helps to ensure and promote right to education[25]. **"*Resolution on the promotion, protection and enjoyment of human rights on the Internet*"**[26] was adopted by the United Nations Human Rights Council in 2016 recognizes that ICT has potential to accelerate human progress and right to access internet can bridge the gap of created by the digital divide and to develop knowledge societies. It further gave emphasis on the role played by the internet in facilitating vast opportunities for affordable and inclusive quality education and turning out as a tool to ensure and promote right to education. State parties are requested to make efforts in promoting digital literacy and bridging the gap of digital divide by expanding facilities to access internet to all. Like the previous resolution this also affirms that the "same rights people have offline must also be protected online particularly freedom of expression regardless of frontiers through any media of their choice in accordance with Article 19 of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Right (ICCPR)[27].

The resolution of 2018 along with reaffirming the points highlighted in previous resolutions in addition emphases the issue of online privacy and recognizes the encryption anonymity as a technical solution; it further talked about the issue of online violence[28]. The

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[24]. https://digitallibrary.un.org/record/731540?ln=en&v=pdf

[25]. Resolution adopted by the Human Rights Council 26/13 The promotion, protection and enjoyment of human rights on the Internet retrieved from https://hrlibrary.umn.edu/hrcouncil_res26-13.pdf.

[26]. "Resolution on the promotion, protection and enjoyment of human rights on the Internet 2016" retrieved from https://digitallibrary.un.org/record/845728?ln=en&v=pdf

[27]. https://www.opendemocracy.net/en/digitaliberties/digital-revolution-in-havana-between-liberation-and submissi
on/

[28] Resolution adopted by the Human Rights Council on 5 July 2018, 38/7. The promotion, protection and enjoyment of human rights on the Internet retrieved from file:///C:/Users/user6/Downloads/A_HRC_RES_38_7-EN.pdf

resolution of 2021 focuses on framing in bridging the gap of digital divide, universal and inclusive internet access and issue of the internet shutdowns along with reaffirming all the issues disused in earlier resolutions[29]. The United Nations High Commissioner for Human Rights in 2023 recognizing the importance of internet in digital age stated that it may be the time to reinforce "universal access to the internet as a human right and not just a privilege"[30].

However, the abovementioned resolutions adopted by the United Nations Human Rights Council are of non-binding in nature and lacks implementation, it means state parties are not bound to recognize and enact any legislation relating to the same. Although it stands out in establishing normative standards on the issue which are referred/cited and relied on by the National courts while delivering judgment as well as the some of the State parties include the same in their domestic legislation.

7. RIGHT TO ACCESS INTERNET AND RIGHT TO EDUCATION IN INDIA

As such in India also we do not have an explicit legal framework relating to the right to access internet however, right to education is recognized as a fundamental right under Article 21A of the Constitution of India. Further, comprehensive legislation was enacted as "Right of Children to Free and Compulsory Education Act, 2009" under which a child between six and fourteen is entitled to receive free and compulsory elementary education. The right to access internet is not explicitly recognized but through judicial interpretation, it was regarded as an integral part of Article 19(1) A & G, 21(A) and 21of the Constitution of India. In the case of "**Anuradha Basin Vs. Union of India AIR 2020 SC 1308"** the Hon'ble Supreme Court of India has given emphasis on 'access to internet' and regarded it as an integral part of right to freedom of speech and expression, right to freedom to practice any profession, carry on trade business, or occupation under Article 19(1) A and 19(1) G of Constitution of India. Freedom to practice any profession, carry on trade, business or occupation with the help of internet is now a constitutionally protected right. The court further stated that any restriction or ban on such fundamental right must be as per Article 19(2) & (6) of the Constitution based on the test of proportionality. In the instant case petition was filed against frequent shutdown of internet

[29] Resolution adopted by the Human Rights Council on 13 July 2021, 47/16. The promotion, protection and enjoyment of human rights on the Internet retrieved fro https://digitallibrary.un.org/record/3937534?ln=en&v=pdf.

[30] Is there a Right to the Internet under International Law? | eReader. (2024, June 25). eReader. https://www.mediadefence.org/ereader/publications/introductory-modules-on-digital-rights-and-freedom-of-expression-online/module-3-access-to-the-internet/is-there-a-right-to-the-internet-under-international-law/

in the state of Jammu & Kashmir due to which petitioner (journalist) could not publish her article in newspaper and that resulted in violation of right to press. However, the court didn't have made any efforts to recognize right to access internet on the pretext that it is not asked by the petitioner specifically in this petition. Although Court highlighted the importance of the internet in enjoyment of the fundamental right to freedom of speech and expression, freedom to practice any profession, carry on any trade, business and occupation and declared right to access internet as a part of Article 19(1)A &G.

The Kerala High Court while delivering judgment in the case of "**Faheema Shirin v. State of Kerala, AIR 2020 KERALA 35",** has recognizes that "the right to the internet is a component of the constitutionally guaranteed rights to privacy and education under Article 21 and 21(A) of the Constitution of India". In this case, the college authority imposes restrictions on the use of the internet, mobile phones, and laptops after 6 pm-10 pm. and 10 pm. to 6 am. in the college hostel. The petitioner refused to follow the regulation and as a result the hostel authorities expelled her from the hostel and asked her to vacate the room within 12 hours. Due to that the petitioner could not attend college for a few days as she had to travel more than 150 kilometers after expulsion from the hostel. On the day when she came to vacate her room, she found that her room was locked by hostel authorities, and she was not permitted to take her belongings. Feeling aggrieved by the decision of the hostel authority, she filed this petition, contending "the restrictions on the use of the internet causes infringement of her right to receive quality education, and the denial of the right to acquire knowledge through the internet and the prohibition on the use of mobile phones is a deprivation of access to the source of knowledge detrimental to the quality of education available to women". After hearing from both the parties, the Hon'ble High Court of Kerala decided that any rules and regulation that restrict students to access internet is unacceptable. Court referred that UN Human Right Council has recognized this right is a fundamental freedom and tool to safeguard the right to education. In delivering judgment instant case the Kerala High Court relied on the observation made in the case of S. Renugaran & Ors. V. P. Jagjivan Ram (1989) 2 SCC 674. In this case, it is observed that State Authorities (Censor Board), should be responsible for societal change and prevailing climate, and any restriction of fundamental rights could only be justified on the anvil. of necessity. State has responsibility to ensure that all children must be equipped with modern technologies for the purpose of competing in this digital world.[31]

[31]. Anuj Garg vs. Hostel Association of India (2008) 3 SCC 1

Recently in a case, it is observed by the court that the digital infrastructure should be made available and accessible to all including the persons with disability and other marginalized groups[32]. At present, every essential service (education, health care, economic opportunity) is mediated through a digital platform. Further Article 21 of the Constitution of India is also interpreted in the light of the technological realities and innovations. The internet has a crucial role in shaping the economic, social, and democratic aspects of countries through providing access to financial systems, government services, health information, educational materials, and political discourse. Because of this, the debate over whether internet access should be considered a basic or fundamental right has gained more traction, particularly in developing nations like India where digital inclusion is still uneven.

India stands second in the list of the highest number of internet users after China in 2022[33]. The number of active Internet users in India is expected to increase by 45% in the next five years and touch 900 million by 2025 from around 622 million in 2020, according to the IAMAI-Kantar ICUBE 2020 report[34]. The Indian government has acknowledged the necessity of integrating digital platforms into administration and development through programs like Digital India, SWAYAM (platform for online learning), Ayushman Bharat (digital healthcare), and e-governance projects. However, most people who lack internet connectivity, lack digital literacy, or are unable to access data services and devices cannot benefit from these programs. The digital divide continues to be a significant barrier to inclusive growth and active democracy, driven by socioeconomic and geographic disparities.

Challenges relating to right to access internet

The recognition of right to access internet as a fundamental human right is a debatable topic in the international as well as the national forum both. Internet is necessity of today's day life as every essential service is mediated through the medium of the digital platform, which can't be accessible without the help of internet. Therefore, the demand for recognizing the right to access internet has become a global concern. Right to access internet is enabler of many human rights including right to education in this era of digitalization. Recognition of right to

[32]. Amar Jain vs. Union of India WP. (C) No 49of 2025

[33]. Number of internet users by country 2023 | Statista. (2024, April 5). Statista. https://www.statista.com/statistics/262966/number-of-internet-users-in-selected-countries/ visited on 16th May 2022.

[34]. EdTech. (2021, June 3). 'India to have 900 million active internet users by 2025', says report. The Economic Times. https://economictimes.indiatimes.com/tech/technology/india-to-have-900-million-active-internet-users-by-2025-says-report/articleshow/83200683.cms?utmsource=Contentofinterest&utm_medium=text&utm_campaign=cppst visited on 15th May 2025.

access internet involves positive and negative approaches. In positive approach State is obligated to take all necessary initiatives/measures to provide internet access for all by removing all Infrastructural difficulties and providing resources and the negative approach is internet freedom is that State can't interfere in enjoyment of the right. There are several challenges/problems as highlighted below relating to right to access internet which are required to be addressed along with recognizing it as fundamental human right otherwise the right to access internet will become meaningless.

8. INFRASTRUCTURAL CHALLENGE

- **Economic challenge:** Right to access internet is an expensive right as to accessing the same there is a need for comprehensive infrastructural development through which it can be accessible by everyone irrespective of their social and economic background. As it is found that during the Covid-19 period, huge numbers of students, especially from marginalized society, must leave their educational aspiration due to lack of economic resources. The Internet along with all necessary tools required to access internet is to be made affordable for everyone. Then only in real sense could the right like right to education and others be enjoyed. The internet is expensive but will become expensive if same is denied.

- **Operational Challenge:** The economical challenge can be lifted but the issue of operational challenge is more serious and technical in nature. Geographical location, logistic difficulty, lack of network coverage, adverse climatic condition and non-availability of electricity are the major operational challenge ahead right to access to internet. To resolve this issue, the possibility of satellite internet services, investment for consistent supply of electricity, erection of mobile towers, laying the fiber optic cables in the remote places can be explored.

- **Non-availability of multilingual educational contents**: The non availability of multilingual educational content and information over the internet is one of the major challenges in enforcing right to online education across globe especially for the people of rural areas as unavailability of educational content in their native languages causes hindrance in ensuring right to online education.

- **Digital Divide:** Digital divide refers to unequal access to the internet due to several factors; a group of people could not access the internet, and this created a gap, and they became subject to digital exclusion. The digital divide is an obstruction to enjoyment of the right to education in this digitalized era. Recognition of right to access internet as a fundamental human right may help to minimize the digital divide and serve to ensure enjoyment of the right to education in equitable manner by everyone in the digitalized world. The recognition of right to access internet as a fundamental right will impose obligation on the state to adopt necessary policies to ensure enforcement of the same and that might result in if not elimination but minimization of the issue of digital divide. According to the reports of the Indian Development Review, 31% of the rural population and 67% of people of the cities uses the internet[35]. Although the Government of India is taking initiative such as Bharat Net to bridge the digital divide gap however till January 2025, internet connectivity reaches to the 30.4% of villages only due to infrastructural and technical constraints.

9. CHALLENGE RELATING TO CONTENT REGULATION

- **Cyber security and content regulation:** The internet has revolutionized access to information on the one hand but that resulted in increase in the cases of cyber breaches on the other hand, therefore there was global concern to draft regulation relating to internet. Absence of regulations on internet makes people vulnerable in cyberspace. Another challenge is relating to content as every coin has two positive and negative sides, it goes with the internet also. The perpetrators are using online platforms to commit crimes due to the lack of strict regulations. Internet can be very useful on the one hand, and on the other hand, it can be very harmful too. Therefore, the rightful and judicious use of the internet must be governed by the proper and stringent regulatory framework.

- **Intellectual Property Right Violation issues:** No doubt use of internet for educational purpose offers ample amount of educational opportunity to the learning but at the same time it also poses a serious issue of copy right violation. The internet is a reservoir of educational content and knowledge. Therefore, it is very important to know what content is to be taken and what not because that might lead to copyright infringement. Recognition of the right to access internet for educational purposes may expose a person towards the intellectual property rights violation. Therefore, it is necessary to frame

[35]. Ashalekshmi BS. (2025b, August 30). The right to internet: A paradoxically expensive fundamental right.The New Indian Express. https://www.newindianexpress.com/web-only/2025/Aug/30/the-right-to-internet-a-paradoxically-expensive-fundamental-righ

policies that address the issue of intellectual property right violation and digital education.

In the digitalized world, recognizing merely right to education without extending any opportunity to access and enjoy the same will be meaningless. The developing countries currently are facing the issues of lack of access to high-speed internet, non-availability of digitally qualified personnel, and proper educational infrastructure.

