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GNLU

GNLU STUDENT LAW REVIEW

ABOUT GSLR

The GNLU Student Law Review ("GSLR") is the flagship student-run journal of the Gujarat National Law University, Gandhinagar. It is annually published in an online and open access format with student-edited and double-blind peer-reviewed process.

The Journal is open to academics, scholars, practitioners and students. The Journal's focus is primarily Indian law. The Journal encourages comparative law and international law research, but the same must be related to Indian legal developments and challenges. The Journal also promotes an interdisciplinary approach to research in law.

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EDITORIAL NOTE

The Gujarat National Law University ('GNLU') Student Law Review ('GSLR') continues its journey as a flagship, student-run, double-blind peer-reviewed journal dedicated to fostering a culture of rigorous legal scholarship. As T.S. Eliot wrote in Little Gidding, *"we shall not cease from exploration, and the end of all our exploring will be to arrive where we started and know the place for the first time"* – a sentiment that captures the spirit in which this Volume approaches even the most familiar questions of law and policy, seeking not novelty for its own sake but a deeper, renewed understanding. Since its inception in 2020, GSLR has remained steadfast in its objective of promoting academic research that meaningfully engages with pressing socio-legal concerns through doctrinal depth and interdisciplinary analysis. The preparation of the present Volume VII has been marked by the same zeal and commitment that animated its earlier editions, as the Editorial Board, contributors, and reviewers collectively sought to ensure that the pieces presented herein not only reflect contemporary debates in law and policy but also push the boundaries of legal thought and practice. In times of rapid legislative reform, judicial reinterpretations, and evolving global challenges, this Volume seeks to provide a platform for scholarly dialogue that is both intellectually stimulating and socially relevant.

With innovations in the market, the digital market is challenging the competition law's traditional approach. The Article, ***Harnessing Competition in the Platform Economy: Lessons from the EU's Digital Markets Act*,** examines the European Union's shift towards ex-ante regulation through the Digital Markets Act. By analysing the European Competition Market's jurisprudence with the Digital Market Act's gatekeeper framework, obligations, and enforcement, from the traditional approach. It evaluates whether such an intervention can preserve contestability without stifling innovation. Stringing it to the Indian Competition Market with the proposal of the Digital Competition Bill and the Digital Market Act being analysed with consideration to the global diffusion of the digital competition norms, with the emerging *"Brussels' Effect"*. At its core, the article delves into whether the law will merely respond to technological change in anticipation of it, rather than becoming an obstacle to innovation itself.

In the Article titled ***AI in Corporate Boardrooms: Calibrating Corporate Accountability in the Age of Artificial Intelligence***, **Vibhav Rajvardhan** and **Arshia Singla** examine the evolving role of corporate boards in an age when artificial intelligence is increasingly influencing business decision-making. It argues that while AI can enhance efficiency and improve access to information, risks such as algorithmic bias, opacity, automation bias, and weakened board monitoring can intensify directors' existing fiduciary duties and liabilities. The paper carefully examines the implications of AI-driven decision-making through the lens of the statutory framework governing directors' duties under the Companies Act, 2013. A comparative study of the EU, the US, and China is also provided to explain how different countries are reshaping corporate governance norms in light of AI-driven changes.

In ***Facial Recognition Technology: Inherent Biases, Impact and Regulatory Framework***, **Jasleen Kaur Sandhu** examines the growing use of Facial Recognition Technology ("FRT") in India and its implications for privacy, equality, and civil liberties. The Article argues that FRT's risks extend beyond technical inaccuracies, as biased datasets can interact with existing inequalities in policing to affect marginalised communities disproportionately. Through examples including the Delhi Police's use of FRT during protests and its deployment in public spaces, Sandhu highlights the risks of mass surveillance and wrongful identification. The Article further examines India's regulatory framework, particularly the Digital Personal Data Protection Act, 2023, and argues that broad exemptions for State agencies leave significant gaps in protection. Drawing on Puttaswamy and the EU's data protection framework, the Author calls for a rights-oriented regime based on legality, necessity, proportionality, transparency, and independent oversight.

In ***Revisiting Obscenity: Moving beyond Community Standards Test to Actual Harm***, **Sudiksha Jha** offers a critique of the prevailing framework to decide the obscenity of digital content, in light of India's Got Latent controversy. The Article argues that the long-prevailing Community Standards Test fails in the era of rising individualism and digital content, posing risks of majoritarian imposition on minorities and excessive judicial discretion. Through an analysis of the history of obscenity laws and the evolution of courts' decision-making frameworks, the Author proposes a two-pronged test based on J.S. Mill's Harm Principle. Drawing inspiration from the Canadian Courts, the "*Harm Test*" is altered to the standards of a pluralistic Indian Society, reconciling constitutional rights with legitimate regulation of obscenity in a digital age.

Ayush Dutta and **Sunayna Sen,** in ***Initial Coin Offerings and Tokenised Securities – A Regulatory Odyssey***, address the growing intersection between decentralised financial systems and modern securities law. The Article examines how Initial Coin Offerings (ICOs) and tokenised securities present alternative avenues for capital formation while posing distinct regulatory challenges. Focusing on the Indian regulatory context, the Article examines recent developments at Gujarat International Finance Tech City and regulations issued by regulators such as SEBI, RBI, and IFSCA. The Authors advocate for regulating tokenised securities primarily at the ICO stage.

By analysing the evolution of crypto-assets using judicial tests such as the United States' Howey test, the Article distinguishes between security and non-security tokens, highlighting how digital assets can morph over their lifecycle. The Article provides a comparative analysis of global regulatory approaches, including Switzerland, the United States, the European Union, and Thailand. The proposed regime for India designates the Securities and Exchange Board of India as the primary regulator for investment-linked tokens, adopts ICDR-style prospectus disclosures, and establishes a phased implementation through regulatory measures.

In ***Beyond CSR Compliance: Examining ESG Integration and Governance Gaps in Indian Corporate Law for Addressing Climate Vulnerabilities***, **Shrivalli Patra** and **Astha Samal** examine whether India's corporate law has moved beyond CSR towards meaningful ESG governance. The Article traces the evolution of CSR and argues that its compliance-driven, spending-focused framework has done little to embed long-term environmental responsibility in corporate decision-making. It then examines India's emerging ESG framework, including SEBI's BRSR and BRSR Core, as well as the RBI's climate-risk framework. While these measures have improved ESG disclosure, the Article argues that they remain limited by weak enforcement, their focus on listed companies, and the absence of clear climate-related duties for corporate boards. Drawing on regulatory models from the EU, UK, and US, the Author proposes stronger statutory duties for directors, mandatory climate transition plans and carbon disclosures, greater external assurance, and stronger action against greenwashing. The Article ultimately argues that ESG must move beyond reporting and become a substantive part of corporate governance and accountability.

In ***Reimagining Conjugal Restitution: Section 9 of the Hindu Marriage Act in India's Privacy Era***, **Aditi** examines the constitutional validity of restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955. The Article traces the remedy from its colonial origins to its recognition under Indian family law. It examines the conflicting approaches of the courts in the cases of *T. Sareetha*, *Harvinder Kaur*, and *Saroj Rani*. It argues that *Saroj Rani's* emphasis on preserving marriage is difficult to reconcile with the constitutional protection of privacy, dignity, and individual autonomy that has developed since *Puttaswamy*. Applying the proportionality test, the Article argues that forced cohabitation is neither necessary nor an effective means of achieving reconciliation. It also highlights how the remedy can reinforce existing gender inequalities within marriage. Drawing on feminist scholarship, reform reports, and the growing use of mediation, the Author argues for the repeal of Section 9. Instead, voluntary reconciliation, irretrievable breakdown as a ground, and stronger financial safeguards for vulnerable spouses are proposed.

In ***Furnished within the State: Physical Presence, The Virtual Service Permanent Establishment and the Limits of Treaty Interpretation***, **Smeet Sanghvi** examines whether the service permanent establishment ("PE") framework under international tax treaties can accommodate cross-border services delivered without physical presence in the source State. The Article traces the architecture of the service PE clause and argues that physical presence is not incidental to the existing framework but forms its territorial foundation. It then examines Indian jurisprudence through three lines of authority: the territorial approach in E-Funds and Clifford Chance, the quantitative approach to counting qualifying days, and the substantive approach in Hyatt International. The Article further considers comparative developments, including Saudi Arabia's withdrawal of its virtual PE approach, India's significant economic presence regime, and other jurisdictions' treatment of digitally supplied services. It argues that courts cannot introduce a virtual service PE through treaty interpretation where the negotiated text does not provide for one. Instead, reform must occur through treaty renegotiation, particularly through the emerging UN framework for cross-border services. The Article concludes by identifying the costs of the present framework. It proposes reforms for treaty negotiators, tax administrators, enterprises, and courts, while advocating a shift from physical presence as a proxy towards negotiated measures of sustained economic engagement.

Revathi and **Shaurya**, in their Article titled, ***Trial in Absentia: The Balancing Dilemma,*** analyse the creation of trial in absentia pursuant to Section 356 of the Bharatiya Nagarik Suraksha Sanhita, 2023 ("BNSS") and the ensuing clash between efficient criminal justice delivery and the right to a fair trial of the accused. In this regard, they analyse the legislative move against the backdrop of Herbert Packer's Crime Control and Due Process models, juxtaposing the two conflicting models to understand the interests of the State, victims, and accused individuals. Further, they consider the procedural and constitutional challenges posed by the provision and highlight aspects of competent legal representation, including the accused's statement and procedural guarantees. Based on jurisprudence from India and International courts, the Article advocates for an improved balance between the two conflicting perspectives, particularly through a right of retrial that does not undermine the provision's objective.

In ***Lt. Samuel Kamalesan v. Union of India: The Limits of Religious Autonomy in the Indian Armed Forces***, by **Pushkar Bapatla** and **Samhita Baruah**, examines the constitutional questions arising from the dismissal of an Indian Army officer who refused to participate in a religious ritual on grounds of conscience. Analysing the interaction between Articles 25 and 33, the authors critically examine the extent to which military discipline and institutional cohesion can justify restrictions on individual fundamental rights. Through its engagement with judicial deference, the Essential Religious Practices doctrine, proportionality, and the meaning of a "lawful command," the case note raises important questions about the constitutional limits of military autonomy and the protection of religious freedom within the Armed Forces.

The successful culmination of Volume VII would not have been possible without the unwavering support of our Faculty Editors, whose guidance has been instrumental in sustaining the academic rigour of this initiative. We extend our sincere gratitude to Prof. (Dr.) S. Shanthakumar, Director, GNLU, and Prof. (Dr.) William Nunes, for their constant encouragement and institutional backing. We also acknowledge the tireless efforts of the entire Editorial Board, whose dedication, especially in navigating the rigorous editorial process, has ensured GSLR's high standards. To borrow Dickens's words from A Tale of Two Cities, ours remains, in many ways, "the best of times" and "the worst of times" for academic spaces – an era of expanding opportunity shadowed by mounting constraint. At a time when academic spaces face both new opportunities and increasing constraints, we hope this Volume serves as a meaningful platform for discourse bridging legal theory and practice. We invite our readers to engage critically with the diverse contributions and remain confident that the pieces herein will provoke reflection, debate, and further research.

Shaharyaar Shahardar
Editor-in-Chief
and
Editorial Board
GNLU Student Law Review

ARTICLE

HARNESSING COMPETITION IN THE PLATFORM ECONOMY: LESSONS FROM THE EU'S DIGITAL MARKETS ACT

Debarun Mukherjee*

Abstract

Markets today have transcended tangibility and geographic limitations, owing to the unprecedented rise of online platforms and service providers. This borderless digital economy, while fostering global integration, has simultaneously created complex challenges for traditional competition law and enforcement frameworks. Conventional mechanisms developed in the era of physical trade and quantifiable market activity are increasingly ill-equipped to address the unique dynamics of digital markets, where value is often derived from data, consumer traffic, and network effects rather than turnovers and market share. To remedy such issues, the EU enacted the Digital Markets Act ('DMA'), which attempts to restore fairness and contestability in the platform economy. This paper examines the evolution, structure, and implications of the DMA as a transformative instrument designed to harness competition in the platform economy while striking a balance between innovation and development. It first explains why traditional antitrust frameworks, rooted in price-based harms and ex-post intervention, are structurally inadequate for data-driven, behaviour-shaping digital markets. It then provides a systematic analysis of the DMA's design, its gatekeeper criteria, obligations, and enforcement model, showing how it operationalises a qualitative shift in competition regulation. The paper further contributes a balanced critique of whether ex-ante rules can genuinely enhance contestability without dampening innovation. Finally, examining India's proposed Digital Competition Bill alongside the DMA demonstrates how the EU's approach is shaping new governance paradigms beyond its borders.

Keywords*:* Digital Markets Act; Gatekeepers; Platform Economy; Competition Control; Core Platform Services; Network Effects.

* Debarun Mukherjee, Associate, Ashlar Law, LLM, National University of Juridical Sciences, Kolkata.

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1. Digital Market Evolution: How 'Big Techs' Became Institutional Actors

Technology conglomerates are omnipresent in daily life, embedded in everyday life and mediating access to communication, information, commerce, and social interaction. What was once a fragmented technological landscape has consolidated into an ecosystem dominated by a small number of firms, including Alphabet, Amazon, Apple, Meta, Microsoft, and ByteDance. These companies, often referred to as "Big Tech,"[1] have expanded far beyond their original business models to become infrastructural entities that serve as gateways to information, communication, commerce, and even social interaction.[2] In many respects, they are not simply participants in markets but define and govern them.

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[1] SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM (Public Affairs New York 2019); JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM (Oxford University Press 2019); Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183 (2016).

[2] Volker Brühl, *Big Tech, the Platform Economy and the European Digital Markets*, INTERECONOMICS (2023), https://www.intereconomics.eu/contents/year/2023/number/5/article/big-tech-the-platform-economy-and-the-european-digital-markets.html.

The dominance of these Big Tech firms in the platform economy stems from more than just scale. They orchestrate entire ecosystems of services, combining network effects[3], data accumulation, vertical integration, and behavioural design[4] to cement their market positions. For example, Alphabet's Google Search commands approximately 89.7% of the global search engine market across all devices as of early 2025,[5] indicating a near-monopolistic position in online discovery. Meanwhile, other platforms, such as Amazon, dominate online retail intermediation. Apple controls the mobile operating system and app store gateway, and Meta reaches billions of users across social networks.[6] The ability of these platforms to serve as essential intermediaries between consumers and business users has given them unprecedented, largely unrestricted power within the digital ecosystem. Their dominance allows them to dictate the terms of market access, control the flow of data, and shape the very architecture of user experience. For instance, Google's Android operating system, which powers nearly three-quarters of the world's smartphones, restricts users from easily opting for third-party applications for core services such as web search, video streaming, or navigation, thereby reinforcing its own ecosystem.[7] Before delving into the complexities of digital market power and

[3] Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility* 75 AM. ECON. REV. 424 (1985); W. Brian Arthur, *Competing Technologies, Increasing Returns, and Lock-In by Historical Events*, 99 ECON. J. 116 (1989); Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CALIF. L. REV. 479 (1998).

[4] Charles Duhigg, *'How Companies Learn Your Secrets,'* THE NEW YORK TIMES (Feb. 16, 2012), https://www.nytimes.com/2012/02/19/magazine/shopping-habits.html.

[5] Dominic Reigns, *'Google Search Market Share Statistics 2025',* ABOUT CHROMEBOOKS (27 October 2025) https://www.aboutchromebooks.com/google-search-market-share/ .

[6] Tejas Jain, *Big Tech's Market Dominance: Challenges and Interventions*, CENTRE FOR BUSINESS LAWS & TAXATION, RGNUL BLOG (Sept. 11, 2025), https://www.cbltrgnul.in/post/big-tech-s-market-dominance-challenges-and-interventions.

[7] M R Baye & J Morgan, *Information Gatekeepers on the Internet and the Competitiveness of Homogeneous Product Markets* (2001) 91 AM ECON REV 454 http://www.jstor.org/stable/2677873 .

regulatory intervention, it is essential to understand the meaning and context of the 'platform economy'.

This article proceeds in six parts. Part I traces how Big Tech firms became institutional gatekeepers of the digital economy and why conventional antitrust tools have failed to restrain them. Part II examines the Digital Markets Act's ('DMA') gatekeeper-designation framework and its substantive obligations. Part III analyses the DMA's enforcement architecture and jurisdictional design. Part IV critically assesses whether the DMA's ex-ante obligations correct market failures or risk chilling innovation. Part V situates the DMA within a comparative "Brussels Effect" and evaluates India's proposed response. Part VI includes concluding remarks.

1.1. The Platform Economy and How It Differs from the Conventional Market Economy?

The previous discussion highlighted Big Tech's pervasive influence; to understand this influence, we must first decode the architecture that empowers it. The platform economy is a business model that encompasses economic and social activities facilitated by digital platforms, which act as intermediaries connecting buyers and sellers to exchange goods, services, and information.[8] Traditional markets operate through linear value chains where firms produce goods or services and sell them directly to consumers.[9] By contrast, platforms serve as digital infrastructures that enable and govern interactions among multiple user groups, including consumers, advertisers, sellers, developers, and service

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[8] EUROFOUND, '*Platform Economy*', (November 19, 2025) https://www.eurofound.europa.eu/en/surveys-and-data/platform-economy .

[9] Geoffrey G. Parker, Marshall W. Van Alstyne & Sangeet Paul Choudary, *Platform Revolution: How Networked Markets Are Transforming the Economy—and How to Make Them Work for You*' (2016); NICK SRNICEK, PLATFORM CAPITALISM(Polity Press 2017); DAVID S. EVANS & RICHARD SCHMALENSEE, MATCHMAKERS: THE NEW ECONOMICS OF MULTISIDED PLATFORMS (Harvard Business Review Press 2016); JULIE E. COHEN, 'BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM' (Oxford University Press 2019).

providers, creating a multi-sided ecosystem rather than bilateral exchanges.[10] Value originates not from production, but from coordination, connection, and data-driven intermediation. Therefore, its power stems not merely from size or revenue, but from how it is embedded in and shapes the network architecture itself.[11] Platforms do not merely compete within markets; instead, they actively shape markets, determining which actors are visible, which transactions are feasible, and which business models can succeed.

1.2. Competition Exploitation In The Digital Market

The nature of competition in digital markets differs from that in traditional industrial or commodity markets. Several features distinguish platform competition, notably due to the presence of multi-sided markets, network and data effects, behavioural design, and algorithmic curation. These features give dominant platforms a leverage over the others and new ways to exploit their advantages[12]. First, multi-sidedness means that platforms serve distinct groups, such as end-users, advertisers, developers, or sellers, and often subsidise one side to build scale, for example, by offering free services to end-users and at the same time, monetising another through advertising or seller fees. Because the price may be zero on the user side, traditional metrics of 'consumer harm' or 'exploitation due to overpricing' are often irrelevant.[13] A platform may appear "free." Yet, the real cost lies in data extraction, attention capture (such as user traffic) and loss of choice. Second,

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10 SCIENCEDIRECT TOPICS, 'PLATFORM ECONOMY', https://www.sciencedirect.com/topics/social-sciences/platform-economy (last visited Nov. 16, 2025); Acquier et al. define the platform economy as "a set of initiatives that intermediate decentralised exchanges among peers through digital platforms"

11 INTERNATIONAL LABOUR ORGANISATION, 'DIGITAL LABOUR PLATFORMS', https://www.ilo.org/digital-labour-platforms (last visited Nov. 18, 2025).

12 CREATIVE NEWS, https://creativenews.io/research-reports/the-multifaceted-nature-of-competition-in-modern-digital-ecosystems (last visited Oct. 28, 2025).

13 John M. Newman. *Antitrust in Zero-Price Markets: Foundations*, 164(1), UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 14 (2015), https://scholarship.law.upenn.edu/penn_law_review/vol164/iss1/4/.

network effects and data accumulation further reinforce market dominance: more users generate more data, enabling better algorithms and more personalised service. This, in turn, attracts more users in a self-reinforcing loop.[14] The difficulty for new market entrants is not simply matching price or quality but overcoming scale, data deficit and lock-in. For example, Google's dominance in search is partly premised on the enormous volume of user queries that feed its algorithm, which in turn refines result quality and reinforces user preference.[15]

Third, behavioural economics and algorithmic design give platforms subtle tools to steer user behaviour. Platforms shape user decisions through choice architecture[16], through default settings, personalised nudges, and 'dark patterns' — interface designs deliberately structured to steer users toward outcomes that favour the platform - such as making it harder to decline data sharing than to accept it. Otherwise, App stores may even pre-install certain services, or a platform may favour its own product in a recommendation feed. The advantage, therefore, stems not just from a "better product", but from "better control". For instance, while browsing Amazon, we might come across similar products that are marked as 'Best Seller' or 'Recommended'. A seller on Amazon may face higher fees, a lower ranking, or reduced visibility compared to a private label run by Amazon itself.[17] A platform's control of ranking, recommendation and default settings becomes an instrument of competitive advantage. Fourth, self-preferencing is a visible manifestation of this exploitation.[18] A dominant platform may privilege its own service over that of its rivals, for

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[14] Geoffrey Parker, *'Platform Revolution: How Networked Markets Are Transforming the Economy,'* Supra note 7.
[15] J Morgan, Baye and Morgan; Supra note 7.
[16] Aryan Mamidwar & Ganesh Bhutkar, '*An Overview of Guidelines on Dark Patterns'* 3720 CEUR WORKSHOP PROC (2025), https://ceur-ws.org/Vol-3720/paper10.pdf. '*Dark patterns manipulate users into making certain choices, often violating principles of informed consent and autonomy.*' [Emphasis supplied]
[17] Case AT. 40462 Amazon Marketplace v. Comm'n, Commitment Decision 2022 O.J. (C 87) 7.
[18] Hervé Jacquemin & Alexandre de Streel, Self-Preferencing and Fair Competition on Digital Markets, 16 COMPETITION L. REV. 1 (2020).

example, Google elevates its own shopping comparison results in search, Apple steers users to its payment service in the App Store, and Amazon promotes its own products using seller data derived from marketplace participants. These conduct patterns may not immediately lead to price increases for consumers and may even appear to improve convenience[19]. Despite their apparent benefits, these practices distort competition by denying rivals equal opportunity, restricting market access, and locking in users.

1.3. Why have existing competition mechanisms failed to regulate the platform economy?

This section examines the structural limitations of ex-post enforcement and addresses the guiding question: why have decades of antitrust jurisprudence proven ineffective in digital markets? While competition authorities in the EU have pursued actions for abuse of dominance and anticompetitive agreements under traditional competition law, such as Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), experience has shown the limits of ex-post enforcement in digital markets. There are several reasons why existing mechanisms have faltered, necessitating the development of a new regulatory instrument. One of the significant limitations is the timing; investigation mechanisms are lengthy, often taking years to complete.[20] By the time an intervention concludes, the market may already have tipped, the dominant platform's advantage may be entrenched, and any remedy may be either too late or ineffective.[21]

In the *Google Shopping* case,[22] the European Commission imposed a €2.42 billion fine on Google for favouring its own comparison-shopping service in search results while demoting rival platforms.

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[19] J Morgan, Baye and Morgan (n 7).
[20] European Commission, 'Inception Impact Assessment: Ex-Ante Regulatory Instrument for Large Online Platforms with Significant Network Effects Acting as Gatekeepers' (2020).
[21] Alexandre de Streel et al., *Economic Analysis of the Digital Markets Act*, CENTRE ON REGULATION IN EUROPE (2021).
[22] Case T-612/17 , Google and Alphabet v. Commission [2021] ECR II-795.

Significantly, the General Court and Court of Justice of the European Union ('CJEU') upheld that such discriminatory self-preferencing constituted an independent form of abuse under Article 102 TFEU, even without meeting the stringent "refusal to supply" standard laid down in *Oscar Bronner GmbH & Co. KG ('Bronner')*.[23] (1998). *Bronner* marked a decisive shift from structural to behavioural scrutiny in assessing digital dominance. It was the first case to require that a dominant firm's refusal to grant access to essential infrastructure be tested against a defined set of conditions, rather than presumed abusive based on market position alone. The European Court of Justice (ECJ) established a foundational precedent for determining when a dominant firm's refusal to grant access to essential facilities or infrastructure constitutes an abuse of a dominant position under Article 102 TFEU. The case involved *Bronner*, a small Austrian newspaper, which claimed that Mediaprint, the publisher of a dominant daily newspaper, abused its position by denying access to its nationwide home-delivery system. The ECJ ruled in favour of Mediaprint, holding that a dominant undertaking's refusal to supply or grant access does not automatically amount to abuse unless five strict conditions are met. Firstly, the dominant entity must have refused to provide access to a service, product, or infrastructure; secondly, the facility is indispensable for enabling competition in the market that a third party operates in, thirdly, the refusal is likely to lead to the elimination of effective competition in the downstream market; fourth, such refusal is capable of harming consumers; and finally, there must be no objective justification for such refusal.[24] This judgment established the "Bronner test," which sets a high threshold for intervention in access cases and has influenced competition law enforcement for decades.

[23] Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG 1998, E.C.R. I-7791 (1998).
[24] Ibid [20].

Similarly, in *Microsoft v. Commission*[25] (2007), the European Commission ('Commission') extended this logic from a pure refusal-to-supply scenario to one of bundling and interoperability: the Commission found Microsoft's tying of Windows Media Player to its operating system, and its refusal to disclose interoperability information to rival server software providers, to constitute abuse — even though, unlike in *Bronner*, no single indispensable facility was being withheld outright. The court upheld a fine of nearly €500 million. It required Microsoft to unbundle Windows Media Player and disclose interoperability protocols, signalling that the *Bronner* conditions were not the only route to a finding of abuse in platform-adjacent markets. More recently, in the *Meta (Facebook Marketplace)*[26] investigations, it was revealed that the Commission fined Meta for unfairly tying its online classified service, Marketplace, to its dominant social networking platform and for misusing advertising data collected from competitors. Similarly, the *Apple App Store Steering*[27] case reflected the growing concern over Apple's restrictive payment rules and self-preferencing behaviour, which prevented developers from directing users to alternative payment methods outside the App Store ecosystem[28].

Digital market abuses extend to algorithmic curation, data aggregation, and other practices that are not easily captured by conventional frameworks, such as in zero-price markets. In these cases, common harm may not be evident in higher prices but rather in diminished choice or stifled innovation.[29] A further problem is the design of proof and remedies, as traditional antitrust requires

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[25] Case T-201/04, Microsoft Corp v. Commission [2007] ECR II-3601.

[26] Case AT.40411, Facebook Marketplace v. Comm'n [2023].

[27] Apple App Store Practices (Music Streaming), Comm'n Decision of 4 Mar. 2024, Case AT.40452.

[28] Pragya Chaurasia, *Abuse of Dominance in Digital Markets: Analysing Apple's App Store Practices under the Competition Act, 2002*, LIVELAW (Aug. 27, 2026) https://www.livelaw.in/articles/abuse-dominance-digital-markets-analysing-apple-app-store-practices-competition-act2002-547499.

[29] ARIEL EZRACHI & MAURICE E. STUCKE, VIRTUAL COMPETITION: THE PROMISE AND PERILS OF THE ALGORITHM-DRIVEN ECONOMY (Harvard University Press 2016); Heike Schweitzer, *The Art of Regulating Big Tech: Ex Ante Regulation and Competition Law* 9 J. ANTITRUST ENF'T 1 (2021); OECD, 'Consumer Welfare in Digital Markets' (2018).

establishing abuse and quantifiable harm, often relying on clear price evidence. In platform markets, the harm may be intangible, such as reduced innovation, foreclosed rivals, and inferior visibility. Merger control has been weak in addressing the 'killer acquisition'[30] of nascent rivals, acquisitions that are too small to trigger merger thresholds but are critically crucial for competitive dynamics.

1.4. What is the DMA, and how does it seek to achieve its aims?

Dominance in digital markets stems from several structural features, such as economies of scale, network effects, data-driven advantages, rapid innovation cycles, and the formation of vast digital ecosystems. Together, these forces create a 'winner-takes-all' dynamic[31] in which a few firms control access to essential digital infrastructure. Over recent years, competition authorities worldwide have voiced growing concern about the concentration of such economic power. The European Commission, drawing from decades of antitrust enforcement, has observed that specific online platforms exercise disproportionate control over market access, user data, and innovation pathways. While the mere possession of market power is not illegal under EU competition law, conduct that entrenches dominance or imposes unfair trading conditions is viewed as anti-competitive, ultimately reducing consumer choice and stifling long-term market contestability. To address shortcomings in traditional competition regulation in digital markets, the European Union (EU) adopted the DMA in 2022.

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[30] Hatice Kocaefe, *No. 84: Killer Acquisitions Under EU Merger Control: Recent European Commission Decisions,* STANFORD LAW SCHOOL (Feb 5, 2024) https://law.stanford.edu/publications/no-84-killer-acquisitions-under-eu-merger-control-recent-european-commission-decisions. 'Killer acquisitions" refer to the strategy whereby dominant firms acquire innovative start-ups primarily to discontinue their innovation projects and eliminate future competition, even when the target's current market share is negligible. [Emphasis Supplied].

[31] Julia Anderson & Mario Mariniello, *Regulating Big Tech: The Digital Markets Act*, Bruegel Blog (Feb. 16, 2021), https://www.bruegel.org/blog-post/regulating-big-tech-digital-markets-act.