10. CONCLUSION

As such there is not a single binding international instrument present which recognizes the right to access internet as a separate right but there are some Resolutions adopted by the international monitoring agencies in which the right to internet access is acknowledged as a fundamental tool to ensure the right to education. Several countries[36] that have recognized right to access internet as a right or universal service and enacted legislation relating to same. In our Country, we also do not have any specific legal provision relating to the same, however our judiciary is playing proactive role in recognizing the right to access to internet as an integral part of the right to freedom of speech and expression, right to life and personal liberty, right to privacy, and right to education etc. In today's digitalized world, it is very important to recognize the right to access internet as a separate fundamental right to ensure meaningful enjoyment of the right to education. The concept of right is something that everyone needs to develop, without which it is not possible to survive in society with dignity. There is still an ongoing debate on the topic of whether the right to access internet is a recognized right or not. It would be right to say that the development of digital technology has emerged as a challenge in protecting digital technology-based human rights. The enforcement of this right involves two factors, i.e., learning digital skills in terms of devices, existing facilities, and Internet connectivity. Denial of the right to access to the internet may cause digital exclusion, inequality adversely affects learners' ability to participate and compete in the digital world, as digital transformation is to be inclusive and equitable.

[36] Esonia, Greece, European Union, France, Finland, Spain, Canada etc.

GIG WORKER CLASSIFICATION AND SOCIAL PROTECTION IN INDIA'S DIGITAL ECONOMY: NAVIGATING THE LEGAL LABYRINTH OF LABOUR CODES AND JUDICIAL PRECEDENTS

Arnav Rishi[1] *and Vedica Tiwari*[2]

ABSTRACT

The exponential growth of India's gig economy has precipitated a fundamental reconfiguration of traditional employment paradigms, creating unprecedented challenges for labour law jurisprudence. This article examines the evolving legal framework governing gig worker classification and social protection in India, analysing the definitional ambiguities inherent in the employee–independent contractor dichotomy as applied to platform-based workers. Through a comparative analysis of landmark judicial pronouncements including the UK Supreme Court's decision in Uber BV v. Aslam and California's legislative experiments with Assembly Bill 5 and Proposition 22 alongside the European Union's Platform Work Directive, this article evaluates India's legislative response through the four Labour Codes enacted in 2019–2020, with particular attention to the Code on Social Security, 2020, and state-level initiatives in Rajasthan and Karnataka. The article critically assesses whether current legal mechanisms adequately balance the flexibility characteristic of gig work against the imperative of worker protection, engaging with the Supreme Court's intervention in Indian Federation of App-Based Transport Workers v. Union of India. It argues that India's nascent regulatory framework, while progressive in recognising gig workers as a distinct statutory category, remains insufficient in implementation and urgently requires robust enforcement mechanisms, clearer definitional boundaries, and comprehensive social security schemes to achieve substantive justice for India's burgeoning gig workforce.

Keywords: *Gig Workers, Platform Economy, Labour Codes, Code on Social Security 2020, Employee Classification, Uber BV v Aslam.*

1. INTRODUCTION

The gig economy has fundamentally transformed the landscape of work in India, challenging centuries-old conceptions of the employer–employee relationship that form the

[1] Arnav Rishi is a third year B.A.LL.B (Hons.) student at the University Institute Of Legal Studies, Panjab University, Chandigarh.
[2] Vedica Tiwari is a third year B.COM LL.B (Hons.) student at the University Institute Of Legal Studies, Panjab University, Chandigarh.

bedrock of labour law. With an estimated 7.7 million workers engaged in gig employment in 2020–21, projected to surge to 23.5 million by 2029–30,[3] India confronts an unprecedented regulatory challenge: how to extend meaningful protection to workers who exist outside traditional employment frameworks while simultaneously preserving the flexibility and innovation that characterises digital platform work.

At the epicentre of this challenge lies a deceptively simple question of classification. Are gig workers 'employees' entitled to the full panoply of labour law protections, or 'independent contractors' operating businesses on their own account? This binary classification system, inherited from industrial-era jurisprudence and entrenched through decades of judicial interpretation, proves manifestly inadequate when applied to drivers who accept rides through Uber's algorithmic dispatch or delivery personnel navigating Zomato's route-optimisation software. These workers exercise neither the autonomy typically associated with entrepreneurship nor enjoy the security traditionally accompanying employment. They occupy a legally ambiguous middle ground, economically dependent but contractually independent.

The legal consequences of this classification are profound. In India, employees enjoy statutory protections under the Industrial Disputes Act, 1947, the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, and various other labour enactments. Independent contractors, by contrast, fall outside this protective scaffold entirely. Classification determines access to minimum wages, social security benefits, grievance redressal mechanisms, and collective bargaining rights, in essence, the difference between precarity and protection. Paradoxically, it is precisely this regulatory gap that platform companies have systematically exploited to internalise profits while externalising the social costs of their workforces onto workers and society at large.[4]

India's response has unfolded in three overlapping registers. At the legislative level, Parliament enacted four Labour Codes between 2019 and 2020, consolidating 29 central labour statutes and most significantly explicitly recognising 'gig workers' and 'platform workers' as distinct categories in the Code on Social Security, 2020.[5] At the state level, Rajasthan enacted pathbreaking welfare legislation in 2023, followed by Karnataka's draft bill in 2024. At the

[3]NITI Aayog, India's Booming Gig and Platform Economy: Perspectives and Recommendations on the Future of Work 3 (2022), available at https://www.niti.gov.in/sites/default/files/2022-06/25th_June_Final_Report_27062022.pdf (last visited Apr. 10, 2025).
[4]Manpreet Singh, India's Gig Economy: A Legal Minefield, Manupatra (Aug. 20, 2024), https://articles.manupatra.com/article-details/India-s-Gig-Economy-A-Legal-Minefield.
[5]Code on Social Security, 2020, § 2(35), No. 36, Acts of Parliament, 2020 (India).

judicial level, the Supreme Court of India has taken suo motu cognisance of implementation delays, publicly admonishing the executive for its failure to notify implementing rules. Each register reflects different political pressures, institutional capacities, and normative commitments.

This article undertakes a comprehensive examination of India's evolving legal framework for gig worker classification and social protection. Part II traces the historical evolution of worker classification in Indian labour law, establishing the doctrinal foundations upon which contemporary disputes are argued. Part III analyses the definitional challenge posed by gig work and examines international approaches in the United Kingdom, the United States, and the European Union. Part IV evaluates India's legislative response through the Labour Codes and state-level initiatives. Part V examines landmark judicial interventions, both domestic and international. Part VI identifies persistent gaps and challenges in the current framework, while Part VII proposes reform measures to strengthen the social protection architecture for gig workers in India.

2. BACKGROUND AND HISTORICAL EVOLUTION OF WORKER CLASSIFICATION IN INDIAN LABOUR LAW

A. Traditional Classification Frameworks

Indian labour law has historically recognised a tripartite classification of workers: employees, contractual workers (including contract labour and inter-state migrant workers), and workers in the unorganised economy. This taxonomy emerged during the post-independence industrialisation period when manufacturing dominated the economic landscape and conventional employer–employee relationships structured the world of work. The foundational test for determining employment status in India derives from the doctrine of control articulated by the Supreme Court in *Dharangadhara Chemical Works Ltd. v. State of Saurashtra*,[6] where the Court held that the critical inquiry is whether the employer exercises control over the manner and means of work performance, not merely over the end result.

This control test borrowed from English common law examines factors including the intensity of supervision, disciplinary authority, provision of tools and materials, and integration into the employer's organisational structure. It was refined in *Silver Jubilee Tailoring House v. Chief Inspector of Shops and Establishments*,[7] where the Court emphasised that no single factor

[6]Dharangadhara Chemical Works Ltd. v. State of Saurashtra, AIR 1957 SC 264 (India)
[7]Silver Jubilee Tailoring House v. Chief Inspector of Shops & Establishments, AIR 1974 SC 37 (India)

is decisive; rather, the totality of the relationship must be examined. Subsequently, in *Ram Singh v. Union Territory of Chandigarh*,[8] the Court articulated a multi-factorial approach encompassing the power to select and dismiss workers, authority to pay remuneration, organisation of work, and deduction of insurance contributions. This multi-factorial test acknowledged that employment relationships exist on a spectrum rather than falling into neat categorical boxes.

Nevertheless, this framework proved inadequate for India's vast informal economy, which employs approximately ninety per cent of the workforce. The Unorganised Workers' Social Security Act, 2008, represented the first significant legislative attempt to extend protection beyond formal employment, defining 'unorganised workers' as home-based workers, self-employed workers, or wage workers in the unorganised sector.[9] Yet even this progressive legislation characterised as a 'welfare architecture without welfare' by scholars struggled to accommodate the emerging reality of digitally-mediated work, lacking funded schemes and robust enforcement machinery.

B. The Emergence of Platform-Based Work and Its Socio-Economic Context

The gig economy in India traces its contemporary origins to the proliferation of smartphone technology and affordable mobile internet access from the early 2010s. Platforms such as Uber, Ola, Swiggy, and Zomato pioneered business models predicated on matching consumers with service providers through algorithmic intermediation, transforming transportation, food delivery, and myriad other sectors. These platforms lowered entry barriers dramatically: workers required minimal capital investment often just a smartphone and a vehicle to commence earning, making participation accessible to large segments of India's workforce previously excluded from organised sector employment.

The rosy narrative of flexible opportunity, however, obscured deeper structural realities. As NITI Aayog documented, approximately 47 per cent of gig work involves medium-skilled jobs, 22 per cent high-skilled work, and 31 per cent low-skilled tasks.[10] Workers in the latter category delivery personnel and ride-hailing drivers frequently face twelve to fourteen-hour workdays, earnings falling below effective minimum wages when vehicle costs are deducted, absence of paid leave, no health insurance, and algorithmic

[8]Ram Singh v. Union Territory of Chandigarh, (1985) 1 SCC 105 (India).
[9]The Unorganised Workers' Social Security Act § 2(m) (India 2008).
[10]NITI Aayog, supra note 1, at 7.

management systems that impose productivity targets while constraining worker agency through non-negotiable platform terms.

The COVID-19 pandemic of 2020 brutally exposed gig workers' structural vulnerability. When consumer demand evaporated during lockdowns, these workers confronted immediate income loss without unemployment benefits, health insurance, or other social safety nets protections enjoyed by formal employees under statutes including the Employees' State Insurance Act, 1948. The crisis galvanised worker organising efforts and accelerated legislative attention to the problem, with the simultaneous enactment of four Labour Codes providing the legislative framework within which gig worker protection would be situated.

The four Labour Codes, the Code on Wages, 2019;[11] the Industrial Relations Code, 2020;[12] the Occupational Safety, Health and Working Conditions Code, 2020;[13] and the Code on Social Security, 2020 represent the most ambitious consolidation and reform of Indian labour law since independence, rationalising 29 central statutes into four comprehensive enactments. The ILO's assessment of non-standard employment forms globally provides important context: the proliferation of such arrangements reflects both technological change and deliberate regulatory arbitrage by firms seeking to externalise labour costs.[14]

3. THE DEFINITIONAL CHALLENGE: CLASSIFYING GIG WORKERS

A. The Inadequacy of Binary Classification

The fundamental problem confronting legal systems worldwide is that gig workers fit uncomfortably within the traditional employee–independent contractor dichotomy. Consider the paradigmatic case of a ride-hailing driver. Factors suggesting independent contractor status include: ownership of one's own vehicle; control over working hours through voluntary platform log-in; the theoretical ability to simultaneously work for competing platforms; and trip-based remuneration rather than a fixed wage. Conversely, factors indicating employment include: the platform's unilateral and non-negotiable fare-setting; detailed performance standards enforced through customer ratings; the algorithmic assignment of trips limiting

[11]The Code on Wages, 2019, No. 29, Acts of Parliament, 2019 (India).
[12]Industrial Relations Code, 2020, No. 35, Acts of Parliament, 2020 (India).
[13]The Occupational Safety, Health and Working Conditions Code (India 2020).
[14]Int'l Labour Org., Non-Standard Forms of Employment: Understanding Challenges, Shaping Prospects 14 (2016).

effective choice; and the contractual ability to 'deactivate' drivers who fall below performance thresholds a power functionally equivalent to summary dismissal.

This conflicting evidence renders traditional tests indeterminate. The control test fails because algorithmic management represents a structurally novel form of control not direct human supervision, but systematic influence exerted through code, data architecture, and application design. The economic reality test, which asks whether workers are economically dependent on the putative employer, yields ambiguous results when workers can theoretically multi-home across platforms but face practical constraints including surge-pricing incentives, proximity-based job allocation, and rating dependencies that limit genuine independence.