Under the DMA, the Commission may designate specific platforms as 'gatekeeper firms' that provide core platform services and have a significant impact on the internal market, acting as essential gateways for business users to reach consumers, and enjoying, or likely to enjoy, an entrenched and durable position.[32]. A gatekeeper refers to a large digital platform that acts as a critical intermediary between business users and consumers, possessing the power to influence market access and shape competitive conditions. A detailed discussion on the designation of gatekeepers will follow in Part II of this paper. Once a company is officially designated as a gatekeeper, it must adhere to strict obligations to ensure fair competition and user choice. These include not combining personal data across services without explicit user consent, avoiding promoting their own products or services over rivals, ensuring interoperability and data portability, allowing business users to offer deals outside the platform, and permitting users to uninstall pre-installed apps or change default settings freely. The Commission made its first designations on September 6, 2023, identifying six major firms, namely, Alphabet, Amazon, Apple, ByteDance, Meta, and Microsoft, as gatekeepers across 22 core platform services. In later designations, Apple's iPadOS and Booking.com were also added to the list, followed by Meta's Facebook Marketplace, which was designed in April 2025, but subsequently removed from the gatekeeper list after Meta discontinued the service in the EU. As of November 2025, the Commission recognises 23 core platform services as falling under gatekeeper regulation.[33]

Having outlined the conceptual and regulatory foundations, this paper now turns to some questions:

[32]Eur. Comm'n, Inception Impact Assessment on the Ex Ante Regulatory Instrument (Dec. 16, 2020), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12648-Ex-ante-regulatory-instrument-for-large-online-platforms-that-are-systemic.

[33]Eur. Comm'n, DMA Designated Gatekeepers (Sept. 6, 2023), https://digital-markets-act.ec.europa.eu/gatekeepers_en.

- Whether the reclassification of "Big Techs" as "Gatekeepers" under the DMA effectively mitigates behavioural lock-ins, algorithmic manipulation, and consumer biases that entrench digital monopolies? And;
- Whether the imposition of strict ex-ante obligations might inadvertently distort incentives or dampen innovation within digital markets? And;
- Can pre-emptive intervention foster competition without undermining innovation and investment?

Part I of this paper has traced how Big Tech firms became institutional gatekeepers and why traditional antitrust enforcement has proven structurally inadequate to address them. Part II of the paper addresses the core problem that arises with the rise of Big Tech, explaining the DMA's gatekeeper designation and responding to the question of how regulatory tools address digital dominance and contestability.

2. Gatekeeper Framework: Why Core Platform Services Are Considered Problematic?

Having introduced the concept of gatekeeper designation in Part I, this Part examines the qualitative and quantitative logic that operationalises it. The DMA's designation mechanism translates the EU's shift from ex-post antitrust enforcement to ex-ante regulation into a precise legal test that classifies dominant players and imposes proactive obligations on them. The gatekeeper mechanism leads to another unalienable question: what makes some firms 'too large to ignore', while others remain beyond regulation?

2.1. Qualitative Thresholds and Functional Logic for Gatekeeper Designation

Despite their significant market presence, not all major digital service providers fall within the scope of the DMA's gatekeeper classification. Platforms such as Spotify, X (formerly Twitter), and Samsung illustrate this distinction. Spotify, for instance, commands roughly one-third of the global music streaming market.[34] While X remains a key player in social networking, Samsung holds a dominant position in smartphone hardware and browser services. Yet these firms are not designated as gatekeepers because their services, although influential, do not function as indispensable intermediaries between businesses and end users in the sense contemplated by the DMA.[35] They lack the same degree of ecosystem integration, multi-sided platform control, and cross-market data leverage that characterise core platform services, such as search engines, app stores, or operating systems.[36]

A platform is presumed to be a gatekeeper in a particular core platform service when it meets three quantitative thresholds, first, it must achieve an annual EU turnover of at least €7.5 billion in each of the last three financial years or a market capitalization of at least €75 billion; second, it must provide a core platform service in at least three Member States; and third, it must have more than 45 million monthly active end users and more than 10,000 yearly active business users established or located in the EU.[37] These numerical indicators serve as a starting point for designation. At the same time, qualitative assessments enable the Commission to classify firms that may not meet all thresholds but still exert a

[34]David Trainer, *It Sounds Like Spotify Is In Trouble*, Forbes (Oct. 13, 2020), https://www.forbes.com/sites/greatspeculations/2020/10/13/it-sounds-like-spotify-is-in-trouble.

[35]See Eur. Comm'n, DMA Designated Gatekeepers (Sept. 6, 2023), https://digital-markets-act.ec.europa.eu/gatekeepers_en; Eur. Comm'n, Questions and Answers: Digital Markets Act (Sept. 6, 2023), https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2349.

[36]Eur. Comm'n, *Remarks by Commissioner Breton: Here Are the First Seven Potential "Gatekeepers" Under the EU Digital Markets Act* (July 4, 2023), https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_23_3674.

[37] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector (Digital Markets Act), arts. 3(2), 3(6), 2022 O.J. (L 265) 1.

significant structural market influence due to ecosystem integration, network effects, or data dominance.[38]

On the other hand, Gmail and Outlook are not classified as core platform services under the DMA because they are not considered general-purpose communication tools that facilitate third-party interaction or economic activity in the same way as messaging or social platforms. Similarly, the Samsung Internet Browser, despite having a considerable user base, does not function as a bottleneck between businesses and end-users in the sense contemplated by the regulation. Conversely, Apple's iPadOS was designated a gatekeeper in 2024 despite initially falling short of some thresholds[39], as the Commission found that it forms part of Apple's tightly integrated ecosystem, reinforcing user lock-in and cross-platform data advantages. Having mapped how gatekeepers are identified, we next ask why their structural position justifies special regulatory treatment.

2.2. Behavioural Economics and Data Exploitation: Logic Behind the Gatekeeper Designation

This section addresses the 'other than economic power' aspect considered for gatekeeper designation. The economic rationale for this framework is rooted in the behavioural and structural realities of digital markets. Gatekeepers can shape user behaviour through default settings, recommendation algorithms, and nudging techniques, exploiting well-documented behavioural biases such as status quo bias, choice overload, and information asymmetry. For example, the pre-installation of Google Search on Android devices or Apple's control over default payment options in its App Store

38 "Gatekeepers do not merely intermediate transactions but increasingly function as private regulators, shaping market norms, user behaviour, and competitive conditions through algorithmic governance." Herbert Hovenkamp, *Gatekeeper Competition Policy*, 30 Mich. Tech. L. Rev. 1 (2024), https://repository.law.umich.edu/mtlr/vol30/iss1/1.

39 Eur. Comm'n, Questions and Answers: Digital Markets Act: Ensuring Fair and Open Digital Markets (Sept. 6, 2024), https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2349.

exemplify how consumer choices are guided, if not constrained by design. Such default effects and algorithmic steering mechanisms, while subtle, create powerful feedback loops as more data a gatekeeper collects from user interactions, the more effectively it can personalise and retain users, further entrenching its dominance.[40]

From a behavioural economics perspective, primarily on status quo and default effects, shows that users systematically under-switch from pre-set options even when switching would improve their welfare, because the perceived effort and uncertainty of change outweigh the perceived benefit. This lock-in effect poses one of the most persistent challenges to contestability in the platform economy. Users rarely switch to alternative services due to convenience, perceived reliability, or concerns about losing personal data and history. Business users, in turn, are compelled to accept restrictive terms to access the platform's massive user base. These factors collectively create a self-reinforcing cycle of dominance that traditional antitrust tools struggle to break.[41] The DMA's designation of gatekeepers, therefore, serves as a precondition to interrupt these feedback loops by imposing obligations aimed at preventing exploitative data practices, ensuring interoperability, and mandating transparency in algorithmic decision-making.

The concentration of economic power in a few technology companies has been a persistent concern among competition authorities worldwide. The Commission, the Organisation for Economic Co-Operation and Development (OECD), and national regulators have repeatedly warned that Big Tech's consolidation

[40] *See* Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector (Digital Markets Act), recitals 32–34, 2022 O.J. (L 265) 1; Ariel Ezrachi & Maurice E. Stucke, Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy (2016); Ryan Calo, *Digital Market Manipulation*, 82 Geo. Wash. L. Rev. 995 (2014); Case AT.40099, *Google Android*, Comm'n Decision (2018).
[41] Ryan Calo, *Digital Market Manipulation*, 82 Geo. Wash. L. Rev. 995 (2014), https://www.gwlr.org/wp-content/uploads/2014/10/Calo_82_41.pdf.

threatens not only market contestability but also democratic accountability, given their influence over information flows and digital advertising. The dimension goes beyond conventional competition harm, to control over information flows, and advertising markets allow a small number of firms to shape the visibility of potential speech, news, and public discourse, raising concerns that sit at the intersection of competition law, media pluralism, and electoral integrity.[42] A 2024 European Commission study revealed that over 80% of EU digital advertising revenue is controlled by just three companies- Alphabet, Meta, and Amazon, which illustrates the asymmetry between platform operators and dependent business users. Despite record fines in antitrust cases, such as Google Shopping's €2.42 billion and Microsoft's €497 million for tying, these penalties have had little impact on the underlying market dynamics, underscoring the need for structural reform through the DMA.[43] After analysing behavioural dominance, we now consider the deeper layer of power: control over personal data and algorithmic systems.

2.3. Data Dominance and Algorithmic Accountability

This section examines how data asymmetries give rise to systemic risks and how DMA seeks to mitigate them by leveraging interoperability and data-use restrictions. At the heart of the problem lies the exploitation of personal data. Gatekeepers utilise their access to vast troves of user information to refine behavioural profiles and deliver hyper-targeted advertisements, thereby reinforcing their monopolistic advantages. Such practices not only distort competition by limiting rivals' access to comparable datasets but also pose privacy concerns by eroding user autonomy. Algorithmic recommendation models, fuelled by continuous

42 Id.

43 Eur. Comm'n, *Study on the Future of Digital Advertising in the European Union* (2024); Org. for Econ. Coop. & Dev. [OECD], *Ex Ante Regulation in Digital Markets* (2021), https://www.oecd.org/competition/ex-ante-regulation-in-digital-markets.htm.

feedback loops of engagement and data harvesting, have become a central mechanism for maintaining user dependency.[44] The DMA's provisions directly confront these asymmetries to reduce dependency and restore choice. Article 5 prohibits combining personal data across services without user consent, while Article 6 mandates interoperability and data portability.[45] To reduce dependency and restore choice.

The DMA builds upon the broader digital policy trajectory initiated under the Juncker Commission[46] (2014–2019), which laid the foundation for Europe's comprehensive digital governance framework. Among its key milestones was the adoption of updated EU copyright legislation, designed to ensure fair remuneration, recognition, and protection for creators and workers across thirty-three cultural and creative sectors, thereby promoting innovation and investment in Europe's creative economy. Another landmark achievement was the implementation of the General Data Protection Regulation (GDPR)[47] in 2016, which established a unified framework governing the collection, use, and transfer of personal data within the EU.[48] The GDPR fundamentally reshaped global data governance, imposing significant compliance obligations on major digital platforms operating in Europe. Complementing these measures, the Regulation on Platform-to-Business (P2B) trading practices' effective since July 2020, aimed

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[44] Ariel Ezrachi & Maurice E. Stucke, VIRTUAL COMPETITION: THE PROMISE AND PERILS OF THE ALGORITHM-DRIVEN ECONOMY (2016).

[45]Data Interoperability Standards Consortium, *What Is "Data Interoperability"?*, DISC, https://www.datainteroperability.org/what-is-data-interoperability [https://web.archive.org/web/20160131000000/https://www.datainteroperability.org/what-is-data-interoperability] (last visited Oct. 30, 2025).

[46] Eur. Comm'n, Communication from the Commission, *A Digital Single Market Strategy for Europe*, COM (2015) 192 final (May 6, 2015); Jean-Claude Juncker, Political Guidelines for the Next Commission: A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change (July 15, 2014); Eur. Comm'n, Communication from the Commission, *Online Platforms and the Digital Single Market: Opportunities and Challenges for Europe*, COM (2016) 288 final (May 25, 2016).

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

[48] Bernd Skiera et al., THE IMPACT OF THE GDPR ON THE ONLINE ADVERTISING MARKET (2022).

to enhance fairness, transparency, and predictability for smaller enterprises & traders relying on online platforms. Together, these legislative initiatives not only curbed unfair practices and promoted competition but also laid the groundwork for the DMA's more targeted intervention in digital market concentration and platform dominance.

In regulating core platform asymmetries, the DMA seeks not merely to address isolated instances of misconduct but to structurally dismantle the opaque governance mechanisms through which gatekeepers exercise control over digital markets. This objective is operationalised through the substantive obligations set out in Articles 5, 6, and 7,[49] which collectively impose both per se prohibitions and specification-based duties. Article 5 lays down directly applicable obligations aimed at curbing exploitative practices, such as prohibiting the combination of personal data across services without user consent and restricting business users from offering products or services outside the platform.[50] These provisions directly target informational opacity and data consolidation, which often allow gatekeepers to operate without meaningful user awareness or competitive checks. Article 6 complements this framework by imposing more granular, context-specific obligations, including requirements to ensure interoperability with third-party services, to provide business users with access to data generated through their activities, and to refrain from self-preferencing in ranking or recommendation systems.[51] For instance, an app developer operating on a dominant app store must be allowed access to performance and consumer interaction data, thereby reducing the informational asymmetry that previously enabled platforms to privilege their own services. Similarly,

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[49] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector (Digital Markets Act), arts. 5–7, 2022 O.J. (L 265) 1.

[50] Heike Schweitzer, *The Art of Regulating Big Tech: Ex Ante Regulation and Competition Law*, 9 J. ANTITRUST ENF'T 1 (2021).

[51] Inge Graef, Martin Husovec & Alexandre P. Engert, *Towards a Holistic Regulatory Approach for the Digital Markets Act*, 53 IIC — INT'L REV. INTELL. PROP. & COMPETITION L. 550, 556–60 (2022).

obligations to permit alternative app stores or payment systems weaken ecosystem lock-in and enhance contestability.[52] Article 7 further empowers the Commission to specify the modalities of these obligations, ensuring that compliance evolves alongside technological developments and cannot be circumvented through technical design choices. Taken together, these provisions function as a systemic intervention: rather than reacting to individual abuses, they restructure the underlying architecture of platform governance by mandating transparency, interoperability, and fair access.[53] In doing so, the DMA seeks to render opaque mechanisms of control previously invisible and contestable, enabling gatekeepers to shape market outcomes. With the substantive contours of gatekeeping thus clarified, the analysis now turns to the enforcement architecture that gives effect to these obligations.

3. Enforcement Framework, Jurisdiction, and Application of DMA

Rules on paper mean little without enforcement teeth; this section tests whether the DMA has them. The DMA, unlike traditional competition instruments under Articles 101 and 102 of the TFEU[54]. It establishes a centralised, proactive, and ex-ante enforcement architecture. This framework represents a paradigmatic shift in how digital market regulation is conceptualised and administered within the EU. While classical antitrust enforcement relied on ex-post investigations into abuse of dominance or anti-competitive conduct,[55] the DMA introduces a

[52] Hervé Jacquemin & Alexandre de Streel, *Self-Preferencing and Fair Competition in Digital Markets*, 16 COMPETITION L. REV. 1, 6–10 (2020). *See also* Jacques Crémer, Yves-Alexandre de Montjoye & Heike Schweitzer, COMPETITION POLICY FOR THE DIGITAL ERA 66–70 (Eur. Comm'n 2019).
[53] Heike Schweitzer, *The Art of Regulating Big Tech: Ex Ante Regulation and Competition Law*, 9 J. ANTITRUST ENF'T 1, 10–15 (2021).
[54] Consolidated Version of the Treaty on the Functioning of the European Union arts. 101–102, Oct. 26, 2012, 2012 O.J. (C 326) 47.
[55] Heike Schweitzer, *The Art of Regulating Big Tech: Ex Ante Regulation and Competition Law*, 9 J. Antitrust Enf't 1 (2021); Org. for Econ. Coop. & Dev., CONSUMER WELFARE IN DIGITAL MARKETS (2018).

rules-based, anticipatory regime, empowering the Commission to act before harm to market contestability occurs. At the heart of this framework lies the Commission's exclusive jurisdiction, ensuring consistency and preventing regulatory fragmentation among member states. Article 1(5) of the DMA explicitly provides that only the Commission is competent to apply the Regulation, though national authorities may assist in investigations and the collection of evidence. This exclusive competence mirrors the enforcement design of EU competition law. Still, it departs from it, in its sector-specific precision and in its targeting of "gatekeepers" identified under Articles 3 and 4 of the Act.[56] The centralisation of enforcement ensures that gatekeepers, most of which operate across multiple Member States, are subject to a uniform regulatory regime rather than a patchwork of divergent national interpretations.[57]

3.1. Institutional Role and Powers of the European Commission

The Commission serves as both regulator and enforcer, endowed with a wide array of investigative and corrective powers. Under Articles 20 to 23 of the DMA, it can initiate proceedings *ex officio* or upon complaints by affected parties, request detailed information, conduct market investigations, and carry out on-site inspections of corporate premises. The procedural framework draws on the principles of competition law, yet it is specifically tailored to the unique structural features of digital markets. For instance, the Commission can impose interim measures where there is an urgent need to prevent irreparable harm to competition[58], and non-compliance decisions that may attract fines

[56]Schweitzer, *supra* note 55.
[57] *See also* Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector (Digital Markets Act), arts. 1(5), 3–4, 29–31, 2022 O.J. (L 265) 1; Eur. Comm'n, *Questions and Answers: Digital Markets Act* (Sept. 6, 2023), https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2349.
[58] DMA, art. 22.

of up to 10% of a company's total worldwide turnover or up to 20% for repeated infringements[59].

In addition to punitive measures, the DMA allows for periodic penalty payments.[60] to compel compliance and transparency obligations requiring gatekeepers to submit annual reports on their compliance mechanisms[61]. These provisions highlight the DMA's orientation toward continuous monitoring and deterrence, rather than episodic enforcement. The Commission's Digital Markets Taskforce, established under DG Competition, serves as the operational body responsible for assessing gatekeeper designations, verifying compliance, and coordinating with national digital regulators under the European Competition Network ('ECN').[62] After outlining the Commission's core powers, it is necessary to assess how the DMA adapts to emerging technologies and market developments.

3.2. Market Investigations and Dynamic Adaptation

One of the most innovative enforcement tools under the DMA is the market investigation mechanism. Articles 17 to 19 empower the Commission to conduct three types of market investigation: designation investigations (Article 17), investigations into systematic non-compliance (Article 18), and investigations into emerging services and technologies to determine whether new digital services should be added to the list of core platform services (Article 19).[63] This flexible design enables the regulatory framework to remain adaptive to technological evolution, addressing concerns that static legal definitions could quickly become obsolete in a rapidly changing digital environment. Through these investigations, the Commission can propose delegated acts to

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[59] *Id.* art. 30.
[60] *Id.* art. 31.
[61] *Id.* art. 11.
[62] The Law Review Article (Rule 16): Pieter Van Cleynenbreugel, *Institutional Competition for Private Enforcement Within the EU's Multilevel Competition Law System*, 51 COMMON MKT. L. REV. 1339 (2014).
[63] Eur. Comm'n, *supra* note 48.

amend the list of core platform services ('CPS') or clarify obligations, ensuring the DMA remains technologically neutral yet responsive to new business models, such as generative AI platforms or virtual ecosystems that might function as future gatekeepers.[64] Having analysed enforcement strength, the next question is whether gatekeepers are afforded procedural fairness.

3.3. Procedural Safeguards and Judicial Oversight

Despite the DMA's strong regulatory stance, its enforcement architecture is embedded within the EU's broader rule-of-law framework. Decisions adopted by the Commission under the DMA are subject to judicial review by the General Court and the CJEU under Article 263 TFEU. This safeguard preserves the procedural balance between effective regulation and corporate due process. Furthermore, the DMA mandates transparency obligations, requiring the Commission to publish non-confidential versions of its decisions, thereby fostering legal certainty and predictability for both regulated entities and market participants.[65]

The compressed timelines for gatekeeper designation (within 45 working days) and for meeting compliance obligations within six months post-designation may limit companies' opportunities to present detailed economic justifications. Critics argue that this may risk transforming complex behavioural assessments into formalistic exercises.[66] Nonetheless, proponents maintain that these strict timelines are essential to achieving the DMA's preventive rationale, intervening before anti-competitive practices become entrenched.[67] Once the Commission's internal

[64] Eur. Comm'n, *Antitrust: Commission Sends Statement of Objections to Amazon for the Use of Non-Public Independent Seller Data and Opens Second Investigation into Its E-Commerce Business Practices* (Nov. 10, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077.
[65] Corp. Eur. Observatory, *Big Tech Brings Out the Big Guns in Fight for Future of EU Tech Regulation* (Dec. 11, 2020), https://corporateeurope.org/en/2020/12/big-tech-brings-out-big-guns-fight-future-eu-tech-regulation.
[66] Aurelien Portuese, *The Digital Markets Act: A Triumph of Regulation over Innovation* 14–16 (ITIF, Aug. 24, 2022), https://itif.org/publications/2022/08/24/digital-markets-act-a-triumph-of-regulation-over-innovation/.
[67] Schweitzer, *supra* note 45.

mechanisms are understood, the broader regulatory ecosystem must be mapped.

3.4. Coordination with National Authorities and International Implications

While the Commission retains primary jurisdiction, national competition authorities ('NCAs') and other sectoral regulators play a crucial supportive role. Under Article 38, Member States may conduct fact-finding and provide enforcement assistance, which feeds into the Commission's centralised investigations. This cooperative model ensures coherence with existing national digital strategies and competition regimes while preventing regulatory overlap. The ECN remains the primary coordination platform, facilitating dialogue and ensuring a consistent interpretation of the Act across Member States. The DMA's enforcement structure also carries significant extraterritorial implications. Many designated gatekeepers, such as Alphabet, Amazon, Apple, Meta, and Microsoft, are headquartered outside the EU, primarily in the United States. Consequently, the Act's implementation has sparked transatlantic debate on regulatory sovereignty, interoperability standards, and data transfer regimes. The Commission's insistence on "digital sovereignty" reflects the EU's broader ambition to set global standards for fair competition and data governance. Compliance with the DMA, therefore, is not merely a legal formality but a test of alignment with the EU's normative framework on transparency, fairness, and consumer protection.[68]

The DMA's enforcement framework is a hybrid of competition law and sectoral regulation. Its proactive design, coupled with stringent sanctions, signals a clear deterrence message to digital conglomerates. By shifting the burden of compliance onto gatekeepers and mandating structural obligations, it reduces the

[68] Corp. Eur. Observatory, *Big Tech Lobbying: Google, Amazon & Friends and Their Hidden Influence* (Sept. 23, 2020), https://corporateeurope.org/en/2020/09/big-tech-lobbying-google-amazon-friends-and-their-hidden-influence.

Commission's reliance on lengthy investigations and the gathering of economic evidence, which are typical of antitrust proceedings. Yet, its success will depend on institutional capacity and interpretative consistency. The Commission must strike a balance between rigid enforcement and flexibility in addressing evolving technologies and business practices. Moreover, the DMA's enforcement structure may serve as a model for global regulatory convergence. Jurisdictions such as the United Kingdom, Japan, and Australia are considering similar frameworks, often inspired by the EU's approach, which is discussed in detail in Part V of this paper.

4. Critical Perspective: Are Ex-Ante Obligations Correcting Market Failures Or Chilling Innovation?

4.1. The Chicken and Egg Problem in the DMA's Implementation

The enactment of the DMA was intended to open up digital gatekeepers' platforms by requiring them to provide effective interfaces, such as application programming interfaces (APIs) or equivalent technical access, to business users. This would enable third-party services, new entrants, and competitors to reach end users on fairer terms. Yet, as Fionna Morton (*et al.*)[69] highlight in their seminal papers, DMA creates a structural coordination dilemma whereby new entrants are unwilling to invest or innovate until they can verify that gatekeepers' interoperability interfaces genuinely work. However, regulators cannot confirm whether these interfaces are effective without active adoption and testing by the very entrants themselves. As a result, both sides wait for the other to move first for the business users for credible access, or

[69] Fiona M. Scott Morton et al., *Equitable Interoperability: The "Supertool" of Digital Platform Governance*, 40 Yale J. on Reg. 1013 (2023).

regulators for evidence of usage, which creates a stall that delays the competitive entry the DMA is designed to enable.[70]

The DMA mandates that gatekeepers provide accessible interfaces that enable business users to interact, offer alternative services, and access end-users through various channels, such as alternative app stores, payment systems, and communication platforms. However, until such interfaces are fully functional and trusted, business users may remain reluctant to invest their resources. Without business user engagement, the regulator lacks empirical evidence of effective competition, which, in turn, delays confirmation of compliance and the full opening of markets. The DMA does not define the detailed technical specifications of those interfaces (for instance, the exact APIs, protocols or data formats). Instead, it sets an outcome-based standard: the interface must be "effective" at enabling access, competition and innovation. This means regulators, gatekeepers and entrants must negotiate and experiment to determine what "effective" means in practice. Because digital markets are subject to strong network effects and path dependence, any delay in the effective rollout of an interface gives incumbents a more extended period to strengthen their lock-in, data advantage, user attention, and switching costs.[71] The longer the delay, the greater the risk that potential competitors never launch or abandon their efforts, reinforcing the dominant position of gatekeepers.[72] Suppose business users conclude that the interface is not sufficiently reliable or that regulation won't deliver meaningful entry. In that case, they might desist from investment, producing a self-fulfilling prophecy of delayed competition.

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[70] Fiona M. Scott Morton, *The Chicken-and-Egg Problem in the European Union Digital Markets Act* (Bruegel, Working Paper No. 02/2024, Jan. 18, 2024), https://www.bruegel.org/system/files/2024-01/WP%2002%202024_0.pdf.
[71] *See* Jacques Crémer, Yves-Alexandre de Montjoye & Heike Schweitzer, Competition Policy for the Digital Era (Eur. Comm'n 2019); Org. for Econ. Coop. & Dev., *Ex Ante Regulation in Digital Markets* (2021), https://www.oecd.org/competition/ex-ante-regulation-in-digital-markets.htm; U.K. Competition & Mkts. Auth., *Mobile Ecosystems: Market Study Final Report* (June 2022).
[72] Morton, *supra* note 69.

Furthermore, the effective implementation of the DMA depends not only on the gatekeeper but also on regulated business users interacting with the Commission by providing input on interface design, reporting on switching metrics, and flagging obstacles to entry. At the time of writing (early 2024), "there is little evidence of platforms interacting with business users or putting out interfaces for evaluation by business users."[73] Without active engagement, both the regulator and entrants may conclude the framework is ineffective, dampening entry incentives and delaying enforcement.

4.2. The Architecture of Ex-Ante Obligations

Are these obligations sufficiently flexible to support innovation while being strict enough to curb abuses? As discussed earlier in Part II, Articles 5, 6, and 7 form the DMA's operational core. The question here is not what these obligations say, but whether they are calibrated correctly: are the Article 5 per se prohibitions specific enough to be enforceable without chilling adjacent, pro-competitive conduct?[74] Does the Article 6 specification-dependent model give the Commission enough flexibility to keep pace with new business models, or does it invite protracted interpretive disputes that undermine the DMA's ex-ante promise? And does Article 7's iterative-compliance mechanism strike the right balance between adaptability and legal certainty for gatekeepers planning long-term investment?[75] Collectively, these provisions seek to rebalance structural asymmetries in data control and access that

[73] Scott Morton, *supra* note 70.
[74] *See* Inge Graef, Martin Husovec & Alex P. Engert, *Toward a Holistic Regulatory Approach for the Digital Markets Act*, 53 IIC — Int'l Rev. Intell. Prop. & Competition L. 550 (2022); Eur. Parl. Pol'y Dep't for Econ., Sci. & Quality of Life Pol'ys, *The Digital Markets Act: Enforcement Challenges and Institutional Design* (2022); BEUC — The Eur. Consumer Org., *The DMA: Making Competition Fairer in Digital Markets* (2021).
[75] Access P'ship, *Competition in Digital Markets: How Can Regulators Incentivise Investment and Innovation?* (Aug. 11, 2022), https://accesspartnership.com/opinion/competitionindigital-markets-how-can-regulators-incentivise-investment-and-innovation-2/.

underpin digital market dominance.[76] Economically, they target "data-driven foreclosure," where incumbents leverage informational advantages to marginalise rivals and entrench network effects.[77] The interoperability mandate thus aspires to restore contestability by permitting alternative services, such as messaging or payment applications, to connect seamlessly with dominant platforms.[78] At the same time, data-sharing requirements aim to equalise informational asymmetries between gatekeepers and business users.[79] Yet, as recent economic commentary notes, these obligations impose significant compliance burdens and architectural overhauls, particularly for globally integrated platforms, raising questions about whether the DMA's corrective ambitions may inadvertently constrain innovation or entrench existing incumbents through high compliance costs.[80] With the ex-ante obligations established, the analysis now turns to their unintended consequences.