The inadequacy of existing categories stems from a more fundamental problem: the categories themselves presume a binary world that no longer accurately describes labour market organisation. Employment and independent contracting represent ideal types at opposite ends of a spectrum. Gig work occupies the contested middle ground what scholars have variously termed 'dependent contractors,' 'workers,' or 'employee-like persons' combining elements of both categories while fitting neatly into neither. India's four Labour Codes have largely retained the binary framework in provisions governing wages, occupational safety, and industrial relations, while the Code on Social Security, 2020 represents the partial exception through its new definitional categories.

B. International Approaches to the Classification Problem

1. United Kingdom: The Tripartite 'Worker' Category

The United Kingdom addressed the classification problem through the creation of an intermediate statutory category. The Employment Rights Act 1996 recognises not merely 'employees' and 'independent contractors' but also 'workers' individuals who personally perform work or services for another party but are not genuinely in business on their own account.[15] This third category extends certain protections minimum wage, holiday pay, and whistleblower protections without conferring the full suite of employment rights such as unfair dismissal protection or redundancy pay.

The UK Supreme Court's landmark decision in *Uber BV v. Aslam*[16] applied this tripartite framework to ride-hailing drivers. The Court unanimously rejected Uber's characterisation of drivers as independent contractors, holding that the written contractual

[15]Employment Rights Act 1996, § 230(3)(b) (U.K.).
[16]Uber BV v. Aslam [2021] UKSC 5 (U.K.).

terms did not reflect the substantive reality of the relationship. Examining actual working arrangements rather than formal documentation, the Court found that Uber exercised significant control through: unilateral and non-negotiable fare-setting; standardised service requirements; algorithmic assignment of trips; and ratings-based discipline including the threat of deactivation. Most significantly, the Court emphasised that the statutory definition of 'worker' must be interpreted purposively to effectuate the protective purpose of employment legislation.[17] The principle that formal contractual documentation cannot override substantive working reality particularly when one party possesses vastly superior bargaining power represents a jurisprudential lodestar of enduring significance for Indian courts grappling with analogous questions.

2. United States: California's ABC Test and the Proposition 22 Counter-Revolution

California adopted a more aggressive approach through the state Supreme Court's decision in *Dynamex Operations West, Inc. v. Superior Court*,[18] which established the 'ABC test' for determining independent contractor status. Under this test, a worker is presumed to be an employee unless the hiring entity affirmatively demonstrates that: (A) the worker is free from control and direction in performing work; (B) the work is outside the usual course of the hiring entity's business; and (C) the worker is customarily engaged in an independently established trade or occupation. The California Legislature subsequently codified this test in Assembly Bill 5 (AB5),[19] dramatically expanding the scope of workers classified as employees, since most platform workers clearly fail prong B ride-hailing is Uber's core business, and drivers perform that very business.

However, in November 2020, California voters approved Proposition 22,[20] a ballot initiative funded by over USD 200 million from gig economy companies. Proposition 22 carved out an exception for app-based drivers, classifying them as independent contractors while providing limited benefits: a minimum earnings guarantee (excluding waiting time), healthcare subsidies for high-volume drivers, vehicle insurance, and non-discrimination protections. This sequence illustrates both the transformative potential and the political vulnerability of legislative reform: AB5 demonstrated that strong classification rules could extend protection to millions of workers; Proposition 22 demonstrated that organised corporate

[17]Id. at [93]–[101].
[18]Dynamex Operations West, Inc. v. Superior Court, 4 Cal. 5th 903 (2018).
[19]California Assembly Bill 5 (AB5), Cal. Lab. Code §§ 2775–2787 (2019).
[20]Cal. Prop. 22, App-Based Drivers as Contractors and Labor Policies Initiative (Nov. 2020).

interests, backed by extraordinary financial resources, can overturn legislative protections through direct-democracy mechanisms. The episode reveals the structural limitations of any purely legislative strategy for gig worker protection absent broader political mobilisation.

3. European Union: The Platform Work Directive

The European Union has pursued regulatory harmonisation through its Directive on Platform Work,[21] which establishes a rebuttable presumption of employment when platform work exhibits at least two of five indicators: determination of remuneration levels; supervision of work performance; control over work organisation; restriction of freedom to organise work; and limitation of the ability to build an independent client base. This shifts the burden of proof to platforms, requiring them to demonstrate genuine independent contractor relationships rather than permitting structural misclassification. The Directive also mandates transparency in automated decision-making systems and requires human review of algorithmically-generated decisions significantly affecting working conditions directly addressing the 'black box' problem of algorithmic management that lies at the heart of platform work governance.

4. INDIA'S LEGISLATIVE RESPONSE: THE LABOUR CODES AND BEYOND

A. The Code on Social Security, 2020: Recognition Without Implementation

India's most significant legislative intervention is the Code on Social Security, 2020, which consolidates nine previous enactments including the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and the Employees' State Insurance Act, 1948 into a unified framework. The Code represents a genuine paradigm shift by explicitly recognising 'gig workers' and 'platform workers' as distinct statutory categories warranting social protection. Section 2(35) defines 'gig worker' as 'a person who performs work or participates in a work arrangement and earns from such activities outside of traditional employer–employee relationship,' while Section 2(61) defines 'platform workers' as workers accessing organisations or individuals through an online platform and providing services or participating in gig work for remuneration.[22]

[21]Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work, COM (2021) 762 final (Dec. 9, 2021).
[22]The Code on Social Security § 2(61) (India 2020).

Section 114 of the Code mandates the establishment of social security schemes for unorganised workers, gig workers, and platform workers,[23] while Section 113 specifically authorises the Central Government to formulate schemes covering life and disability insurance, health and maternity benefits, old age protection, and such other benefits as may be determined.[24] These provisions acknowledge the existence of workers who operate neither as traditional employees nor as genuine independent contractors, creating statutory space for protection without forcing workers into inapt existing categories.

However, the Code's promise remains largely unrealised. Four years after enactment, the Central Government had failed to notify the implementing rules necessary to operationalise these provisions. During hearings before the Supreme Court in February 2025, the Additional Solicitor General admitted that framing and notifying the rules had taken longer than anticipated, prompting the Court to express strong displeasure.[25] Without implementing rules establishing specific schemes, funding mechanisms, administrative structures, and enforcement procedures, the statutory framework remains an aspirational declaration recognition without remedy, legislation without implementation. This implementation deficit represents the single most critical failure of India's gig worker protection policy to date.

B. State-Level Legislative Initiatives

While the Central Government continues to delay, several states have attempted to fill the regulatory void. Rajasthan enacted the Platform Based Gig Workers (Registration and Welfare) Act, 2023,[26] the first comprehensive state law directly addressing gig workers. The Act requires digital aggregators to register gig workers operating on their platforms, mandates platform contributions to a state welfare board at rates of one to two per cent of annual turnover, and provides for minimum benefits including accident insurance and skill development support. The Act's registration requirement, linking gig workers to Aadhaar-based identification, provides the data infrastructure necessary for benefit delivery.

Karnataka introduced a draft Platform-based Gig Workers (Social Security and Welfare) Bill, 2024,[27] proposing analogous measures augmented by grievance redressal mechanisms and representation of gig workers on the welfare board itself, a governance

[23]Id. § 114.
[24]Id. § 113.
[25]Social Security for Gig Workers | Day 2: 'Pull up your socks!' Supreme Court Tells Union on Delays in Implementing the Social Security Code, Sup. Ct. Observer (Feb. 19, 2025), https://www.scobserver.in/reports/social-security-for-gig-workers-day-2.
[26]The Rajasthan Platform Based Gig Workers (Registration and Welfare) Act (India 2023).
[27]Karnataka Platform-Based Gig Workers (Social Security and Welfare) Bill (India 2024) (draft).

innovation ensuring worker voice in scheme administration. These state initiatives demonstrate growing legislative recognition of the protection gap and willingness to act absent Central leadership. They simultaneously raise important questions of jurisdictional overlap under Entry 24 of the Concurrent List, potential for regulatory fragmentation across states creating compliance complexity for platforms operating nationally, and the risk that competition for platform investment could trigger a regulatory race to the bottom among states.

C. The Industrial Relations Code, 2020 and the Collective Bargaining Gap

A critical gap in India's framework concerns collective bargaining rights. The Industrial Relations Code, 2020 confines the recognition of 'trade unions' and collective bargaining processes to enterprises with traditional employment arrangements. This structural exclusion denies gig workers access to collective bargaining arguably the most powerful mechanism through which workers can secure improved conditions through collective action rather than atomised individual negotiation with counterparties of vastly greater economic power.

The absence of organising rights leaves gig workers structurally atomised. While informal worker organisations such as the Indian Federation of App-Based Transport Workers (IFAT) have emerged organically from below, they lack legal recognition under the Industrial Relations Code and consequently cannot compel platforms to negotiate, certify agreements as legally binding, or invoke dispute resolution machinery. This legal vacuum perpetuates the power asymmetry that enables platform companies to unilaterally set remuneration rates, algorithmic parameters, and performance standards without meaningful worker input. Rectifying this exclusion represents perhaps the single most consequential reform India could undertake to structurally improve gig worker conditions.

D. The E-Shram Portal and Digital Infrastructure for Protection

The Ministry of Labour and Employment launched the E-Shram portal[28] to create a comprehensive database of unorganised workers, including gig workers. The portal enables registration against Aadhaar, generates a Universal Account Number facilitating benefit portability across states and sectors, and serves as India's first attempt at centralised identification of informal labour. Registration provides a verifiable identity linking workers to potential benefit delivery systems.

[28]E-Shram Portal, Ministry of Labour & Employment, Govt. of India, https://eshram.gov.in (last visited Apr. 10, 2025).

However, the portal's limitation is fundamental: it functions as data infrastructure rather than a protection system. Registration provides no substantive benefits in the absence of funded schemes to which the database links workers. Without operationalised social security programmes, the E-Shram portal risks functioning primarily as a surveillance mechanism generating valuable data for state and platform actors rather than as a genuine vehicle for worker protection. The portal's value is entirely contingent on the implementation of substantive schemes that have not materialised in the years since its launch.

5. LANDMARK JUDICIAL INTERVENTIONS

A. Indian Federation of App-Based Transport Workers v. Union of India: The Supreme Court as Implementation Catalyst

The most significant domestic litigation directly addressing gig worker rights is the writ petition filed by the Indian Federation of App-Based Transport Workers before the Supreme Court of India.[29] The petition challenges the non-implementation of the Code on Social Security, 2020 and seeks directions compelling the government to frame and notify rules enabling the establishment of social security schemes for gig workers, arguing that the legislative mandate of Sections 113 and 114 creates enforceable obligations that the executive cannot indefinitely defer through administrative inaction.

During hearings in February 2025, the Supreme Court expressed palpable displeasure at the government's protracted delay, with the bench remarking pointedly: 'Pull up your socks!'[30] The Court questioned why, four years after the Code's enactment, workers continued to remain without the statutory social security protections Parliament had explicitly mandated. This judicial intervention signals the emerging role of courts as institutional catalysts for implementation where executive action lags behind legislative aspiration a familiar dynamic in the enforcement of constitutional rights, now extended to statutory social security entitlements.

The litigation raises questions of profound constitutional significance. If the Code on Social Security creates statutory entitlements for gig workers to receive social security benefits, do these entitlements generate judicially enforceable rights enabling courts to mandate executive action to fulfil legislative promises? The answer implicates foundational debates about separation of powers, the justiciability of positive socio-economic rights, and the

[29]Indian Federation of App-Based Transport Workers v. Union of India, W.P.(C) No. 1068/2021 (Supreme Court of India).
[30]See Sup. Ct. Observer, supra note 23.

institutional competence of courts to supervise complex social policy implementation. The Supreme Court's willingness to engage robustly with these questions rather than deferring entirely to executive discretion reflects a jurisprudential tradition of using fundamental rights and directive principles to enforce social welfare legislation.

B. Delhi Commercial Driver Union v. Union of India: Due Process and Algorithmic Dismissal

The petition filed by the Delhi Commercial Driver Union[31] challenges the arbitrary deactivation of drivers by ride-hailing platforms without notice, explanation, or opportunity for response. Deactivation, the platform equivalent of dismissal severs a driver's access to the application and thereby to their livelihood, yet platforms typically exercise this power unilaterally based on algorithmic assessments of performance metrics. The petition argues that such deactivations violate fundamental principles of natural justice audi alteram partem and nemo judex in causa sua and constitute deprivation of livelihood contrary to the right to life guaranteed under Article 21 of the Constitution of India.

This case raises whether constitutional guarantees of procedural fairness apply to platform–worker relationships, even in the absence of formal statutory employment status. The argument proceeds from the premise that when algorithmic systems function as de facto employers exercising comprehensive control over worker access to income constitutional norms constraining the arbitrary exercise of power should apply irrespective of the contractual label attached to the relationship. This horizontal application of constitutional rights to private actors remains constitutionally contested in India, yet the stakes the livelihoods of millions invest the argument with compelling normative force.