4.3. Dynamic Efficiency and the Risk of Innovation Stagnation

So, if obligations impose high regulatory burdens, how do they affect long-term innovation incentives? A more profound concern lies in the potential erosion of dynamic efficiency, the market's capacity to innovate over time. Unlike static efficiency, which focuses on short-term price and output effects, dynamic efficiency emphasises technological progress, product differentiation, and

[76] Laurie Clarke, Europe's Digital Markets Act: A Shift to Proactive Big Tech Regulation, Tech Monitor (Dec. 16, 2020), https://techmonitor.ai/policy/europes-digital-markets-act-a-shift-to-proactive-big-tech-regulation.
[77] *Digital Ecosystems*, *supra* note 60.
[78] Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act) (Dec. 15, 2020), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0842.
[79] Info. Tech. & Innovation Found., *The Digital Markets Act: A Triumph of Regulation over Innovation* (Aug. 24, 2022), https://itif.org/publications/2022/08/24/digital-markets-act-a-triumph-of-regulation-over-innovation/.
[80] Aurelien Portuese, *The Digital Markets Act: A Triumph of Regulation over Innovation* (Info. Tech. & Innovation Found., Aug. 24, 2022), https://itif.org/publications/2022/08/24/digital-markets-act-a-triumph-of-regulation-over-innovation/.

long-term consumer welfare.[81] The DMA's prescriptive obligations may discourage experimentation by constraining how gatekeepers design and integrate services. For instance, self-preferencing prohibitions, while addressing legitimate competitive concerns, may limit gatekeepers' ability to promote integrated innovations, such as Apple integrating hardware and software or Google bundling AI tools with search services.[82]

Empirical evidence on this trade-off remains inconclusive. A 2024 study by the Centre for European Policy Studies ('CEPS') noted that 60% of surveyed digital firms believed the DMA would "improve market fairness," yet 45% expressed concern that compliance burdens could "divert resources from R&D investment." The challenge, therefore, is not whether regulation is necessary, but whether its form of intervention optimally balances innovation incentives with market contestability.[83]

Indeed, the "chilling innovation" critique assumes that all innovation is beneficial. Still, much of Big Tech's innovation has been directed toward user retention, data extraction, and ecosystem enclosure, rather than toward broad-based consumer welfare.[84] In that light, the DMA's constraints may redirect innovation toward competitive and consumer-oriented outcomes rather than suppress it. If implemented judiciously, the DMA could recalibrate incentives, encouraging innovation through openness, interoperability, and accountability. Critiques aside, the DMA may also generate adaptive benefits.

[81] Oxera, *The Impact of the Digital Markets Act on Innovation* (Nov. 2020), https://www.oxera.com/wp-content/uploads/2020/11/The-impact-of-the-Digital-Markets-Act-on-innovation_FINAL-3.pdf.

[82] Sean O'Dea, *What the Tech Is Going on with Digital Markets and Antitrust/Competition Law?*, McCann FitzGerald (Nov. 27, 2020), https://www.mccannfitzgerald.com/knowledge/competition/what-the-tech-is-going-on-with-digital-markets-and-antitrust-competition-law.

[83]Ctr. for Eur. Pol'y Stud., *The DMA One Year On: Early Evidence and Emerging Challenges* (2024), https://www.ceps.eu/ceps-publications/the-dma-one-year-on-early-evidence-and-emerging-challenges/.

[84] Alexandre de Streel, *Digital Markets Act: Making Economic Regulation of Platforms Fit for the Digital Age* (Ctr. on Reg. in Eur. 2020), https://cerre.eu/publications/digital-markets-act-making-economic-regulation-platforms-fit-digital-age/.

5. Regulating Digital Competition Across Nations: A 'Brussels Effect'?

5.1. *The 'Brussels Effect*[85]*' and Reactions Within the EU*

The implementation of the DMA is indeed a bold move by the EU. It has not only redefined the contours of digital competition in Europe but has also triggered a Brussels Effect across the globe - a phenomenon by which EU regulation becomes a de facto global standard as multinational firms and other jurisdictions adjust to comply with it rather than maintain separate regimes. The Act works in conjunction with the classical Articles 101 and 102 of the TFEU,[86] and the Commission's enforcement practice remains foundational in tackling anti-competitive behaviours. Over the last decade, however, the EU has deliberately expanded its toolkit to reflect the unique characteristics of platform markets by incorporating landmark legislation, such as the Digital Services Act[87] ('DSA') and the GDPR[88], alongside sectoral telecom rules, consumer protection laws, and merger control[89]. Each Member State enforces EU competition principles through its NCA and sectoral regulators, which include telecommunications and consumer protection agencies,[90] as well as data protection bodies, thereby creating a multi-layered governance structure. The ECN[91]

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[85] "The Brussels Effect reflects the European Union's ability to unilaterally export its regulatory standards globally through market mechanisms rather than international diplomacy." Anu Bradford, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD [page number] (2020) (emphasis added), https://scholarship.law.columbia.edu/books/232.

[86] Consolidated Version of the Treaty on the Functioning of the European Union arts. 101–102, Oct. 26, 2012, 2012 O.J. (C 326) 47.

[87] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services (Digital Services Act), 2022 O.J. (L 277) 1.

[88] GDPR.

[89] Javier Espinoza & Scott Hindley, *Brussels' Plans to Tackle Digital "Gatekeepers" Spark Fevered Debate*, FIN. TIMES (Dec. 16, 2019), https://www.ft.com/content/example-url.

[90] Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 Establishing the European Electronic Communications Code, 2018 O.J. (L 321) 36.

[91] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to Empower the Competition Authorities of the Member States to Be More Effective Enforcers, 2019 O.J. (L 11) 3.

serves as the connective tissue, enabling coordination, evidence sharing, and harmonisation of enforcement. The ECN ensures that competition enforcement across Member States aligns with the EU's objective of a single, contestable digital market, preventing regulatory divergence or jurisdictional overlap.

Despite the harmonising effect of EU law, Member States have also introduced independent or complementary measures tailored to their domestic contexts. What unites these divergent national responses is not the substance of their rules but their timing relative to the DMA: proactive states such as France and Germany moved ahead of Brussels and arguably shaped the DMA's final text, while more cautious jurisdictions such as Ireland reveal how domestic economic interests can dilute enforcement appetite even within a harmonised EU framework.

France has taken a distinctly proactive stance, consistently calling for stronger regulation of major digital platforms. Even before the DMA, France introduced the "GAFA Tax"[92] in 2019, targeting the revenues of large technology companies operating within its borders.[93] French competition law was amended in 2020 to allow the Autorité de la Concurrence[94] to intervene more swiftly in digital markets, particularly concerning data access and self-preferencing practices. France's position reflects its broader ambition to champion European digital sovereignty and to limit the economic and cultural dominance of U.S.-based technology conglomerates.[95]

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[92] Loi 2019-759 du 24 juillet 2019 relative à la création d'une taxe sur les services numériques et à la modification de la trajectoire de baisse de l'impôt sur les sociétés [Law 2019-759 of July 24, 2019 relating to the creation of a tax on digital services and the modification of the corporate tax reduction trajectory], J.O., July 25, 2019 (Fr.).

[93] *France's Digital Minister Says Tax on Big Tech Is Just the Start*, Guardian (Jan. 12, 2020), https://www.theguardian.com/technology/2020/jan/12/france-digital-tax-big-tech.

[94] Ordonnance 2020-116 du 12 février 2020 relative à l'adaptation des règles de procédure devant l'Autorité de la concurrence [Ordinance 2020-116 of February 12, 2020 relating to the adaptation of the rules of procedure before the Competition Authority], J.O., Feb. 13, 2020 (Fr.).

[95] Ministerie van Economische Zaken en Klimaat, *Considerations of France, Belgium and the Netherlands Regarding Intervention on Platforms with a Gatekeeper Position – Report* (Oct. 15, 2020), https://www.government.nl/documents/reports/2020/10/15/considerations-

Germany, meanwhile, has pioneered one of the most sophisticated national approaches to regulating digital competition. In 2021, it amended its Competition Act, called the Gesetz gegen Wettbewerbsbeschränkungen[96] (GWB), through the 10th Amendment, introducing Section 19a, which empowers the Bundeskartellamt (Federal Cartel Office) to designate companies with "paramount significance for competition across markets." This provision allows proactive intervention against firms such as Google, Amazon, Apple, and Meta, even without a formal finding of abuse[97].

Spain has also begun modernising its competition regime to reflect digital realities. The Comisión Nacional de los Mercados y la Competencia[98] (CNMC) has intensified its scrutiny of digital intermediation and online advertising, calling for interoperability standards and algorithmic transparency to safeguard smaller enterprises. Spain's Digital Economy Strategy 2025 further integrates competition, data governance, and innovation policies, seeking to create a balanced regulatory framework.

The Netherlands has taken a collaborative approach, aligning closely with France and Belgium in calling for stricter enforcement mechanisms[99] during the DMA's drafting phase. Dutch authorities have supported policies that enhance algorithmic transparency, non-discriminatory access, and user mobility. Meanwhile, the Authority for Consumers and Markets (ACM) has independently investigated platform practices, including Apple's in-app payment rules and Google's advertising ecosystem. Similarly, Italy's

of-france-belgium-and-the-netherlands-regarding-intervention-on-platforms-with-a-gatekeeper-position.

96 Gesetz gegen Wettbewerbsbeschränkungen [GWB] [Act Against Restraints of Competition], *as amended by* Tenth Amendment Act, Jan. 18, 2021, BGBl. I at 2, § 19a (Ger.).

97 *German Competition Chief Sees Vanguard Digital Role at Risk*, Politico (Dec. 20, 2021), https://www.politico.eu/article/german-competition-chief-sees-vanguard-digital-role-at-risk/.

98 Gobierno de España, ESPAÑA DIGITAL 2025: PLAN DE DIGITALIZACIÓN DEL PAÍS (2020).

99 Ministerie van Economische Zaken en Klimaat, *Considerations of France, Belgium and the Netherlands Regarding Intervention on Platforms with a Gatekeeper Position* (Oct. 15, 2020).

AGCM[100] has imposed fines on Amazon and Apple for anti-competitive coordination in marketplace listings.[101]

At the same time, Ireland, home to the European headquarters of several major technology firms, including Google, Meta, Microsoft, and HubSpot, has adopted a more cautious regulatory stance, prioritising investment and employment. The Irish Competition and Consumer Protection Act, 2014,[102] empowers the Competition and Consumer Protection Commission ('CCPC') and the Data Protection Commission ('DPC') to remain key enforcement bodies. However, Ireland has faced criticism within the EU for delays in data protection and competition investigations concerning Big Tech companies.[103]

Taken together, this comparative picture shows the Brussels Effect operating unevenly even within the EU itself; convergence on the DMA's substantive rules has not eliminated divergence in enforcement intensity, suggesting that formal legal harmonisation and de facto regulatory outcomes remain distinct questions.

5.2. Digital Competition Regime in India

India had proposed a Digital Competition Bill, 2023 ('Bill'), which, much like its European counterpart, seeks to impose an ex-ante obligation on large digital platforms, not after harm has occurred but before their dominance becomes irreversible. As discussed below, the Bill was ultimately not taken forward, but its design remains instructive for how India might approach ex-ante digital competition regulation in the future. Yet, this raises a critical

[100] *Amazon/Apple Marketplace Cooperation*, Autorità Garante della Concorrenza e del Mercato [AGCM][Italian Competition Authority], 23 November 2021, n. 29889 (It) https://www.agcm.it/ .

[101] MINISTERIE VAN ECONOMISCHE ZAKEN EN KLIMAAT , CONSIDERATIONS OF FRANCE AND THE NETHERLANDS REGARDING INTERVENTION ON PLATFORMS WITH A GATEKEEPER POSITION (2020).

[102] Competition and Consumer Protection Act 2014 (Act No. 29/2014) (Ir.) https://www.irishstatutebook.ie/eli/2014/act/29/enacted/en/html; Data Protection Act 2018 (Act No. 7/2018) (Ir.) https://www.irishstatutebook.ie/eli/2018/act/7/enacted/en/html.

[103] *Department of Enterprise, Tourism and Employment, National Submission to the EU Consultation on the Digital Services Act Package*, GOVERNMENT OF IRELAND, (17 September 2020) https://www.gov.ie/en/publication/example-url .

question: Can India effectively transplant the EU's regulatory model into its own digital economy without causing unwarranted issues for growth and innovation? Currently, the Competition Act, 2002[104] serves as the cornerstone of India's overarching competition control instrument, curbing anti-competitive conduct and empowering the Competition Commission of India ('CCI') to address such practices. However, the framework is ex-post, mainly focusing on interventions after dominance is exerted and abuse is proven. The existing mechanism imposes very few, if any, mandates on the entities themselves regarding reports of dominance and appreciable adverse effects on markets, apart from killer acquisitions. Network effects, data-driven advantages, and ecosystem lock-ins consolidate so rapidly that by the time CCI investigates, competition is already lost. The Standing Committee on Finance wants the government to finalise the Digital Competition Bill (DCB) and expand its scope to cover Virtual Assistants and Cloud Services. It wants a shift towards proactive, ex-ante regulation of digital markets. The recommendation was made in the Committee's Thirty-Seventh Report, which was presented to Parliament on August 10, 2026.[105]

One of the most persistent challenges in India's competition enforcement landscape is jurisdictional overlap between the CCI and sectoral regulators, particularly in technology-driven markets that transcend traditional regulatory boundaries. This tension came to the forefront in the landmark case of *CCI v. Bharti Airtel Ltd.*[106] (2019). The dispute arose when Reliance Jio alleged that incumbent telecom operators Bharti Airtel, Vodafone, and Idea had colluded to deny it adequate interconnection points, amounting to cartelization. Before the CCI could proceed, the telecom operators

[104] Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India).
[105] Prabhanu Kumar Das, *Lowdown: Parliamentary committee on finance calls for digital competition bill, e-commerce code of conduct* MEDIANAMA (August 17, 2026) https://www.medianama.com/2026/08/223-committee-finance-digital-competition-bill/.
[106] Competition Commission of India v. Bharati Airtel & Ors., (2019) 2 SCC 521.

contended that the matter fell squarely within the jurisdiction of the Telecom Regulatory Authority of India (TRAI), as it involved technical and licensing issues under the Indian telecom laws, particularly the TRAI Act, 1997[107]. The Supreme Court, in its judgment, held that TRAI must first determine the foundational or jurisdictional facts, namely, whether a breach of license conditions or telecom regulations had indeed occurred, before the CCI could examine whether such conduct constituted an abuse of dominance or an anti-competitive agreement. Building on these challenges, the following section highlights India's proposed legislative response.

5.3. Digital Competition Bill, 2023: India's Response to DMA

The Bill[108] mirrors the logic of the DMA while adapting to India's institutional realities. The Bill adopts a similar approach by identifying and designating gatekeepers, considering factors such as size, user base, and control over the digital market, and by defining the term Systematically Significant Digital Enterprise ('SSDEs'). The identification of SSDEs will be based on both quantitative thresholds (such as turnover, market share, and active users) and qualitative factors, including network effects, ecosystem control, and data access.[109] The Bill establishes a list of pre-defined obligations for these enterprises, prohibiting practices such as self-preferencing, unfair use of non-public data, and restrictions on interoperability. It also mandates that business users be granted fair access to data and platform analytics, addressing a persistent concern in platform markets: information asymmetry.[110] Notably, the Bill places a strong emphasis on transparency: SSDEs must

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[107] Telecom Regulatory Authority of India Act, 1997, No. 24, Acts of Parliament, 1997 (India).

[108] Ministry of Corporate Affairs, Government of India, *Report of the Committee on Digital Competition Law* (2024) https://prsindia.org/files/parliamentry-announcement/2024-04-15/CDCL-Report-20240312.pdf .

[109] "*Ex-Ante Regulation of SSDEs Compliance Challenges Under India's Digital Competition Bill.*" AGRUD PARTNERS (April 23, 2025), https://agrudpartners.com/ex-ante-regulation-of-ssdes-digital-competition-bill/.

[110] A Ganesh, M Yadav & G Pathak, *'The Indian draft digital competition bill and report: a critical perspective'* (2025) 9 INDIAN L REV 193 https://doi.org/10.1080/24730580.2025.2506958.

clearly disclose how algorithms rank search results or recommend products, reducing the opacity that allows covert manipulation of market outcomes. The Bill proposes an ex-ante enforcement model. Instead of waiting for abuse to occur, the CCI will have the power to monitor and enforce compliance through continuous oversight and supervision.[111]

To qualify as an SSDE, an enterprise must meet certain quantitative and qualitative thresholds. On the quantitative side, an enterprise is deemed systemically significant if it has a turnover of at least ₹4,000 crore[112] in India or US $30 billion globally in each of the preceding three financial years, or possesses a global market capitalisation (or equivalent fair value) exceeding US $75 billion.[113] Alternatively, entities with a gross merchandise value in India of ₹16,000 crore[114] or more over the same period may also fall within this ambit. In addition to financial metrics, user-base criteria play a critical role: platforms serving at least one crore (10 million) end-users or 10,000 business users in India[115] in each of the past three years.[116] However, the Bill does not limit the CCI to mere numerical benchmarks. It may also designate an enterprise as an SSDE based on qualitative factors such as its degree of control over data,

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111 Shilpa Das, *"Ex-Ante Regulation: An Evolving Need in Digital Markets."*, 5(1) COMPETITION COMMISSION OF INDIA JOURNAL ON COMPETITION LAW AND POLICY 55 (2024), https://ccijournal.in/index.php/ccijoclp/article/view/182/88.

112 MINISTRY OF CORPORATE AFFAIRS, GOVERNMENT OF INDIA, REPORT OF THE COMMITTEE ON DIGITAL COMPETITION LAW, DRAFT DIGITAL COMPETITION BILL, 2024, § 3(2)(a) 154 (2024).

113 MINISTRY OF CORPORATE AFFAIRS, GOVERNMENT OF INDIA, REPORT OF THE COMMITTEE ON DIGITAL COMPETITION LAW, DRAFT DIGITAL COMPETITION BILL, 2024, § 3(2)(b) 154 (2024).

114 MINISTRY OF CORPORATE AFFAIRS, GOVERNMENT OF INDIA, REPORT OF THE COMMITTEE ON DIGITAL COMPETITION LAW, DRAFT DIGITAL COMPETITION BILL, 2024, § 3(2)(c) 154 (2024).

115 MINISTRY OF CORPORATE AFFAIRS, GOVERNMENT OF INDIA, REPORT OF THE COMMITTEE ON DIGITAL COMPETITION LAW, DRAFT DIGITAL COMPETITION BILL, 2024, § 3(2)(a), § 3(2)(b) 154 (2024).

116 *"Ex-Ante Regulation of SSDEs Compliance Challenges Under India's Digital Competition Bill."* AGRUD PARTNERS (April 23, 2025), https://agrudpartners.com/ex-ante-regulation-of-ssdes-digital-competition-bill/.

interlinked ecosystem services, network effects, or the creation of barriers to entry for smaller players.[117]

This proposed Bill, however, was not taken forward in its initial form due to a combination of institutional, economic, and regulatory concerns.[118] A central issue was the risk of over-regulation through an ex-ante framework, which many stakeholders argued could impose rigid obligations on digital enterprises without sufficient evidence of harm, potentially stifling innovation in a rapidly evolving market.[119] Unlike the EU, India's digital ecosystem is still in a high-growth, developing phase, and policymakers were cautious about transplanting a model like the DMA without adapting it to domestic realities. There were also concerns regarding regulatory overlap and institutional capacity, particularly given the existing jurisdictional tensions between the Competition Commission of India (CCI) and sectoral regulators such as TRAI, as highlighted in cases like *Bharti Airtel Ltd. (supra).*[120] Additionally, industry stakeholders raised concerns about compliance burdens, uncertainty around threshold definitions (such as SSDE classification), and the potential chilling effect on investment, particularly for both global tech firms and emerging Indian startups.

6. Conclusion: Balancing Fairness, Innovation, And Global Regulatory Convergence

Having discussed the intricacies of the DMA, let us now address the motivating questions that shaped this paper. Has the

[117] Overview of the Digital Competition Bill, VERITAS LEGAL (Mar. 27, 2024), https://www.veritaslegal.in/legal-update-overview-of-the-digital-competition-bill/.
[118] Aakriti Bansal, *Why India Withdrew the Digital Competition Bill 2024*, MEDIANAMA (Aug. 16, 2025), https://www.medianama.com/2025/08/223-india-digital-competition-bill-2024-withdrawal.
[119] *Govt to Withdraw Draft Digital Competition Bill*, FINANCIAL EXPRESS (Aug. 2025), https://www.financialexpress.com/business/industry-govt-to-withdraw-draft-digital-competition-bill-3942328.
[120] Supra Note 101*;* Anush Ganesh, Mohit Yadav and Gaurav Pathak, *'The Indian Draft Digital Competition Bill and Report: A Critical Perspective'* 9 INDIAN L REV 193 (2025), https://doi.org/10.1080/24730580.2025.2506958.

reclassification of "Big Techs" as "Gatekeepers" succeeded in addressing the behavioural lock-ins, algorithmic steering, and consumer biases that perpetuate digital monopolies? And, in doing so, has it risked dampening the very innovation that defines the digital age?

The evolution of the DMA sits within a broader jurisprudential debate over whether technology drives law or law shapes technology. Digital markets, by their very architecture, evolve faster than the pace of legal adaptation. Yet the DMA represents a rare instance in which law attempts to anticipate rather than react to technological shifts. The idea that law is forever playing catch-up with innovation is being put to the test here. Instead of waiting for harm to occur, the EU has designed a preventive legal framework to regulate the structure of digital markets before monopolies ossify. However, this ambition raises more profound normative questions about the scope of legal intervention in a domain inherently defined by technological dynamism. Can law, as an instrument of human design, keep pace with self-learning algorithms and global data networks? Or will such pre-emptive regulation inevitably constrain the creative chaos that fuels digital progress?

The DMA reflects the transformation: it is not merely a transplant of traditional antitrust law into the digital sphere, but a new model of "algorithmic regulation," in which law operates ex ante, embedded within digital infrastructures through interoperability, data-sharing, and transparency mandates. In that sense, the DMA redefines regulatory philosophy. Rather than treating digital markets as exceptional, it recognises that technology now constitutes a parallel form of norm creation, one that influences choices, markets, and even democratic discourse. Law, therefore, must respond not by retreating but by adapting its form. The global diffusion of DMA-like frameworks, from the UK's Digital Markets Act to India's Digital Competition Bill, reflects the Brussels Effect at work and signals a convergence of regulatory philosophies in the digital era.

Ultimately, the DMA is both a legal experiment and a political statement. Whether the DMA becomes a global blueprint or a cautionary tale will depend on its capacity to evolve alongside the technologies it seeks to regulate. This serves as a reminder that in the digital age, law must not merely chase innovation, but learn to innovate itself. The views and opinions contained herein are personal.

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ARTICLE

AI IN CORPORATE BOARDROOMS: CALIBRATING CORPORATE ACCOUNTABILITY IN THE AGE OF ARTIFICIAL INTELLIGENCE

Arshia Singla *&* Vibhav Rajvardhan*

Abstract

This article explores how Artificial Intelligence ("**AI"**) is reshaping corporate governance in India, including the duties and liabilities of directors. AI has tremendous potential to process large amounts of data efficiently and without human error, but it also comes with certain risks. The article identifies four governance risks resulting from the incorporation of AI in routine corporate decision-making: algorithmic bias, opacity of "black box" algorithmic models, automation bias and ineffective monitoring mechanisms. It depicts how these risks can result in a breach of directors' obligations to act in good faith, exercise due and reasonable care, and exercise independent judgment, as required under the Companies Act, 2013 ('**Act**'). Crucially, it analyses these duties alongside the Digital Personal Data Protection Rules, 2025, and 2025 AI Governance Guidelines, which replace the standard of "Explainable AI" with the more exacting mandate of "Understandable by Design". The comparative analysis of the European Union ("**EU**"), the United States ("**US**"), and China reveals major differences: the EU's approach is prescriptive and risk-based; the US takes a market-based approach; and China takes a top-down regulatory approach. To avoid these liabilities, directors must develop algorithmic competence, and boards must adopt Explainable AI and Human-in-the-Loop processes to satisfy the "Seven Sutras" of governance. The article argues that these measures will allow Indian corporate boards to harness the benefits of AI algorithms while ensuring accountability and responsible decision-making.

KEYWORDS – Artificial Intelligence; Fiduciary Duty; Algorithmic Bias; Corporate Governance; Accountability.

* Authors are third-year students at National Law University Delhi. They would like to extend their gratitude to Prof. Dr Abha Yadav, Associate Professor at National Law University Delhi, for her valuable feedback and guidance.

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1. Introduction

The Indian corporate sector is undergoing a significant transformation driven by the widespread adoption of Artificial Intelligence in fundamental business operations and strategic corporate governance. The scope of AI, originally conceived as the science of creating intelligent machines[1], has allegedly expanded to encompass a "thinking machine[2] that simulates human cognitive abilities.[3] It has emerged as a rational system capable of handling tasks and problem-solving.[4]

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[1] John McCarthy, *Programs with Common Sense*, 1 Mechanization of Thought Processes 75 (1959).
[2] Hokey Min, *Artificial Intelligence in Supply Chain Management: Theory and Applications*, 13 Int'l J. Logist. Res. & Appl. 13 (2010).
[3] Stuart J. Russell & Peter Norvig, Artificial Intelligence: A Modern Approach (3d ed. Pearson 2016).
[4] Jürgen Paschen, Marian Wilson & José J. Ferreira, *Collaborative Intelligence: How Human and Artificial Intelligence Create Value Along the B2B Sales Funnel*, 63 BUS. HORIZONS 403. (2020), *See also*, S. Verma, R. Sharma, S. Deb & D. Maitra, *Artificial Intelligence in Marketing: Systematic Review and Future Research Direction*, 1 Int'l J. Info. Mgmt. Data Insights, no. 1, 2021, at 100002.

Corporate governance is a framework of guidelines and policies on how the organisation will be governed[5], and AI is creating a huge impact in this realm.[6] AI's ability to process an enormous amount of data has revolutionised the way Environmental, Social, and Governance ("**ESG**") reporting and analysis are done.[7] A report revealed that AI can analyse 11 annual reports containing over 1.2 million words in merely five minutes, while a human would take 17 days to complete the same task.[8] Apart from saving time, it eliminates the scope for human error[9] and allows humans to focus on higher-level planning rather than routine data entry and analysis.[10] This further helps in cost-cutting and higher productivity due to higher efficiency.[11] It can also perform predictive analysis using historical datasets and patterns to support effective decision-making.[12]

Various Fortune 500 companies are employing AI to track, forecast future performance[13] and effectively reduce emissions.[14] Amazon uses its own Flamingo algorithm to calculate the environmental impact of

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[5] Ronald J. Gilson, From Corporate Law to Corporate Governance, in The Oxford Handbook of Corporate Law and Governance 3 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., Oxford Univ. Press 2018).

[6] Ijeamaka Charity Mgbemena, Chike Kanayo Nwosu, Chinedu Francis Egbunike, Daniel Izuchukwu Chude & Kenebechukwu Jane Okafor, *The Role of Artificial Intelligence (AI) in Enhancing Corporate Governance within Enterprises*, J. COMPREHENSIVE BUS. ADMIN. RES., June 24, 2025, at 1.

[7] Jigar Patel*, Leveraging AI for ESG Goals: A Case Study of Select Fortune 500 Companies*, 16 INT'L J. MGMT. 1 (2025).

[8] Amplyfi, *Leveraging AI to Analyse ESG Strategies* (Dec. 17, 2024), https://amplyfi.com/2024/10/07/leveraging-ai-to-analyse-esg-strategies/.

[9] Jayajit Dash, *How AI Is Disrupting Corporate Boardrooms* (Oct. 4, 2023), NASSCOM, https://community.nasscom.in/communities/data-science-ai-community/how-ai-disrupting-corporate-boardrooms.

[10] Mustafa K. Ustahaliloğlu, *Artificial Intelligence in Corporate Governance*, 7 Corp. L. & Gov. Rev. 123 (2025).

[11] *Id.*

[12] Jayajit Dash, *supra* note 9.

[13] Gokhan Sariyer, Sachin Kumar Mangla, Subrata Chowdhury, Mustafa Emre Sozen & Yigit Kazancoglu, *Predictive and Prescriptive Analytics for ESG Performance Evaluation: A Case of Fortune 500 Companies*, 181 J. BUS. RES. 114742 (2024).