C. Uber BV v. Aslam: Comparative Jurisprudential Significance for Indian Courts

While decided by the UK Supreme Court, the judgment in *Uber BV v. Aslam* carries significant comparative authority for Indian courts engaging with analogous classification questions. The Court's central holding that written contractual terms characterising drivers as independent contractors could not override the substantive reality of a relationship in which Uber exercised pervasive algorithmic control resonates directly with the interpretive challenges confronting Indian courts and tribunals. Indian labour courts have a robust tradition of looking

[31]Delhi Commercial Driver Union v. Union of India, W.P.(C) No. 12422/2018 (India H.C. Delhi).

beyond contractual form to substance, articulated in the Supreme Court's own jurisprudence on contract labour and disguised employment.

The purposive interpretive methodology employed in *Uber BV v. Aslam* reading protective legislation to achieve its social purpose rather than permitting evasion through contractual creativity aligns closely with the approach recommended by the International Labour Organization and adopted in various strands of Indian constitutional and statutory interpretation. As the UK Supreme Court observed, the statutory definition of 'worker' must be interpreted to prevent 'a mismatch between the statutory language and the practical reality of the relationship.' This principle that protective legislation must be construed to prevent its circumvention by sophisticated contractual arrangements represents perhaps the most transferable lesson from the UK experience for Indian legal development.

6. PERSISTENT GAPS AND CHALLENGES IN THE CURRENT FRAMEWORK

A. The Implementation Deficit: The Central Failure

The most critical problem in India's gig worker framework is the chasm between legislative recognition and operational reality. The Code on Social Security recognises gig workers and authorises protective schemes, but the promised benefits remain entirely theoretical in the absence of implementing regulations. This implementation deficit transforms progressive legislation into symbolic gesture recognition without remedy, aspiration without action. Multiple factors contribute: bureaucratic inertia, the genuine complexity of designing workable contributory schemes for non-traditional workers, and less palatably the influence of well-resourced platform company lobbying operations that have strong financial incentives to delay the imposition of contribution obligations. The result is regulatory stasis: sufficient acknowledgement to deflect criticism, insufficient action to disturb arrangements benefiting platform shareholders.

B. Definitional Ambiguity and the Risk of Regulatory Evasion

While the Code defines 'gig workers' and 'platform workers,' these definitions remain potentially over-inclusive and easily evaded. The broad definition ‘a person who performs work or participates in a work arrangement and earns from such activities outside of traditional employer–employee relationship’ provides minimal guidance on which platforms and work arrangements are covered. Definitional precision matters because it determines both who receives protection and who bears contributory costs. Platform companies, anticipating regulatory obligations, have already begun restructuring contractual arrangements and technological intermediation to argue that their workers fall outside applicable definitions. Without implementing rules providing concrete guidance, these definitional vulnerabilities create opportunities for evasion that erode the Code's protective ambition.

C. Funding Mechanisms and the Cost Allocation Problem

A fundamental unresolved question concerns how to fund social security schemes for gig workers. Traditional social security models presuppose stable employment relationships with payroll-based contributions split between employers and employees. Platform work disrupts this model by contractually severing the employment relationship that would trigger contribution obligations. Options include: requiring platform contributions as a percentage of transaction volumes or revenues (effectively treating platforms as quasi-employers for funding purposes); imposing micro-levies on workers per transaction (risking reduction of already-strained earnings); general tax-based funding (socialising costs but politically challenging); or blended approaches. The Code authorises the government to determine funding mechanisms without prescribing them, leaving this central question for implementing rules that have not materialised.

D. Algorithmic Management, Transparency, and Worker Autonomy

The opacity of algorithmic management systems presents challenges to which Indian law has no current response. Workers typically cannot understand how algorithms determine work allocation, calculate surge pricing, assess performance, or trigger disciplinary processes including deactivation. This informational asymmetry prevents effective contestation of unfair outcomes and enables discrimination through design that may be invisible to both workers and regulators. While the EU's Platform Work Directive mandates algorithmic transparency and human review rights, Indian law remains entirely silent. As algorithmic management grows more sophisticated, the absence of transparency requirements risks entrenching structural information asymmetries that fundamentally undermine the bargaining equality that labour law ostensibly seeks to promote.

E. The Collective Action Deficit

Perhaps the most structurally significant gap is the absence of meaningful worker voice in determining the conditions under which gig work is performed. The Industrial Relations Code's exclusion of gig workers from recognised collective bargaining rights atomises workers, preventing the collective mobilisation that historically enabled employees to counterbalance managerial power. Without the ability to organise and negotiate, workers cannot effectively advocate for fair pay, adequate safety standards, or protection against algorithmic arbitrariness. The asymmetry is compounded by platform market concentration: in many sectors, a single platform commands dominant market share, leaving workers with no effective exit option. Addressing this deficit requires not merely technical amendments to the Industrial Relations Code, but a rethinking of how collective labour rights are conceptualised in the context of platform-mediated work.

7. TOWARD A COMPREHENSIVE FRAMEWORK: RECOMMENDATIONS FOR REFORM

A. Immediate Implementation of the Code on Social Security

The most urgent reform priority is implementing the Code on Social Security's existing provisions. The Central Government must expeditiously notify implementing rules establishing specific schemes for gig workers covering health insurance, accident insurance, maternity benefits, and old age security. Clear funding mechanisms requiring platform contributions recommended at two to five per cent of relevant transaction value should be prescribed, with transparent accounting ensuring funds reach intended beneficiaries. The Supreme Court's intervention may provide the institutional catalyst, but sustained pressure from worker organisations, civil society, and informed public opinion remains essential to translate judicial direction into administrative action.

B. Refining Definitional Boundaries to Prevent Regulatory Evasion

Implementing regulations should establish concrete multi-factor criteria for identifying covered platform work, including: frequency and duration of engagement through the platform; degree of economic dependence (percentage of income derived from platform work); degree of control exercised by the platform over pricing, work allocation, performance monitoring, and disciplinary decisions; and the extent to which workers genuinely multi-home across competing platforms without penalty. These criteria should be applied flexibly through a totality-of-the-relationship assessment rather than through mechanical bright-line rules, allowing adaptation to evolving work arrangements while preventing manipulation through cosmetic contractual restructuring.

C. Creating an Intermediate Legal Category

Rather than perpetuating the inadequate binary of employee versus independent contractor, India should formally recognise an intermediate legal category drawing on the UK's 'worker' concept acknowledging the hybrid status of gig workers. This category should carry minimum earnings guarantees, social security benefit entitlements, protection against arbitrary deactivation with notice and appeal rights, anti-discrimination protections applicable to algorithmic systems, and limited collective bargaining rights. This approach preserves the scheduling flexibility that genuinely benefits many gig workers while ensuring minimum standards that prevent exploitation.

D. Enabling Sectoral Collective Bargaining

Amending the Industrial Relations Code to permit sectoral collective bargaining for gig workers represents a reform of structural importance. Enterprise-level bargaining is inherently unsuited to platform work given the non-employee contractual status of workers; sectoral bargaining could instead establish industry-wide standards for minimum per-transaction rates, algorithmic management transparency, deactivation procedures, and expense reimbursement. Recognised worker organisations should possess legal standing to negotiate with platform industry associations, with resultant agreements binding all platform operators in the sector. Antitrust concerns which precluded Seattle's pioneering collective bargaining ordinance for ride-hailing workers can be addressed through carefully designed statutory safe harbours.

E. Mandating Algorithmic Transparency and Accountability

Drawing from the EU Platform Work Directive, Indian law should mandate disclosure requirements compelling platforms to explain their algorithmic decision-making systems in accessible terms; human review rights enabling workers to seek reconsideration of automated decisions affecting pay, work allocation, or account status; regulatory auditing empowering labour authorities to inspect algorithmic systems for discriminatory parameters and regulatory compliance; and pre-deployment impact assessments for significant algorithmic changes. These measures can be calibrated to balance legitimate proprietary interests in trade secret protection against the fundamental worker right to understand the systems that govern their economic lives.

F. Strengthening Enforcement Capacity

Effective legal rights require effective enforcement infrastructure. India should establish specialised labour tribunals with expedited procedures for platform work disputes, reducing the cost and temporal complexity that currently deter individual workers from asserting rights. Digital complaint mechanisms accessible through mobile applications reflecting the technological reality of gig work should be created with mandatory response timelines. Labour inspectorate capacity must be augmented with inspectors trained in digital platform regulation and algorithmic systems. Penalty structures must carry genuine deterrent weight relative to platform revenues; current penalties under labour codes are largely negligible in relation to the financial capacity of major platforms.

G. National Coordination and Standards Harmonisation

To prevent regulatory arbitrage and jurisdictional confusion among state initiatives, the Central Government should establish minimum national standards applicable across all states, while preserving state authority to provide additional protections above the floor. Interstate coordination mechanisms should facilitate information sharing and joint enforcement against platforms exploiting jurisdictional gaps. Crucially, benefit portability must be ensured for workers who migrate or operate across state boundaries a common reality for gig workers in India's mobile labour market through the Universal Account Number infrastructure of the E-Shram portal.

8. CONCLUSION

India stands at a critical juncture in defining legal protection for its gig economy workforce. The legislative framework established through the Code on Social Security, 2020 represents genuine normative progress: for the first time, Indian statute law formally acknowledges gig workers as a distinct category of persons deserving social protection, transcending the inadequate binary of employees and independent contractors. Yet formal recognition proves insufficient indeed, it risks becoming counter-productive when implementation lags indefinitely and workers remain without the protections that Parliament has explicitly mandated.

The definitional challenge posed by platform work exposes the structural inadequacy of employment classification systems designed for an industrial economy. Binary categories inherited from nineteenth-century common law and codified in India's post-independence labour statutes cannot comprehend workers who are neither genuine entrepreneurs nor conventional wage employees. International experience: the UK's tripartite framework endorsed in Uber BV v. Aslam, California's legislative conflict between AB5 and Proposition 22, the EU's presumptive directive demonstrates that multiple approaches are possible, each reflecting different configurations of political power and normative commitment. None provides a panacea; the complexity of platform work resists simple solutions.

What emerges clearly from comparative analysis is that comprehensive protection requires multi-dimensional legal intervention: definitional clarity preventing regulatory evasion; funded social security schemes with real benefit content; collective bargaining rights enabling workers to exercise structural power; algorithmic transparency requirements piercing informational asymmetries; robust enforcement infrastructure translating rights into reality; and continuous institutional adaptation as platforms and work arrangements evolve. The NITI Aayog's projection that India's gig workforce will expand from 7.7 million to 23.5 million workers by 2029–30[32] means that the regulatory choices made in the coming years will determine the working conditions of tens of millions of persons.

The Supreme Court's ongoing engagement in Indian Federation of App-Based Transport Workers v. Union of India[33] signals judicial recognition that legislative mandates cannot be indefinitely deferred by executive inaction. Courts may compel the framing of rules; but sustained reform requires broader mobilisation worker organisations building collective capacity, civil society organisations illuminating conditions and advocating policy responses, and political leaders willing to prioritise the interests of an economically significant but politically marginalised constituency over the lobbying power of well-resourced platform companies.

Labour law exists fundamentally because labour markets suffer from structural power asymmetries. Workers typically need employment more urgently than any particular employer needs any particular worker. This imbalance enables exploitation absent legal constraints. Platform work amplifies these dynamics through network effects concentrating market power in dominant platforms, algorithmic opacity obscuring the determinants of income and discipline, and legal atomisation preventing collective action. Effective regulation must directly address these power imbalances not merely by providing social security benefits, important as these are, but by fundamentally restructuring the platform–worker relationship to incorporate meaningful worker voice and to limit the unilateral exercise of platform power.

The path forward requires both legislative courage to challenge entrenched interests and institutional imagination to develop solutions fitted to genuinely novel problems. The

[32]NITI Aayog, supra note 1, at 4.

technical capacity to design effective schemes and regulatory mechanisms exists; what India requires is political will. The consequences of inaction, the perpetuation of exploitation masked as entrepreneurship, the denial of dignity and security to millions of workers whose labour enables platform profitability are too serious to accept. India must act, for the time to act is now.

SATIRE ON TRIAL: RETHINKING CONSTITUTIONAL LIMITS OF POLITICAL COMEDY UNDER ARTICLE 19(1)(A)

-Sooraj Kalarikkal[1]

ABSTRACT

Political satire has long operated as a significant medium of dissent, enabling citizens to critique authority through humour, exaggeration, and ridicule. In contemporary India, however, the rise of political comedy has increasingly intersected with legal restrictions in the domains of contempt of court, defamation, and public order. This paper examines the constitutional limits imposed on satire under Article 19(1)(a) of the Constitution, with specific reference to the evolving judicial approach towards speech that challenges institutional authority.

Anchored in the controversy surrounding Kunal Kamra v. Union of India, the paper argues that the current legal framework governing restrictions on speech suffers from doctrinal vagueness and inconsistent application. The absence of a clear judicial standard distinguishing permissible satire from punishable expression has led to a chilling effect on comedians and political commentators. By analysing relevant case law and statutory provisions, the paper demonstrates how overbroad interpretations of contempt and defamation undermine the constitutional commitment to free expression.

The paper concludes by proposing a more narrowly tailored approach to restrictions under Article 19(2), advocating for the recognition of satire as core political speech deserving heightened protection. It suggests the adoption of a stricter threshold based on demonstrable harm rather than subjective offence, thereby ensuring a balance between institutional integrity and democratic accountability.

Keywords: *Political Satire, Freedom of Speech, Contempt of Court, Chilling Effect, Article 19(1)(a).*

1. INTRODUCTION

Political satire enables citizens to critique authority through humour, exaggeration, and irony. However, it increasingly conflicts with restrictions under Article 19(2). The use of such

[1] BBA LL.B. (Hons.), 7th Semester, Government Law College, Thrissur

restrictions raises a critical constitutional concern: whether the law is disproportionately constraining a form of speech that lies at the heart of democratic dissent.

It contends that satire must be recognised as core political speech deserving heightened protection, and that existing restrictions must be narrowly tailored to prevent a chilling effect on democratic discourse.

2. NATURE OF SATIRE AS PROTECTED SPEECH

Political satire occupies a distinct and constitutionally significant position within the framework of free speech. Satire uses exaggeration and irony to critique public institutions. Its value lies in facilitating democratic accountability.

From a constitutional perspective, satire must be located within the core of political speech protected under Article 19(1)(a). The Indian Supreme Court has consistently recognised that speech concerning public affairs and governance warrants the highest degree of protection, given its direct nexus with democratic participation. This position finds further support in *R. Rajagopal v. State of Tamil Nadu*, where the Supreme Court recognised the vital role of the press in disseminating information on public officials and matters of public interest, thereby reinforcing the constitutional value of uninhibited public discourse.[2] In *Shreya Singhal v. Union of India*, the Court underscored that restrictions on speech must be narrowly tailored and cannot be justified on the basis of mere annoyance or inconvenience.[3] This reasoning becomes relevant in the context of satire, where the very nature of expression is intended to provoke, discomfort, and challenge prevailing narratives.

As observed in *S. Rangarajan v. P. Jagjivan Ram*, freedom of expression cannot be suppressed unless the situation created by allowing the freedom is of such a nature that it would lead to a clear and present danger.[4] This threshold is crucial in assessing the legality of satirical content, which may offend but does not necessarily incite harm.

Satire enables dissenting voices to critique dominant power structures. Therefore, recognising satire as a form of core political speech is not merely a doctrinal necessity but a constitutional imperative. It ensures that the marketplace of ideas remains robust and that dissent, even when expressed through humour, is not rendered vulnerable to arbitrary restriction.

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[2] R. Rajagopal v. State of Tamil Nadu, (1994) 6 SCC 632.
[3] Shreya Singhal v. Union of India, (2015) 5 SCC 1.
[4] S. Rangarajan v. P. Jagjivan Ram, (1989) 2 SCC 574.

3. LEGAL FRAMEWORK RESTRICTING SATIRE

Despite the constitutional protection afforded to free speech under Article 19(1)(a), political satire in India operates within a restrictive legal framework shaped by contempt law, defamation, and public order considerations. These restrictions, though ostensibly justified under Article 19(2), are often applied in a manner that disproportionately burdens satirical expression due to their inherent vagueness and broad interpretive scope.

A. Contempt of Court: The Problem of "Scandalising the Court"

Contempt law, particularly criminal contempt, significantly constrains satirical speech directed at the judiciary. Under Section 2(c) of the Contempt of Courts Act, 1971, criminal contempt includes any publication that "scandalises or tends to scandalise" the authority of the court.[5] This formulation is inherently indeterminate, lacking a clear threshold for what constitutes "scandalising."

In *E.M.S. Namboodiripad v. T.N. Nambiar*, the Supreme Court upheld the use of contempt powers against statements critical of the judiciary, emphasising the need to preserve public confidence in judicial institutions.[6] Recent decisions such as *In Re: Prashant Bhushan* further illustrate the expansive interpretation of contempt, often without requiring demonstrable harm.[7] When applied to satire, this creates a chilling effect, as comedians may refrain from commenting on judicial functioning due to fear of punitive consequences.

Thus, the doctrine of "scandalising the court" operates as a disproportionately restrictive tool, failing to adequately distinguish between malicious attacks and legitimate satirical criticism.

B. Defamation: Reputation vs. Democratic Critique

Defamation law, both civil and criminal, further constrains satirical expression. Under Sections 499 and 500 of the Indian Penal Code, speech that harms the reputation of an individual may attract criminal liability, subject to certain exceptions.[8] While these provisions recognise defences such as truth and public good, their application to satire remains problematic.

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[5] Contempt of Courts Act, 1971, § 2(c).
[6] E.M.S. Namboodiripad v. T.N. Nambiar, (1970) 2 SCC 325.
[7] In Re: Prashant Bhushan, (2021) 1 SCC 745.
[8] Indian Penal Code, 1860, §§ 499–500.

The intersection of defamation law and satire is further complicated by the absence of a clear standard for distinguishing opinion from assertion. Satirical content targeting political actors may be interpreted as defamatory despite its evident intent to critique rather than to convey verifiable factual assertions.

C. Public Order and Vague Restrictions

Restrictions on speech in the interest of public order represent another avenue through which satire may be curtailed. Article 19(2) permits reasonable restrictions on this ground; however, judicial interpretation has emphasised the need for a proximate and direct nexus between the speech and the anticipated disorder.

In *Superintendent, Central Prison v. Ram Manohar Lohia*, the Supreme Court held that the restriction must have a close and proximate connection with public disorder, rather than a remote or speculative link.[9] Similarly, in *Shreya Singhal v. Union of India*, the Court invalidated Section 66A of the Information Technology Act on the ground of vagueness, reiterating that speech cannot be restricted merely because it is offensive or inconvenient.[10]

Satirical performances and online content have, in several instances, attracted police action on the apprehension of disturbance, even in the absence of any tangible threat. This reflects a broader tendency to prioritise perceived sensitivity over constitutional freedoms.

4. CASE ANALYSIS – *Kunal Kamra v. Union of India*

The controversy surrounding *Kunal Kamra v. Union of India* provides a contemporary lens through which the constitutional tensions between satire and legal restriction can be examined. The case arose from a series of tweets by stand-up comedian *Kunal Kamra,* wherein he criticised the functioning of the Supreme Court through satirical commentary. These remarks led to the initiation of contempt proceedings, raising significant questions regarding the permissible limits of criticism directed at judicial institutions.

At the heart of the issue lies the classification of Kamra's statements: whether they constituted legitimate satirical critique protected under Article 19(1)(a), or whether they crossed the threshold into criminal contempt by "scandalising the court." The absence of a clearly articulated judicial standard for making this determination exposes a fundamental doctrinal gap.

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[9] Superintendent, Central Prison v. Ram Manohar Lohia, AIR 1960 SC 633.
[10] Supra note 2

However, the invocation of contempt jurisdiction suggests a lower threshold one that prioritises the preservation of institutional authority over the protection of dissent. This approach is problematic for two reasons. First, it conflates criticism with contempt, thereby expanding the scope of restriction beyond what is constitutionally permissible. Second, it fails to incorporate the "clear and present danger" or proximate harm standard articulated in earlier jurisprudence such as *S. Rangarajan v. P. Jagjivan Ram*.[11]

A critical examination reveals that the standard applied in cases of contempt remains largely subjective. The determination of what "tends to scandalise" the court is often influenced by the perceived tone of the expression rather than its actual impact. This is concerning for satire, where irreverence is inherent to the form. By penalising such expression, the law risks creating a chilling effect that discourages not only comedians but also ordinary citizens from engaging in critical discourse about the judiciary.

The initiation of contempt proceedings itself reflects the asymmetry between State power and individual expression, reinforcing the chilling effect.

In this light, the Kamra case illustrates the urgent need for a more precise and narrowly tailored approach to contempt law one that distinguishes between genuine threats to the administration of justice and expressions of satirical dissent. Without such a distinction, the continued application of contempt jurisdiction risks undermining the very constitutional values it seeks to protect.

5. THE CHILLING EFFECT AND DOCTRINAL DEFICIENCIES

The cumulative impact of contempt law, defamation, and public order restrictions on satirical speech manifests most clearly in the form of a chilling effect. In the Indian context, the chilling effect is pronounced due to the lack of doctrinal clarity in the application of Article 19(2). While the Constitution permits reasonable restrictions, the absence of precise thresholds for determining what constitutes "reasonable" has led to inconsistent judicial outcomes. This uncertainty compels speakers to err on the side of caution, resulting in self-censorship. The Supreme Court in *Anuradha Bhasin v. Union of India* acknowledged that restrictions on fundamental rights, those affecting expression, must be scrutinised for their potential to create a chilling effect, thereby recognising the constitutional harm caused by indirect suppression of speech.[12]

[11] Supra note 3
[12] Anuradha Bhasin v. Union of India, (2020) 3 SCC 637.

A key doctrinal deficiency lies in the failure to distinguish between offence and harm. Constitutional jurisprudence has repeatedly emphasised that speech cannot be restricted merely because it is offensive or disagreeable. However, in practice, this distinction is often blurred. Satirical expression, which frequently challenges sensibilities, is treated as inherently suspect despite lacking any tangible impact on public order or institutional functioning.

The lack of a uniform judicial test compounds these issues. Unlike jurisdictions that have developed clear standards for protecting parody and satire, Indian courts have not articulated a consistent framework. This doctrinal vacuum leaves excessive discretion in the hands of authorities, increasing the likelihood of arbitrary enforcement.

Transition to final section

The foregoing analysis demonstrates that the current legal framework not only inadequately protects satire but actively discourages it. To address these concerns, it is necessary to re-evaluate the scope and application of restrictions under Article 19(2) and to develop principled safeguards that preserve the constitutional value of dissent.

6. TOWARDS A CONSTITUTIONALLY SOUND FRAMEWORK

The analysis reveals the need to recalibrate the legal framework governing restrictions on satirical speech in India. While Article 19(2) permits reasonable restrictions, the current application of contempt, defamation, and public order doctrines reveals a pattern of overbreadth and inconsistency. A constitutionally sound approach must therefore prioritise doctrinal clarity, proportionality, and the protection of dissent as a democratic necessity.

A. Recognising Satire as Core Political Speech

A foundational step lies in the explicit judicial recognition of satire as a form of core political speech. Given its role in critiquing public institutions and facilitating democratic accountability, satire should be accorded a higher threshold of protection. This would align with the Supreme Court's broader free speech jurisprudence, which places political expression at the apex of constitutional protection.

Such recognition would ensure that restrictions on satire are subjected to stricter scrutiny, thereby preventing the casual invocation of legal provisions to suppress dissenting voices.

B. Reforming Contempt Jurisdiction

The doctrine of "scandalising the court" requires urgent reconsideration. Courts must adopt a narrow and harm-based standard, wherein contempt is invoked only when there is a demonstrable and proximate threat to the administration of justice.

Mere criticism, ridicule, or even harsh commentary in satirical form should not attract contempt liability unless it:

- Obstructs judicial proceedings, or
- Undermines the administration of justice in a tangible manner

This aligns with constitutional free speech principles.

C. Recalibrating Defamation Standards

In the context of satire, defamation law must evolve to distinguish clearly between factual assertions and expressive opinion. Courts should recognise that satirical content, by its very nature, does not purport to state literal facts and must therefore be evaluated differently.

A heightened threshold should be adopted for public figures, requiring proof of:

- Intentional falsehood, and
- Actual harm to reputation

This would prevent the misuse of defamation as a tool to silence political critique while preserving the legitimate interest in protecting individual dignity.

D. Strengthening the Proximity Test in Public Order Restrictions

The application of public order restrictions must adhere strictly to the requirement of a proximate and direct nexus between the speech and the anticipated harm. Authorities should not be permitted to curtail satirical expression based on speculative or remote apprehensions of disorder.

This necessitates a shift from a precautionary approach to a rights-based approach, where the burden lies on the State to demonstrate a clear and immediate threat before restricting speech.