[14] Lundberg, I., *Future of Business: How AI Is Transforming Fortune 500 Companies* (Sept. 4, 2024), Forbes Coaches Council, https://www.forbes.com/councils/forbescoachescouncil/2024/09/04/future-of-business-how-ai-is-transforming-fortune-500-companies/.

its operations and has effectively reduced its carbon footprint by 3%, with a target to switch completely to renewable energy by 2030.[15] Apart from Amazon, Dell,[16] Ford,[17] IBM,[18] PepsiCo[19], and various others consistently rely on AI for a range of operations, such as production optimisation, energy management, and resource conservation. Even the Government of India ("**GOI**") has not shied away from recognising the potential role that AI can play in nationwide initiatives. The GOI has launched a strategic flagship program, "AI for All", under the aegis of its IndiaAI Mission to exploit the potential of AI.[20] AI Samarth is India's first-ever large-scale program to promote AI literacy in underserved communities, aiming to empower 50 lakh students and parents with the requisite knowledge for meaningful AI engagement.[21]

In November 2025, MeitY formally released the India AI Governance Guidelines, reflecting a strategic vision that marked a significant regulatory milestone. The framework reorients India's approach from

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[15] Mark Segal, *Amazon Hits 100% Renewable Energy Goal* (July 10, 2024), ESG TODAY, https://www.esgtoday.com/amazon-hits-100-renewable-energy-goal/.
[16] Dell Technologies, *Dell Technologies Deep Learning Empowers Volunteers Worldwide to Protect the Great Barrier Reef* (May 24, 2023), Dell, https://www.dell.com/en-us/lp/dt/dell-protecting-the-great-barrier-reef.
[17] Sapizon Technologies, *Enhancing Car Designing and Production with Digital Twin* (Jan. 30, 2023), https://sapizon.com/enhancing-car-designing-and-production-with-digital-twin/.
[18] IBM, Envizi ESG Suite (May 16, 2024), IBM, https://www.ibm.com/products/envizi. *See also* Environment + Energy Leader, IBM Expands Climate, Air Pollution Initiative Globally (July 3, 2024), Environment + Energy Leader, https://www.environmentenergyleader.com/stories/ibm-expands-climate-air-pollution-initiative-globally,11747.
[19] PepsiCo, *PepsiCo and Intuitive AI Join Forces to Launch Oscar Sort—AI Recycling Sortation and Education Technology First Being Deployed at High-Traffic PepsiCo Customer Locations Across the U.S.* (n.d.), PepsiCo, https://www.pepsico.com/our-stories/press-release/pepsico-and-intuitive-ai-join-forces-to-launch-oscar-sort---ai-recycling-sortation-and-education-technology-first-being-deployed-at-high-traffic-pepsico-customer-locations-across-the-us.
[20] Abhishek Singh & Shaveta Sharma-Kukreja, *Why AI Literacy Is Key to India's Future* (July 11, 2025), Hindustan Times, https://www.hindustantimes.com/ht-insight/future-tech/why-ai-literacy-is-key-to-india-s-future-101752228241664.html#:~:text=As%20India%20accelerates%20its%20leadership, use%20it%20safely%20and%20thoughtfully.
[21] *Id.*

a broad developmental agenda to a clearly articulated governance philosophy grounded in the **Seven Sutras**: "Trust; People First; Innovation over Restraint; Fairness & Equity; Accountability; Understandable by Design; and Safety, Resilience & Sustainability". At the core of this reorientation is the idea of "Innovation over Restraint", which means favouring responsible innovation over precautionary restraint.[22] This is a clear and elaborate deviation from the European Union's prescriptive, risk-based AI Act. Unlike the EU's preventive approach,[23] the Indian framework proposes an agile, "light touch" techno-legal model to harness AI's game-changing capacity for global competitiveness while integrating safety and trusted innovation into the national digital public infrastructure. Notably, these seven sutras were adapted from the Reserve Bank of India's Framework for Responsible and Ethical Enablement of Artificial Intelligence ("FREE-AI") report, released for the financial sector on 13 August 2025, some months before the horizontal Guidelines discussed here, suggesting a degree of coordination between India's sectoral and cross-sectoral AI governance efforts.[24]

However, this technological feat comes with its own set of disadvantages, and AI is no less than a dual-edged sword. AI introduces a plethora of risks that strike at the heart of transparent and responsible corporate governance. The algorithms originally designed for efficiency have introduced unfairness, discrimination, and a lack of transparency.[25]

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[22] Government of India, Ministry of Electronics & Information Technology (MeitY), India AI Governance Guidelines (Nov. 5, 2025), https://static.pib.gov.in/WriteReadData/specificdocs/documents/2025/nov/doc2025115685601.pdf.
[23] Marco Almada & Nicolas Petit, *The EU AI Act: Between the Rock of Product Safety and the Hard Place of Fundamental Rights*, 62 Common Mkt. L. Rev. 85 (2025).
[24] Reserve Bank of India, Gov't of Ind., Framework For Responsible And Ethical Enablement Of Artificial Intelligence (Free-Ai) (2025), https://www.rbi.org.in/.
[25] Berry Smith, *Navigating AI in Corporate Governance: A Practical Look at Challenges and Opportunities — Part 2*, Berry Smith (Oct. 22, 2024),

Part 2 of the piece explores the scope of a company director's duties and liabilities in India, analysing the provisions of the Companies Act, 2013, along with judicial precedents which have shaped the contours of director accountability. Parts 3 and 4 of the paper posit that the directors breach their duties by unduly relying on AI, which presents complications that far outweigh its overall advantages. Rather than relieving directors' accountability, the heightened use of AI amplifies their responsibility to employ it effectively. Part 5 of the paper undertakes a comparative analysis of legislation on AI use in corporate governance across regimes such as the EU, the US, and China. It further juxtaposes those laws with the legal position in India. Finally, Part 6 of the paper considers a way forward and offers recommendations to make the use of AI in corporate governance more responsible and ethical. It also focuses on the pressing need for company directors to develop algorithmic competence.

2. The Bedrock of Accountability

To set the stage for these issues, it is first necessary to examine the statutory framework of accountability that anchors directors' responsibilities under Indian corporate law. The Companies Act, 2013,[26] serves as the cornerstone of Indian Corporate Law by transforming the duties of directors from common-law precedent to a codified statutory framework.[27] The pre-existing Companies Act, 1956, did not explicitly stipulate directors' duties, thereby necessitating recourse to common law principles. The 2013 act provides a technology-neutral framework for accountability, allowing it to adapt to contemporary challenges, such as those posed by artificial intelligence. Since directors are the ultimate custodians of corporate

https://www.berrysmith.com/news/navigating-ai-in-corporate-governance-a-practical-look-at-challenges-and-opportunities-part-2/.
[26] The Companies Act, No. 18 of 2013, §2(34) (Ind.).
[27] The Companies Act, No. 18 of 2013 (Ind.).

governance, their statutory duties directly determine how companies deploy and oversee AI systems. The increasing reliance on AI in business decision-making, therefore, necessitates a reinterpretation of directors' responsibilities, effectively creating principles-based regulations for AI governance and demanding a higher threshold of diligence and business judgment from the board.

Section 2(34) of the Companies Act, 2013 defines a director as a "director appointed to the Board of a company". The statutory framework makes clear that such a director must be a natural person. This position has also been affirmed judicially, where the Supreme Court emphasised that a director, by definition, is a natural person and not a juristic entity.[28] This is particularly relevant in the context of AI, which, while advancing in terms of autonomy in the corporate world, cannot assume the role of a director or bear the risk of being a director. As AI begins to influence or drive important decisions, the responsibility cannot fall solely to algorithms or systems. Directors who are natural persons will ultimately be responsible for ensuring that AI-driven tools are used responsibly, ethically, and in compliance with the law. In one example, Deep Knowledge Ventures engaged a machine learning algorithm, VITAL, as its sixth board "member" to consider life-science investments.[29] VITAL had the power to vote on whether to make specific investments in start-ups like a normal director. Yet Hong Kong law bars non-humans from serving as directors, so VITAL never held formal director status. This illustrates that even if directors use AI-based tools, the process must ultimately be completed and approved by human beings. Boards should think of AI as a powerful resource, not a replacement.

[28] Oriental Metal Processing Works (P) Ltd. v. Bhaskar Kashinat Thakur, AIR 1961 SC 573 (Ind.).
[29] Muzaffer Eroğlu & Meltem Karatepe Kaya, *Impact of Artificial Intelligence on Corporate Board Diversity Policies and Regulations*, 23 Eur. Bus. Org. L. Rev. 541 (2022).

To this end, Section 166 of the Act plays a foundational role by codifying a broad suite of director duties rooted in common law.[30] Section 166(2) and (3) require every director to comply with the company's articles of association and act in good faith to promote the best interests of the company, promote its objective and exercise due and reasonable care with independent judgment.[31] Section 166(3) of the Act states that directors "shall exercise independent judgment"[32], with the underlying understanding of independent judgment being the rationale behind a decision.

The most distinctive provision in the Indian context is Section 166(2), which expressly mandates that directors consider community interests, thereby extending the fiduciary duty beyond profit maximisation.[33] This stakeholder-centric approach model creates a direct and powerful link between algorithmic fairness and a director's personal fiduciary duty. In *TCS v. Cyrus Investments*[34], the Supreme Court invoked directors' stakeholder responsibilities under Section 166(2), which requires directors to balance shareholder interests with the community's interests. Reliance on biased or harmful AI could violate this stakeholder duty, especially if it harms the community.

In an era where AI can analyse data and model risks at a scale and velocity far exceeding human capacity, the definition of "reasonable care" is expanding.[35] A board that intentionally ignores the potential of AI tools to inform critical decisions may be seen as failing to exercise reasonable care. Conversely, and more critically, a director who passively accepts an AI-generated recommendation without a critical

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30 The Companies Act, No. 18 of 2013, §166 (Ind.).
31 *Codification of Directors' Duties: Is Common Law Excluded?*, IndiaCorpLaw (May 31, 2014), https://indiacorplaw.in/2014/05/31/codification-of-directors-duties-is/.
32 The Companies Act, No. 18 of 2013, §166(3) (Ind.).
33 The Companies Act, No. 18 of 2013, §166(2) (Ind.).
34 Tata Consultancy Services Limited (S) v. Cyrus Investments Pvt. Ltd. And Others (S)., 2021 INSC 217 (Ind.) *See* Para 19.24.
35 Matthew R. Gaske, *Regulation Priorities for Artificial Intelligence Foundation Models*, SSRN Electronic Journal, Apr. 2023.

and informed assessment abdicates their responsibility.[36] This evolving standard advances the duty of care, which mandates a minimum level of literacy in the operation of AI, including its limitations and inherent risks.[37] They must be equipped to ask probing questions about data provenance and model validation, thereby moving beyond mere acceptance to active and informed oversight.[38] Though Indian courts have not yet directly addressed AI, related cases offer guidance. This is beginning to change, as in July 2026, the Delhi High Court, at the interim stage, declined to injunct OpenAI's use of news content to train ChatGPT in a copyright suit brought by Asian News International, finding that the fair-dealing exception arguably covered the reproduction and that the alleged substantial reproduction in outputs was unproven. This serves as an early position of the Indian Court directly confronting an AI developer's accountability, though outside the corporate governance context.[39] The case of *LIC v. Hari Das Mundhra* held that directors are not liable for mere errors in judgment or for honest mistakes by others, absent complicity. Directors are to be judged by the standards of a "reasonable businessperson," not with hindsight.[40]

Although the Business Judgment Rule ("**BJR**") is not expressly enshrined in Indian statute, it has been robustly endorsed by judicial practice and plays a central role in corporate adjudication. Indian courts afford substantial deference to decisions taken by directors who act honestly, in good faith and on an informed basis; Section 463 of

[36] Sunil Kumar, *Integrating Artificial Intelligence (AI) into Corporate Governance Systems*, EDPACS 69(12) 28–51 (Sept. 26, 2024).
[37] Shani R. Else & Francis G.X. Pileggi, *Corporate Directors Must Consider Impact of Artificial Intelligence for Effective Corporate Governance*, Business Law Today (ABA) (Feb. 12, 2019) https://businesslawtoday.org/2019/02/corporate-directors-must-consider-impact-artificial-intelligence-effective-corporate-governance/.
[38] S. Matthew Liao, Iskandar Haykel, Katherine Cheung & Taylor Matalon, *Navigating the Complexities of AI and Digital Governance: The 5W1H Framework*, 23 J. Responsible Tech. 100127 (2025).
[39] ANI Media Pvt. Ltd. v. OpenAI OpCo LLC, 2026:DHC:5900, para 271-273 (Ind.).
[40] Life Insurance Corporation Of India v. Hari Das Mundhra And Others, 1962 SCC ONLINE ALL 252 (Ind.); *See* Para 109 and 111.

the Act gives statutory expression to this doctrine by enabling courts to absolve directors who have "acted honestly and reasonably." The Supreme Court's formulation in *Miheer H. Mafatlal v. Mafatlal Industries* exemplifies this approach, holding that judicial intervention is inappropriate where a director's conduct, judged by the standards of a reasonable businessman, is just, fair and commercially prudent and advances the company's interests.[41] Likewise, in *Needle Industries*, the board's resolution to issue rights was upheld because the decision aligned with the company's interests and broader corporate purpose.[42]

Notwithstanding this protective ambit, the BJR operates subject to evidentiary and procedural constraints, as relief is contingent on the board having reached its decision on an adequately informed basis and in compliance with the duty of care reflected in Section 166(3). Jurisprudence from other common-law jurisdictions illustrates the converse risk where that threshold is not met. In *Smith v. Van Gorkom*, for example, the Delaware Supreme Court imposed personal liability on directors who approved a merger after only cursory consideration and without requisite expert input, concluding that the board had acted on an uninformed basis and therefore failed the "reasonably informed" standard, thereby negating any claim that they had "acted honestly and reasonably."[43] Even in India, in *Narayanan v. Adjudicating Officer, SEBI*, the Supreme Court held that directors cannot shut their eyes to what would be obvious to anyone examining the company's affairs even superficially. In that case, the directors had failed to exercise due care and diligence, overlooking glaring red flags in revenues, profits, receivables, and deposits, such as profits tripling within a single quarter and security deposits skyrocketing, which were disproportionate to the company's actual expansion. By participating in board meetings and

41 Miheer H. Mafatlal v. Mafatlal Industries Ltd., (1997) 1 SCC 579 (Ind.); *see* para 29.
42 Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd., (1981) 3 SCC 333; *see* para 108, 111 and 119 (Ind.).
43 Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985) (US).

being privy to these irregularities, they were found to have breached their fiduciary duties.[44] In other words, inscrutable technology does not relax directors' duty to be diligent; if anything, it heightens the need for rigorous oversight. Boards using AI must ensure they conduct thorough vetting of AI tools and demand explainable rationale; otherwise, they jeopardise their BJR protection.[45]

A robust ancillary regulatory framework supports this expansive view. The Director's Responsibility Statement, enumerated under Section 134 of the Act, requires a collective statement by the board to confirm that, among other things, "the directors had designed appropriate systems to ensure compliance with the provisions of all applicable laws, and these systems were reliable and in operation"[46]. An AI system that operates in breach of law, for instance, by violating data privacy regulations or anti-discrimination statutes, is prima facie evidence of a failed compliance system. The board's statement that this system is reliable and effective exposes the directors to liability, as it would be a false or misleading statement. In addition to the Act, directors of listed companies are bound by SEBI Listing Obligations and Disclosure Requirements ("**LODR**") Regulations, 2015.[47] Regulation 4 requires boards to be responsible for strategic management, risk management, succession planning, financial oversight, and disclosure of "material information".[48] The integration of AI into managerial or board-level decision-making clearly falls within this scope, since the adoption, design, or reliance on AI systems can fundamentally alter a company's strategic direction, its risk profile, and the quality of information flows

[44] N. Narayanan v. Adjudicating Officer, Securities and Exchange Board of India, 2013 ABR 4 889 (Ind.).
[45] David Helleringer & Maximilian Moëslein, *AI & The Business Judgment Rule: Rethinking Director Liability in the Age of Algorithms*, U. Chi. Legal Forum 1, 2025.
[46] The Companies Act, No. 18 of 2013, §134 (Ind.).
[47] See SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (Listing Regulations), PR No. 226/2015 (Sept. 3, 2015).
[48] Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, Reg. 4.

between management and directors. Accordingly, AI constitutes "material information" whose disclosure and oversight are mandatory under the regulation, and boards that fail to recognise this risk are non-compliant.