E. Developing a Clear Judicial Test for Satire

Perhaps the most critical reform lies in the articulation of a uniform judicial test for evaluating satirical expression. Such a test could include:

- **Contextual Interpretation**
  Whether the expression is recognisably satirical in tone and intent
- **Intent of the Speaker**
  Whether the purpose is critique rather than incitement
- **Harm Assessment**
  Whether the expression creates a real and proximate threat to a protected interest under Article 19(2)
- **Proportionality**
  Whether the restriction imposed is the least restrictive means available

The adoption of such a framework would significantly reduce arbitrariness and provide much-needed clarity to both courts and speakers.

7. CONCLUSION

The analysis of legal restrictions and their application in cases such as *Kunal Kamra v. Union of India* reveals a troubling pattern of overreach, where vague doctrines and inconsistent standards have led to the suppression of legitimate dissent. The resulting chilling effect not only constrains comedians and commentators but also impoverishes public discourse.

A reorientation of the legal framework is therefore imperative. By recognising satire as core political speech, narrowing the scope of contempt and defamation, and developing clear judicial standards, the law can strike a more appropriate balance between institutional integrity and individual freedom.

Ultimately, the strength of a democracy lies not in its ability to silence criticism, but in its capacity to withstand it. Protecting satire is not merely about humour, it is about preserving the constitutional guarantee of dissent.

THE COUNTER-MAJORITARIAN DILEMMA IN INDIA: EVALUATING ELECTORAL ACCOUNTABILITY BEYOND THE COLLEGIUM USING AMERICAN STATE COURT MODELS

-Sohom Nandi[1] *& Soumika Aich Roy*[2]

ABSTRACT

Unlike the legislative and executive branches, the higher judiciary remains the only branch of the government that excludes public participation in appointments. This paper evaluates the democratic deficit prevalent in the collegium system for appointing judges to the country's constitutional courts. This democratic deficit can be interlinked to Alexander Bickel's concept of "counter-majoritarian dilemma", which questions the validity of unelected and unaccountable judges in a democracy. Consequently, the authors aim to explore the possibility of incorporating electoral accountability in higher judicial appointments in India. To carry out this study, the authors have undertaken a comparative analysis of the judicial election models adopted by American states for appointing judges to the higher judiciary and other subordinate courts. The paper's findings indicate that although adopting judicial elections to appoint judges to the Indian higher judiciary solves the "counter-majoritarian difficulty" and the democratic deficit highlighted by the authors, the challenges outweigh the virtues. The elective higher judiciary has the potential to incorporate democratic legitimacy and address the problems of opacity, inadequate social representation, and accountability introduced by the collegium system of appointment. However, in the Indian context, the authors argue that judicial elections will compromise judicial independence by politicising the judiciary and also violate the principle of natural justice. Additionally, judicial elections exhibit the "majoritarian difficulty", in which judges may give greater weight to public sentiment than to protecting minority rights, which is very difficult to justify in a country devoted to constitutionalism. However, the authors state that the collegium system of higher judicial appointments is far from perfect and involves no indirect public participation or accountability. Consequently, the authors have recommended that, instead of incorporating direct public participation and accountability through judicial elections, an improved version of the National Judicial Appointments Commission (NJAC) may be implemented, wherein

[1] Junior Research Fellow, The West Bengal National University of Juridical Sciences, Kolkata
[2] Assistant Professor of Law, Sister Nivedita University, Kolkata

NJAC could act as a recommendatory authority, with the elected executive finalising the judicial appointments to balance both judicial independence and democratic accountability.

Keywords: *Counter-majoritarian, judicial elections, democratic deficit, judicial independence, accountability*

1. INTRODUCTION

"The judiciary is a non-elective institution, which has an elitist approach with little or no accountability."[3]

- *Justice P.N. Bhagwati*

Since independence, the people of India have enjoyed democracy to the fullest. The Indian Parliament, of which the Lok Sabha is the most important and largest decision-making body in the country, is composed entirely of members elected directly by the citizens through Universal Adult Franchise.[4] This is the organ that, by majority vote, decides who will be the leader of the Government of India (GOI), what the Prime Minister's (PM) cabinet will look like for the next five years, and, ultimately, who will comprise the executive. The same democratic mechanism is also followed at the state level, where citizens elect members of the Vidhan Sabha to determine the state's Chief Minister and other members of the executive. Among the differences between the structure of the Judiciary and those of the other two organs, there is one more exceptional feature in the constitution and functioning of the Judiciary in India. While the representatives of the legislature and executive are elected, and their reappointment rests with the public, the appointment of judges of the High Courts (HC) and the Supreme Court (SC) in India involve no role whatsoever for the general public, indicating a democratic deficit. Further, there is no provision for the reappointment of judges in these constitutional courts, as they have a fixed retirement age.[5] Also, judges of the higher judiciary in India can be removed only through a stringent impeachment procedure.[6]

At present, the collegium system decides on the appointments of judges of the SC and HCs in India. While in most other important appointments in India, including the appointment

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[3] S.P. Gupta v. Union of India, AIR 1982 SC 149.
[4] INDIA CONST. art. 326.
[5] Gauri Kashyap, Framers of the Constitution on Retirement Age of SC Judges, SUPREME COURT OBSERVER (June 26, 2023), https://www.scobserver.in/journal/framers-of-the-constitution-on-retirement-age-of-sc-judges/.
[6] Dr. Arvind P. Bhanu and Kavya Tyagi, Judging the Judges: Reimagining India's Judicial Impeachment Process After the Delhi HC Corruption Scandal, JURIST (May 4, 2025), https://www.jurist.org/commentary/2025/05/judging-the-judges-reimagining-indias-judicial-impeachment-process-after-the-delhi-hc-corruption-scandal/.

of the President, which is by indirect election through electoral rolls, the appointment of judges completely excludes the general public of the country. Critics have argued that the collegium system has numerous drawbacks, including its opaque procedures, favouritism, and the absence of objective assessment criteria.[7] However, while briefly discussing the core vices of the collegium system in India, the authors have primarily focused on the democratic deficit in the process of judicial appointments.

This democratic deficit in judicial appointments draws attention to Alexander Bickel's concept of "counter-majoritarian difficulty", arguing that the power of judicial review exercised by the higher judiciary to declare laws and executive actions void goes against the will of the majority and is thereby "counter-majoritarian".[8] He argued that the "difficulty" emanates when certain unelected and unaccountable judges strike down laws passed by the elected representatives of the general public.[9] Consequently, it is very difficult to justify vesting such power in a non-democratic, unelected body that frustrates majority rule. It could be viewed that he highlighted the need for electoral accountability in the judiciary, which judges essentially lack. Quite interestingly, although the federal SC judges are appointed by the president with the Senate's approval, some states in the USA, including Texas, California, and Washington, have incorporated electoral accountability by adopting judicial elections as a mechanism for appointing judges to the SC and other appellate and trial courts, thereby mitigating the "difficulty" of "counter-majoritarianism".[10] The authors hypothesise that, although the adoption of elections to appoint judges in the Indian higher judiciary seems to provide a solution to the counter-majoritarian difficulty as previously stated, the constitutional and other sociopolitical challenges make it prima facie unfeasible in the Indian context. However, to test such a hypothesis and arrive at a reasoned conclusion, the authors aim to study the counter-majoritarian dilemma in India by evaluating the scope of introducing electoral accountability in judicial appointments, drawing on a comparative study of the USA's state courts, specifically the state SCs.

The authors initially discuss the democratic deficit in the process of higher judicial appointments in India. Subsequently, the paper focuses on the different types of judicial elections adopted by the majority of American states. Then, the authors critically analyse the

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[7] Pramod Ranjan & Mona Purohit, Appointed Judges through the Collegium: Risk and Challenges, 5 INT'L J.L. MGMT. & HUMAN. 876 (2022).
[8] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16-23 (Yale University Press 1986).
[9] Id. at 16-23.
[10] Steven P. Croley, The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law, 62 U.CHI.L.REV. 689 (1995).

virtues and vices of an elective higher judiciary, and conclude on the possibility of incorporating electoral accountability in India.

2. THE INDIAN STATUS QUO: THE COLLEGIUM AND DEMOCRATIC DEFICIT IN JUDICIAL APPOINTMENTS

2.1. The Original Constitutional Vision

The constitutional text governing the judicial appointments to the constitutional courts in India, as provided in Articles 124(2) and 217(1), originally intended to provide a system of "checks and balances".[11] Even during the Constitutional Assembly Debates, the framers extensively discussed this particular issue. Dr. B.R. Ambedkar stated that it is a risky affair to leave judicial appointments in the hands of the President without any checks.[12] Similarly, granting the CJI veto power over judicial appointments in the higher judiciary, a power not even granted to the democratically elected president or the government, poses the same amount of risk.[13] As a result, the middle path was ultimately chosen by the Constituent Assembly, under which the president must "consult" the CJI before making judicial appointments to the higher judiciary, and this was reflected in the constitutional text in Articles 124(2) and 217(1).[14]

2.2. The Collegium and the Failed NJAC Attempt

Despite the constitutional vision of the framers, who envisaged incorporating a system of "checks and balances" in relation to higher judiciary appointments, judges of the constitutional courts in India are currently appointed through the collegium system, consisting of the CJI and 4 other senior-most judges of the SC.[15] Its roots can be traced to various historical judicial pronouncements in Indian Constitutional Law jurisprudence. In the Second Judges Case[16], the Hon'ble Apex Court rejected the Court's decision in the First Judges case by mentioning that the word "consultation" must be interpreted to mean "concurrence", as a result of which the CJI's opinion on the appointment of judges is binding. However, such an opinion must not be the CJI's individual opinion but the collective opinion of the CJI and two other

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[11] Shivkrit Rai & Nipun Arora, Judicial Appointments in India — A Critical Analysis, SCC TIMES (May 23, 2017), https://www.scconline.com/blog/post/2017/05/23/judicial-appointments-in-india-a-critical-analysis/.
[12] M. P. Singh, Securing the Independence of the Judiciary - The Indian Experience, 10 IND. INT'L & COMP. L. REV. 245 (2000).
[13] Id. at 264.
[14] Id.
[15] Aparna Chandra, William Hubbard & Sital Kalantry, From Executive Appointment to the Collegium System: The Impact on Diversity in the Indian Supreme Court, 51 VERFASSUNG UND RECHT IN ÜBERSEE / LAW AND POLITICS IN AFRICA, ASIA AND LATIN AMERICA 273 (2018).
[16] Supreme Court Advocates on Record Association v. Union of India, (1993) 4 SCC 441.

senior-most judges in the Apex Court. Subsequently, the SC, in the third judges case[17], widened the ambit of the collegium system for the appointment of judges in the constitutional courts to include four other senior-most judges of the Apex Court, in addition to the CJI. The 99th Constitutional Amendment Act in 2014 attempted to replace the country's collegium system of judicial appointment with a body called the NJAC, established under the NJAC Act, 2014.[18] However, the NJAC Act, 2014, was held unconstitutional by the Apex Court in the Fourth Judges case for violating the basic structure, including the fundamental principles of separation of powers and judicial independence.[19] As the SC held the NJAC to be invalid, the collegium system, which had existed before that, became operative once again.

2.3. Fundamental Vices of the Collegium

Eminent jurists, legal scholars, and even members of the judiciary have criticised the country's collegium system of judicial appointments, including calling it a "deeply flawed system".[20] One of the most widely discussed criticisms of the collegium system is its lack of transparency and objectivity in judicial appointments.[21] Similarly, allegations regarding nepotism and favouritism have also been highlighted in judicial appointments in the higher judiciary.[22] Furthermore, scholars have highlighted that judicial appointments through the collegium breach the principle of "checks and balances".[23] India follows the principle of "checks and balances" in the functioning of the three organs of government to prevent any organ from exercising unrestricted authority. However, the collegium system grants excessive authority to the judiciary in higher judicial appointments and involves no executive control, thereby deviating from the original constitutional vision of the country's framers. Official data also portrays the existence of a "diversity deficit" in the constitutional courts, as there is

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[17] Special Reference 1 of 1998, 1998 (7) SCC 739.
[18] Gautam Bhatia, The Primacy of Judges, SSRN (Mar. 8, 2016), https://papers.ssrn.com/abstract=2744838.
[19] Id.
[20] TNN, Collegium System Flawed, Says Senior Advocate Harish Salve, THE TIMES OF INDIA, Mar. 22, 2025, https://timesofindia.indiatimes.com/india/collegium-system-flawed-says-senior-advocate-harish-salve/articleshow/119320994.cms.
[21] Arghya Sengupta, Judicial Independence and the Appointment of Judges to the Higher Judiciary in India: A Conceptual Enquiry, 5 INDIAN J. CONST. L. 99 (2011-2012).
[22] Srimathi Venkatachari, Understanding the Role of Nepotism in India's Judiciary: A Case for Legacy and Competence, THE TIMES OF INDIA, Sept. 28, 2025, https://timesofindia.indiatimes.com/city/chennai/understanding-the-role-of-nepotism-in-indias-judiciary-a-case-for-legacy-and-competence/articleshow/124197988.cms.
[23] Vakeel and Dr. Harvinder Barak, Judicial Appointments and the Role of the Collegium System: A Critical Analysis, 7 INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION 92 (2025).

inadequate representation of marginalised communities, including Scheduled Castes, Scheduled Tribes, women, and religious minorities.[24]

2.4. The Democratic Deficit and Counter-Majoritarian Reality in Judicial Appointments

The Indian legislature, by enacting the NJAC Act, 2014, attempted to mitigate the democratic deficit in higher judiciary appointments by introducing indirect democratic representation. This was done by including an elected executive member (the Union Minister of Law and Justice) in the NJAC's composition, and by including the PM and the opposition leader in a committee responsible for nominating "eminent persons".[25] The NJAC framework sought to incorporate indirect public participation in the appointment of judges to constitutional courts through elected executive members. However, this attempt failed miserably, as the NJAC Act, 2014, was declared unconstitutional by the Hon'ble Apex Court owing to excessive executive interference in higher judiciary appointments, thereby compromising the independence of the judiciary.[26] Consequently, the NJAC Act, 2014, passed by the legislature, which included elected representatives of the general public, was struck down by unelected, unaccountable judges, highlighting the existence of a "counter-majoritarian difficulty" in which the will of the majority was indirectly compromised. Additionally, this democratic deficit and lack of public accountability exist not only at the appointment stage, but also at the removal stage. Unlike the legislature and executive members, who face periodic elections for reappointment, judges in the higher judiciary serve until the fixed retirement age.[27] This was an intentional choice by the constitutional framers to provide judges with security of tenure and ensure maximum judicial independence. Furthermore, the lack of public accountability and democratic deficit in the removal of higher judiciary justices is supplemented by the lack of judicial accountability, as the impeachment mechanism for removing higher judiciary judges is a very stringent procedure, and the same is evidenced by the fact that no judge has been impeached to date in the country.[28] Consequently, by striking down the law aimed at

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[24] Aiman J. Chishti, Only 3% High Court Judges Appointed Since 2018 Belong To SC Category, 1.5% To ST & 5.3% To Minority; Parliamentary Committee Calls It 'Diversity Deficit,' LIVELAW (Aug. 9, 2023), https://www.livelaw.in/news-updates/parliamentary-standing-committee-diversity-deficit-high-court-judges-appointed-2018-sc-category-st-minority-234805.

[25] Advay Vora, Why Did the SC Strike down the NJAC Act in 2015?, SUPREME COURT OBSERVER (Apr. 4, 2025), https://www.scobserver.in/journal/why-did-the-sc-strike-down-the-njac-act-in-2015/.

[26] Dr. Anurag Deep and Shambhavi Mishra, Judicial Appointments in India and The NJAC Judgement: Formal Victory or Real Defeat, 3 JAMIA LAW JOURNAL 49 (2018).

[27] Kashyap, supra note 3.

[28] Naveen Talawar, Removal of Judges of Higher Judiciary in India: A Difficult Process and a History of Unsuccessful Attempts, (Feb. 2, 2022), https://papers.ssrn.com/abstract=5121323.

introducing indirect democratic representation in judicial appointments and removing public accountability from removals, there is a complete democratic deficit.

3. THE AMERICAN STATE COURTS: MODELS OF JUDICIAL ELECTIONS

3.1. Distinction Between Federal and State Courts in the USA

In the USA, the judicial framework includes federal and state courts, and both operate simultaneously and independently. The Constitution of the USA provides for the establishment of federal Courts, which include a four-tier court structure consisting of magistrate judges, district and circuit courts, and, eventually, the federal SC as the court of last resort.[29] The appointment of federal SC justices involves both legislative and executive involvement, in which the President nominates an eligible individual to the office of SC justice, and the Senate must confirm the nominee.[30] The federal Courts are primarily responsible for resolving cases involving the US Constitution and federal laws. On the contrary, each state of the USA has a judicial hierarchy that includes Courts of First Instance, Appellate Courts, and its own SC. State courts are tasked with resolving cases under state law and the State Constitution.[31] One prominent feature of the judicial framework in the USA is that the federal SC is not entitled to entertain appeals from the state SCs, unless a federal component is involved.[32] This essentially means that, in cases without a federal component, the verdict of the respective state SCs is final in their jurisdictions. SC judges in the 12 states in the USA, including Delaware, Virginia, and New York, are appointed through the same process used to appoint federal SC justices.[33] On the contrary, quite interestingly, the remaining 38 states employ elections to select or reappoint their state SC judges, thereby providing democratic representation in the judiciary.[34]

3.2. Tracing The Roots of Judicial Elections in the USA

Historically, every state in the USA employed the non-democratic process of executive nominations, followed by legislative confirmation, to appoint its state SC judges.[35] Initially, Thomas Jefferson raised concerns about the unelected judicial structure in the USA and suggested that justices should be elected to their positions.[36] Scholars and jurists argued against

[29] Rangin Pallav Tripathy, A Critical Analysis of Appointment of Federal Supreme Court Judges in United States of America, 5 CHRIST U. L.J. 23 (2016).
[30] Id. at 4.
[31] Tarr, G. Alan, Judicial federalism in the United States: structure, jurisdiction and operation, 2 REVISTA DE INVESTIGAÇÕES CONSTITUCIONAIS 7 (2015).
[32] Rangin Pallav, supra note 27, at 24.
[33] Ric Simmons, ChooseYourJudges.org: Treating Elected Judges as Politicians, 45 AKRON L. REV. 1 (2012).
[34] Id. at 6.
[35] Id. at 7.
[36] Id. at 6.

relying on the legislative and executive branches of government for judicial appointments and advocated for incorporating democratic legitimacy into the judicial appointment process.[37] Subsequently, during Jackson's tenure as President of the USA, a culture of electing all public officials began to emerge, and states began to include judicial elections in their constitutions.[38] Georgia was the first state to shift from merit selection to judicial elections, and subsequently, other states followed suit, incorporating electoral accountability.[39] Additionally, although not evidenced, scholars have highlighted a few other reasons that might have induced the American states to adopt judicial elections, including outrage at judicial decisions backing landlords and creditors, and potential corruption in the judiciary.[40]

3.3. Types of Judicial Elections Adopted by the American States

The American states have adopted distinct methods for selecting their state court judges, including those of their highest court. This non-uniformity could be attributed to the respective states' philosophies and the priority they give to judicial independence over accountability or vice versa. The American states have adopted among many three judicial electoral models, which may even involve a combination of two or more.

3.3.1. Partisan Elections

Partisan elections emerged during the Jacksonian period, when reformers advocated greater judicial accountability and viewed it as a democratic-republican principle that allowed citizens to not only select public officials but also to hold them accountable for their performance during service.[41] Partisan elections resemble other elections, in which judicial candidates must be affiliated with a political party to contest.[42] That party affiliation is explicitly mentioned alongside their name on the respective ballots. Judicial candidates must be nominated by a political party and run for office in the elections against a candidate nominated by another party. Once a judicial candidate wins an election, is appointed to the bench, and serves the full term, they must undergo the same process to run for another term. Consequently, partisan elections may politicise the judiciary, thereby compromising judicial independence, but they may also ensure peak judicial accountability through public

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[37] Id. at 7.
[38] Steven, supra note 8, at 716.
[39] Ric, supra note 31, at 7.
[40] Steven, supra note 8, at 717.
[41] Charles Gardner Geyh, The Endless Judicial Selection Debate and Why it Matters for Judicial Independence, 21 THE GEORGETOWN JOURNAL OF LEGAL ETHICS 1259 (2008).
[42] Ric, supra note 31, at 6.

participation.[43] Party affiliation of judicial candidates suggests their philosophy and approaches to the law, helping voters in the respective states form an idea of the prospective rulings and verdicts of such candidates. For instance, Texas has adopted partisan elections to appoint justices of the state SC and other lower courts.[44] A total of 8 American states use partisan elections at some point to select their SC justices. For instance, Illinois and Pennsylvania employ partisan elections at the selection stage, but resort to retention elections at the reappointment stage.[45]

3.3.2. Non-Partisan Elections

In this type of judicial election, judicial candidates run without any political party affiliation, so the ballot doesn't mention it. Although the elections appear to be politically neutral, political parties and other interest groups may still provide funds and assist candidates' campaigning.[46] However, the absence of political party affiliation allows voters to reflect on candidates' legal approach, past judicial decisions, and experience when casting their vote, rather than on the political party to which the candidate is affiliated, thereby depoliticising the judiciary. Proponents of this kind of election assume that judges cannot be selected in the same manner as other public officials, as they are different.[47] The judiciary must be guided solely by law, and therefore, the politicisation of the judiciary must be avoided to the greatest extent possible. For instance, Washington is one of the American states that has employed non-partisan elections to select justices for its SC and other appellate courts. A total of 14 American states use a non-partisan judicial election model to appoint their SC justices.[48]

3.3.3. Merit Selection and Retention Elections

Here, the initial appointment of the judge is done by the executive of the respective state, and such a judge serves in the office for a definite period of time. Elections take place at the time of a judge's reappointment, when the citizens of the state are allowed to decide whether to retain the judge or remove them from office through a yes/no vote.[49] If a judge is retained, he/she serves another term; however, if a judge is voted out of office, another judge is appointed by the state's executive and must face retention elections at the time of reappointment.[50]

[43] Charles, supra note 39, at 1271.
[44] Steven, supra note 8, at 725.
[45] Id. at 725.
[46] Charles, supra note 39, at 1272-74.
[47] Id. at 1272.
[48] Steven, supra note 8, at 725.
[49] Ric, supra note 31, at 5-6.
[50] Id. at 6.

Therefore, retention elections technically grant veto power to the general public and involve non-competitive elections, unlike partisan and non-partisan elections. Scholars highlight that retention elections were introduced to find a balance between judicial independence (executive appointments at the selection stage) and judicial accountability (public voting at the reappointment stage).[51] For instance, Missouri uses this model of judicial elections to select its SC, trial and appellate courts' justices. 16 American states use merit selection and retention elections to select their SC justices, while 3 states (Illinois, Pennsylvania and New Mexico) employ a combination of partisan and retention elections.[52]

4. ARGUMENTS FOR JUDICIAL ELECTIONS IN INDIA

4.1.Democratic Legitimacy

In general, an affirmative argument for elections as a method of appointing judges in India's higher judiciary is to uphold the principles of "popular sovereignty" and collective "self-determination".[53] The elected representatives of the legislature and executive indulge in law-making and enforcement, the subject matter of which includes human beings. However, the same appears democratic, as the general public is entitled to directly or indirectly elect the legislative and executive representatives of the government, thereby ensuring that the principles of "popular sovereignty" and collective "self-determination" are upheld. Consequently, in a democratic setup, judges, as members of one of the organs of government, must be selected by those against whom the orders and verdicts are issued. Public participation, being a pillar of democracy, is entirely absent in the election of representatives to one of the organs of government, namely, the judiciary. Hence, judicial elections, despite significant drawbacks that will be subsequently discussed, prima facie support the claim of democratic legitimacy.

4.2. Transparency

As already noted, the prevailing collegium system for appointing judges to the country's constitutional courts is heavily criticised for being non-transparent. One of the former SC judges, Hon'ble Justice Ruma Pal, stated that higher judiciary appointment is "possibly the best kept secret of this country".[54] It is very difficult for the general public to accept an

[51] Charles, supra note 39, at 1274.
[52] Steven, supra note 8, at 725-726.
[53] David E. Pozen, The Irony of Judicial Elections, 108 COLUMBIA LAW REVIEW 265 (2008).
[54] Dhananjay Mahapatra, Collegium System: Don't Shoot the Messenger, It Will Hurt the Little Man's Faith in Judiciary, THE ECONOMIC TIMES, Sept. 12, 2016, https://economictimes.indiatimes.com/news/politics-and-

appointment process as credible and legitimate if it lacks transparency. In that regard, one of the most genuine arguments for introducing judicial elections is to ensure maximum transparency, as the general public is fully aware of the entire process. In all the electoral models previously discussed, judicial candidates most often resort to campaigning, leading to public disclosure of all information. This will give the general public a complete record of all judicial candidates, including financial information and probable conflicts of interest, so they can make an informed choice.

4.3. Increased Social Representation

As previously highlighted, there is a "diversity deficit" in the higher judiciary, leading to inadequate social representation. Scholars have also referred to the composition of various HCs as "Old Boys' Club", reflecting elitism, inadequate gender and caste representation.[55] Judicial elections can break these stereotypes by shifting away from elitism and bias toward a bench that is much broader, more democratic, and more socially representative. Judicial elections will provide an organic push to nominate individuals from backward communities, including scheduled castes, scheduled tribes, women, and religious minorities, thereby improving the current "diversity deficit" in the constitutional courts of the country. Consequently, a diverse and socially representative bench is better positioned to understand the ground realities of the country's citizens and interpret the laws accordingly, particularly in a nation like India, which consists of people from diverse communities.

4.4. Accountability

Choosing representatives of any branch of government through elections ensures the greatest level of accountability, as they are well aware that they could be voted out of office in subsequent elections. Judicial elections will have the same consequences, as the judges will be publicly accountable for their actions. Such public accountability may be argued by the proponents supporting judicial elections to fill the accountability deficit in the Indian higher judiciary. At present, there is a substantial accountability gap in the country's higher judiciary, as the prevailing impeachment mechanism is difficult to implement due to stringent requirements.[56] As a result, the judges in the higher judiciary have full security of tenure, which was a legitimate choice of the constitutional framers. While the security of tenure in the judicial

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nation/collegium-system-dont-shoot-the-messenger-it-will-hurt-the-little-mans-faith-in-judiciary/articleshow/54288239.cms?from=mdr.

[55] Prabha Sridevan, Judiciary, an Old Boys' Club, THE HINDU, Mar. 30, 2016, https://www.thehindu.com/opinion/op-ed/judiciary-an-old-boys-club/article8410065.ece.

[56] Naveen, supra note 26.

branch of government is essential, elections serve as a mechanism for periodically evaluating judicial conduct.

4.5. Mitigation of Nepotism and Favouritism

Scholars have also highlighted the existence of favouritism and nepotism in the Indian higher judiciary and described the former as "uncle judges syndrome".[57] When a practising advocate of an HC is appointed as a judge of the same HC, there could be an inherent tendency to favour his/her former colleague advocates, who practised with him/her in the same HC. In such a scenario, it is difficult to expect partial delivery of justice, ultimately impeding the justice delivery system. To curb nepotism, the SC collegium opposed recommending close relatives of judges for appointment to the country's constitutional courts.[58] Although such a practice will provide requisite opportunities to first-generation advocates, it could exclude qualified candidates, who are relatives of former SC and HC justices, from being appointed as justices in the higher judiciary. Judicial elections, on the other hand, could ensure a level playing field for outsiders to compete for judicial positions in the higher judiciary and exclude appointments that lead to favouritism.

5. CHALLENGES OF JUDICIAL ELECTIONS IN INDIA

5.1. Majoritarian Difficulty

Although judicial elections solve the issue of "counter-majoritarian difficulty", scholars have explained how judicial elections pose a challenge of "majoritarian difficulty", wherein the nature of elections motivates judges to cater to public interests and sentiments.[59] Judicial elections can influence judges through the majority opinion, thereby weakening the safeguarding of minority rights. While deviating from the principle of "counter-majoritarian difficulty", the "majoritarian difficulty" questions the validity of elected and publicly accountable judges in a framework dedicated to constitutionalism.[60] Judges' decision-making will be influenced by electoral incentives, thereby violating the principle of the rule of law. Similarly, the adoption of judicial elections in India has negative implications for the "majoritarian difficulty," as India is committed to the principle of constitutionalism, which

[57] India Today News Desk, Uncle Judge Syndrome Will Remain till Collegium System Is There: Kiren Rijiju, INDIA TODAY, Apr. 22, 2023, https://www.indiatoday.in/india/story/kiren-rijiju-on-collegium-system-uncle-judge-syndrome-2363479-2023-04-22.
[58] PTI, Close Kin of Judges for HC Judgeship: SC to Consider Idea against It, THE ECONOMIC TIMES, Dec. 30, 2024, https://economictimes.indiatimes.com/news/india/close-kin-of-judges-for-hc-judgeship-sc-to-consider-idea-against-it/articleshow/116804493.cms?from=mdr.
[59] David, supra note 51, at 279-290.
[60] Id. at 279.

includes the rule of law and the protection of minority rights. Elective higher judiciaries in India will motivate judges to favour the majority and interpret laws and provide rulings that go against religious, linguistic and other minorities to get votes, thereby going against the constitutional protection provided to such minorities. Similarly, as elected judges will be influenced by public sentiment, they will seek to satisfy voters rather than decide the case on merit. For instance, imagine a poll conducted by a popular Indian news channel, the result of which highlights that a rape accused must be given the death penalty. An elected judge deciding the concerned rape case will be motivated by the poll results to provide the death penalty even when the accused didn't legally deserve it based on the evidence provided. Consequently, the continuous attempt to please the majority to secure votes will have unimaginable social and legal consequences. This particular issue of "majoritarian difficulty" applies to all three types of judicial electoral models employed by the American states to appoint their state SC judges.

5.2. Politicisation of the Judiciary and Decreased Judicial Independence

Although this particular challenge doesn't apply to retention elections, it definitely applies to partisan elections and, indirectly, to non-partisan elections.[61] One of the major reasons behind declaring NJAC unconstitutional was its contravention of judicial independence.[62] Similarly, judicial appointments through partisan elections and non-partisan elections (where political parties provide funding) will compromise judicial independence, as judges appointed through such modes will be subjected to political pressure, totally negating their ability to be politically independent. In cases involving political party affiliation, judges will attempt to uphold their party's ideology rather than legal principles. For instance, as a part of judicial review, an enactment can be struck down if it infringes any fundamental rights under Part 3 of the Indian Constitution.[63] Hence, when such an enactment, which is alleged to be violative of Part 3 of the Constitution, appears before a 5-judge bench of the SC, out of which 3 judges are said to be affiliated to the ruling party, there is a possibility of a 3:2 judgment in favour of not declaring such enactment unconstitutional despite infringing Part 3 of the Indian Constitution. This is because the said enactment has been passed by both houses of the parliament, where the majority of the members hail from the ruling party. Therefore, judges in the apex court hailing from the ruling party will, more often than not, go against the ruling party's ideology, significantly compromising judicial independence and the nature and

[61] Ric, supra note 31, at 9.
[62] Gautam, supra note 16.
[63] INDIA CONST. art. 13, cl. 2.

objectives of judicial review. Empirical evidence reveals that judges facing partisan elections in the USA come across significant political pressure.[64] Scholars have even analysed and explained that even retention elections, which prima facie appear to be a depoliticised model of judicial elections, do not entirely remove politics from the judicial branch, as they simply shift it behind closed doors.[65]

5.3. Violation of Natural Justice

Judicial candidates appearing for elections need to raise campaign funds, which are more often than not sourced by advocates, giant companies, or political parties. Consequently, when such a judicial candidate wins the elections and secures a seat in the higher judiciary, the campaign funders might appear before a bench composed of the beneficiaries of that funding.[66] In the landmark Caperton judgement, the SC of the USA observed that a state judge who has received funds for campaigning from a company's executive cannot sit in a matter for adjudication where such an executive is a party, as it contravenes the Due Process Clause of the Fourteenth Amendment.[67] Similarly, in India, it will violate the principle of natural justice under Article 21 of the Indian Constitution, as it involves an element of personal or pecuniary bias.[68] This is even empirically evidenced in America, where more than three-fourths of its citizens believe that campaign funds affected the outcome of cases, and half of the judges agree.[69]

5.4. Judicial Backlog

Another convincing argument against elective higher judiciaries in India is the persistent judicial backlog in the country's higher judiciary.[70] The introduction of elections could further worsen the judicial backlog by diverting judges' attention from their work to campaigning and related activities.

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[64] Joanna M. Shepherd, The Influence of Retention Politics on Judges' Voting, 38 THE JOURNAL OF LEGAL STUDIES 1 (2009).
[65] G. Alan Tarr, Do Retention Elections Work, 74 MISSOURI LAW REVIEW 605 (2009).
[66] Ric, supra note 31, at 9.
[67] Ronald D. Rotunda, Judicial Disqualification in the Aftermath of Caperton v. A.T. Massey Coal Co., 60 SYRACUSE LAW REVIEW 247 (2010).
[68] Rimali Batra & Rajeev Anand, Principles of Natural Justice: Definition, Application to Administrative Proceedings and Contours of Application, SCC TIMES (Apr. 22, 2025), https://www.scconline.com/blog/post/2025/04/22/principles-of-natural-justice-application-scope-administrative-proceedings/.
[69] Ric, supra note 31, at 9.
[70] Nileena Banerjee, Justice Delayed, Prosperity Denied: An Indepth Economic Analysis of Judicial Backlogs in India, 6 GNLU JOURNAL OF LAW & ECONOMICS 64 (2023).

5.5. Administrative Deficiency

Administrative deficiencies are another compelling argument against judicial elections in India, as they must be held immediately upon a vacancy, leading to frequent elections. As a result, the election commission will be overburdened, as it is responsible for conducting parliamentary and state assembly elections in the country. Moreover, establishing a separate body to conduct and maintain judicial elections is an impractical solution to address such administrative deficiencies, as it demands enormous financial and human resources.

5.6. Unqualified Voters and Voting Dynamics

Moreover, the quantum of unqualified and uninformed voters in the country exceeds that of qualified and informed voters. As a result, a large portion of the electorate will vote in judicial elections based on non-legal factors such as party affiliation (in partisan elections), caste, and gender, rather than on judges' approach to law and their past judicial pronouncements.[71] Even in the USA, empirical evidence shows that voters rarely consider judges' quality when voting in partisan judicial elections; instead, they vote based on party affiliation.[72] In America, empirical data also show that voter turnout significantly drops in retention elections when party affiliation is not indicated.[73] It could very well be assumed that these scenarios will occur in India, where the majority of the voters are unqualified and illiterate.

Additionally, campaigning for elections to the legislative and executive branches of government focuses on vital, popular political issues that are easier to explain to unqualified voters.[74] On the contrary, it is a mammoth task to make voters understand the landmark judicial pronouncements and philosophies of the judicial candidates contesting for judicial elections. Furthermore, the voting dynamics naturally push candidates who appear in subsequent legislative and other elections to make forward-looking promises to win voters' confidence, such as increasing employment, removing corruption, or implementing social welfare schemes. However, it is absurd to imagine candidates appearing for judicial elections making prospective promises like "I will ensure that all rape convicts get the death penalty" while campaigning.

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[71] David, supra note 51, at 293-294.
[72] Claire S.H. Lim & James M. Snyder, Jr., Elections and the Quality of Public Officials: Evidence from U.S. State Courts (NAT'L BUREAU OF ECON. RESEARCH, Working Paper No. 18355, 2012).
[73] Id. at 1.
[74] Ric, supra note 31, at 9.

6. CONCLUSION AND RECOMMENDATIONS

The authors initially relied on Alexander Bickel's theory of "counter-majoritarian difficulty" to analyse the possibility of judicial elections in the higher judiciary to fix the democratic deficit in judicial appointments. The counter-majoritarian difficulty questions the validity of unelected, accountable judges in a democracy, and the authors relied predominantly on this theoretical underpinning to evaluate the inclusion of electoral accountability using models from American state courts. The authors also hypothesised the prima facie unfeasibility of conducting judicial elections to select judges of the country's constitutional courts. Still, they wanted to conduct a rigorous review to arrive at a reasoned and well-documented conclusion for the readers who have always wondered why the judiciary, the only branch of the government, was kept immune from public participation. The time has come to look beyond the collegium system of the higher judiciary appointments.

However, after analysing the virtues and vices of judicial elections in India, it can be concluded that the vices outweigh the virtues by a strong margin. While judicial elections address deficits in democratic participation, transparency, diversity, anti-favouritism, and judicial accountability in higher judiciary appointments, the negative repercussions of diluted minority rights protection, politicisation, and violations of natural justice are more severe. Also, the fact that judicial elections haven't been adopted to select federal SC judges indicates the USA's primacy of judicial independence over judicial accountability. As observed, India grants primacy to judicial independence over judicial accountability, as evidenced by the prevailing collegium structure of appointments and the striking down of the NJAC Act, 2014. While preserving judicial independence is indeed essential, indirect democratic representation through limited executive interference would also ensure the country's continued adherence to the principles of "checks and balances". Security of tenure in higher judiciary appointments, coupled with indirect public participation through executive involvement, fixes the democratic deficit. Judicial accountability must also be incorporated in India, but, as the paper analyses, certainly not through judicial elections but through other means. Judges of the superior courts must be kept immune from periodic public accountability in the form of reappointment elections, but indirect public participation at the time of appointment, through executive involvement, may be adopted through an improved version of the NJAC. India could draw inspiration from the USA's "Merit Selection" framework, in which the NJAC, instead of acting as an independent appointing authority, could operate as a recommendatory authority comprising senior judges of the SC, as well as other legislative and executive representatives.

The executive could then be tasked to finalise the appointment of judges selected by such a recommendatory authority. Such a practice would ensure indirect public participation in higher judicial appointments without compromising judicial independence.