Apart from directors' obligations, even independent directors have a duty to act in the best interests of the company, and they must ensure that AI systems are used appropriately. Schedule IV of the Companies Act, 2013, lays down the obligations of an independent director.[49] An independent director must pay attention to their professional obligation to make informed decisions, monitor management's performance reporting, and ensure the integrity of financial information.[50] SEBI's order in *Bombay Dyeing & Mfg. Co. Ltd.* held independent directors accountable, despite their non-executive status, for failing to act to prevent management from recording improper accounting and materially inflating sales.[51] In a similar case involving *LEEL Electricals Ltd.*, SEBI issued findings against two independent directors, imposing personal fines of ₹10 lakh each for dereliction of duty as members of the Audit Committee, and subsequently imposed significant penalties on executive directors, indicating that liability was beginning to be imposed on independent directors.[52] Although in some cases, independent directors are held liable for oversight, the same standard applies to executive and non-executive directors in AI governance. Directors can incur personal liability if AI systems operating under their authority result in regulatory breaches, compliance failures, or material misstatements. Strengthening this,

[49] The Companies Act, No. 18 of 2013, Schedule IV (Ind.).
[50] The Companies Act, No. 18 of 2013, Schedule IV, Clause II(4) (Ind.).
[51] Securities and Exchange Board of India, Adjudication Order in the Matter of Bombay Dyeing and Manufacturing Company Limited, Adjudicating Officer Order (Oct. 31, 2022); *See also* Manendra Singh & Ambareen Khatri, *Director's Liabilities: Navigating Accountability and Corporate Governance Challenges*, The Chamber's Journal, Vol. XIII, No. 4 (Jan. 2025), at 40.
[52] Securities and Exchange Board of India, Final Order in the Matter of LEEL Electricals Ltd., Order No. WTM/AB/IVD/ID-1/ 2024-25/ 82934/1.

SEBI's June 2025 consultation paper titled "Guidelines for responsible AI/ML usage in Indian Securities Market" signals a clear regulatory intent to hold market participants accountable for model governance, investor protection disclosures, robust testing, and bias mitigation, further solidifying the expected standard of care for directors.[53] Independent of this consultative process, SEBI's regulatory hooks for AI/ML tools are already binding. Regulation 16C, inserted by the SEBI (Intermediaries) (Amendment) Regulations 2025, with effect from 10 February 2025, assigns sole liability to SEBI-regulated entities for the AI/ML tools they deploy, whether developed in-house or procured from third parties, including data privacy, output integrity, and compliance with securities law.[54] As of August 2026, however, the more substantive guidelines in the June 2025 Consultation Paper remain at the proposal stage and have not been notified as a binding circular.[55]

The establishment of a national oversight mechanism further entrenched the shift toward explicit board-level accountability. Sitting atop this architecture is the AI Governance Group ("**AIGG**"), a permanent, high-level inter-agency entity charged with ensuring coherence in AI policy and strategic orientation across ministries and sectoral regulators. The AI Safety Institute ("**AISI**") was created as the principal body for technical validation and safety research, intended to reconcile technical complexity with fiduciary duty.[56] This coordinating body has since been formally constituted under a different name. On

[53] Consultation Paper on Guidelines for Responsible Usage of AI/ML in Indian Securities Markets, June 20, 2025.
[54] Securities and Exchange Board of India (Intermediaries) (Amendment) Regulations, 2025, Gazette of India, pt. III sec. 4, Reg. 16C (Feb. 10, 2025).
[55] Securities and Exchange Board of India, Gov't Of Ind., Guidelines For Responsible Usage Of Artificial Intelligence (Ai) And Machine Learning (Ml) In Indian Securities Markets (2025), https://www.sebi.gov.in/.
[56] Government of India, Ministry of Electronics & Information Technology (MeitY), India AI Governance Guidelines, 32, (Nov. 5, 2025), https://static.pib.gov.in/WriteReadData/specificdocs/documents/2025/nov/doc2025115685601.pdf.

16 April 2026, MeitY notified the establishment of the AI Governance and Economic Group ("AIGEG"), chaired by the Union Minister for Electronics and Information Technology, with a supporting Technology and Policy Expert Committee ("TPEC") constituted two days later, giving institutional shape to the coordination function envisaged in the Guidelines.[57] Under Section 166(3), directors are required to exercise due care; accordingly, directors may advance a compelling argument that AISI does not constitute a "testing framework," since the statute is silent as to who must provide such a framework. The 2025 Guidelines introduce a "graded liability system" for board-level risk governance, in which a director's personal liability is not absolute but is adjusted according to the AI system's function, the foreseeability and magnitude of associated risks, and the demonstrable degree of board-level due diligence.[58] This calibrated regime thus affords greater protection to directors who regularly engage with these institutional safeguards.

Further, Section 134(3)(n) requires the board's report to include "a statement indicating development and implementation of a risk management policy for the company and identification in that policy of any elements of risk, which in the opinion of the Board, may threaten the existence of the company".[59] The opaque, complex, and potentially biased nature of AI, when used in key decision-making processes, undoubtedly constitutes a risk that should be included in the Board's risk management policy and is explicitly or implicitly disclosed by the board.

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[57] Press release, Ministry of Electronics & IT, Government Constitutes AI Governance and Economic Group (AIGEG) to Lead India's National AI Governance Strategy (Apr. 16, 2026), https://www.pib.gov.in/PressReleasePage.aspx?PRID=2252739.

[58] Government of India, Ministry of Electronics & Information Technology (MeitY), India AI Governance Guidelines, 06, (Nov. 5, 2025), https://static.pib.gov.in/WriteReadData/specificdocs/documents/2025/nov/doc2025115685601.pdf.

[59] The Companies Act, No. 18 of 2013, §134(3)(n) (Ind.).

Finally, the recently enacted Digital Personal Data Protection Act, 2023 ("**DPDP Act**") classifies Indian entities that process personal data as "data fiduciaries," imposing strict requirements on consent and data security[60], and authorising penalties of up to ₹250 crore for security breaches.[61] A board's failure to ensure the security of AI systems that process personal data can therefore attract substantial fines, and directors can be held responsible for supervisory deficiencies. Although the DPDP Act initially appeared to leave a lacuna regarding algorithmic testing, emphasising consent rather than substantive fairness concerns, that position was altered by the notification of the Digital Personal Data Protection Rules, 2025, on 14 November 2025. The Rules now explicitly require Significant Data Fiduciaries ("**SDFs**") to conduct periodic Data Protection Impact Assessments ("**DPIAs**"), commission independent audits, and adopt an expansive definition of "harm" that expressly includes discriminatory outcomes generated by biased AI models. As a result, the board's role has evolved from abstract ethical stewardship under Section 166(2) into a concrete statutory duty: the failure to audit an AI system that subsequently causes harm amounts to a breach of the compliance obligations under Section 134,[62] exposing directors to penalties for both the resulting data breach and the antecedent governance failure. Thus, while Section 166(2) continues to serve as the principal normative basis for community interest, the new DPDP Rules supply the procedural mechanisms necessary to enforce it.[63] It bears noting, however, that these substantive obligations, including the

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[60] Manendra Singh & Ambareen Khatri, *Director's Liabilities: Navigating Accountability and Corporate Governance Challenges*, The Chamber's Journal, Vol. XIII, No. 4 (Jan. 2025), at 40.
[61] Bharvi Shahi & Anand Raj Dev, *Navigating India's Digital Personal Data Protection Act: Critical Implications and Emerging Challenges*, Int'l J. Legal Stud. & Soc. Sci., Vol. 3, Issue 1, at 412–22 (2025).
[62] The Companies Act, No. 18 of 2013, §134 (Ind.).
[63] Aradhay Pandey & Utkarsh Shukla, *Algorithms of Oppression: Addressing AI Bias in India*, Cell for Law & Technology National Law Institute University, Bhopal (May 2025) https://clt.nliu.ac.in/?p=1144.

duty to conduct DPIAs and commission independent audits, bind significant Data Fiduciaries only from 13 May 2027, eighteen months after the Rules' notification. At present, only the Data Protection Board's constitutive and procedural provisions are in force; therefore, the compliance pathway described above remains prospective rather than immediately enforceable.[64]

3. The Algorithmic Challenge: How AI Risks Amplify Directors' Duties and Liabilities

While AI offers various strategic advantages, the risks it introduces are not merely technical but are intertwined with the legal obligations of the directors. These risks adversely affect the basic tenets of corporate governance, such as accountability, transparency, and continuous monitoring.[65] AI does not possess consciousness or moral judgment and cannot be held accountable for its decisions.[66] Additionally, it has no assets or obligations to preserve the reputation at stake.[67] Human designers may create deficient AI tools that produce erroneous results[68], as even if they are algorithmic experts, they are not company directors or business administrators.[69] This section examines these perplexities and how they can lead to breaches of directors' obligations when directors rely on these complicated algorithms to exercise due care in their actions.

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[64] Digital Personal Data Protection Rules, 2025, Gazette of India, pt. II sec. 3(i), Rules 1 & 13 (Nov. 13, 2025).

[65] Julien Kiesse Bahangulu & Louis Owusu-Berko, *Algorithmic Bias, Data Ethics, and Governance: Ensuring Fairness, Transparency and Compliance in AI-Powered Business Analytics Applications*, 25 World J. Adv. Res. & Rev. 1746 (2025).

[66] Sofia Gramitto Ricci, *Artificial Agents in Corporate Boardrooms*, 105 Cornell L. Rev. 869 (2020).

[67] John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 Mich. L. Rev. 386 (1981).

[68] William Terdoslavich, *Recognizing (and Solving) Bad Algorithms* (Nov. 22, 2016), DICE, https://www.dice.com/career-advice/recognizing-solving-bad-algorithms.

[69] Alfred R. Cowger, Jr., *Corporate Fiduciary Duty in the Age of Algorithms*, 14 J.L. Tech. & Internet 211 (2022–2023).

3.1. Bias

Algorithmic bias refers to systematic errors in AI systems that lead to prejudiced outcomes that disadvantage a particular section of society based on their natural characteristics, such as race, gender, or religion.[70] Algorithms are often trained on skewed, incomplete and biased datasets and tend to replicate the societal inequalities in their outcomes. Corporate governance principles are built on equity and non-discrimination, and algorithmic bias threatens to embed latent discrimination in corporate operations when deployed without proper scrutiny.[71] Algorithmic bias may originate at multiple stages of an AI system's lifecycle, including data selection, model design, training, and deployment.[72] AI works on data sets, which serve as raw materials for algorithms to train on and refine their analytical processes, making them more efficient.[73] An algorithm is only "as good as the data it works with[74], and therefore, if the sub-data employed in an algorithm is biased, the result will also be biased. Thus, these algorithms might provide incorrect and misleading conclusions to the corporate fiduciaries.[75] Since one of the most important functions of AI is prediction, the entire output of the AI becomes questionable if the input is biased.[76]

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[70] Aapti Institute**,** *Artificial Intelligence and Potential Impacts on Human Rights in India*, United Nations Development Programme, July 2022 https://www.undp.org/india/publications/artificial-intelligence-and-potential-impacts-human-rights-india; Shani R. Else & Francis G.X. Pileggi**,** *Corporate Directors Must Consider Impact of Artificial Intelligence for Effective Corporate Governance*, Bus. Law Today (ABA) (Feb. 12, 2019); George Benneh Mensah**,** *Artificial Intelligence and Ethics: A Comprehensive Review of Bias Mitigation, Transparency, and Accountability in AI Systems*, Research Gate, (Nov. 2023).

[71] Berry Smith, *supra* note 25.

[72] *Id.*

[73] Nicole Turner Lee, Paul Resnick & Genie Barton, *Algorithmic Bias Detection and Mitigation: Best Practices and Policies to Reduce Consumer Harms* (May 22, 2019), Brookings Institution, https://www.brookings.edu/articles/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-to-reduce-consumer-harms/.

[74] Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 Calif. L. Rev. 671 (2016).

[75] Shani R. Else & Francis G. X. Pileggi, *supra* note 38.

[76] Luca Enriques & Dirk A. Zetzsche, *Corporate Technologies and the Tech Nirvana Fallacy*, 72 Hastings L.J. 55 (2020).

This demerit of AI's tendency to reinforce latent historical discrimination in the databases has been recognised both by the supporters and critics of AI.[77] Amazon, a multinational technology company engaged in e-commerce, created its own AI program as part of its resume-screening process to shortlist candidates who would flourish in Amazon's work environment, and it provided its hiring and promotion data to the algorithm.[78] The algorithm uncovered historically discriminatory practices in Amazon's promotions that disfavoured women candidates and screened them out from the selection procedure. This highlights the importance of distinguishing statistical bias from the outcomes of machine learning models, which are often arbitrary. While statistical bias can result from incomplete data and be mitigated through improved data collection, discriminatory bias arises when an AI system produces different outcomes for different demographic groups.[79]

The "Fairness and Equity" provision in the 2025 Guidelines clarifies that legal liability for systemic failures is contingent upon demonstrable compliance with requirements that AI design and empirical validation be free from bias and avoid producing discriminatory outcomes for marginalised groups.[80] To translate these normative ethical commitments into enforceable duties, the Guidelines mandate that developers and boards rely on "evaluation datasets" that are reliable, representative, and standardised, and are disseminated via state-

[77] Frank A. Pasquale*, Toward a Fourth Law of Robotics: Preserving Attribution, Responsibility, and Explainability in an Algorithmic Society*, 78 Ohio St. L.J. 1243 (2017).
[78] Jeffrey Dastin, *Amazon Scraps Secret AI Recruiting Tool that Showed Bias Against Women* (Oct. 10, 2018, 7:04 PM), Reuters, https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G.
[79] Olumide Ajayi, *Data Privacy and Regulatory Compliance: A Call for a Centralized Regulatory Framework*, 12 Int'l J. Sci. Rsch. & Mgmt. 573 (Dec. 2024).
[80] Government of India, Ministry of Electronics & Information Technology (MeitY), India AI Governance Guidelines, (Nov. 5, 2025), https://static.pib.gov.in/WriteReadData/specificdocs/documents/2025/nov/doc 2025115685601.pdf.

supported platforms such as AIKosh.[81] Consequently, under the due-care obligation in Section 166(3), directors are effectively obliged to ensure that AI systems incorporate localised socio-economic data so that their predictive outputs do not reproduce existing social hierarchies in India.

An argument proposed in favour of the use of AI in the corporate world is that it enhances the efficiency of independent directors, who are required to uphold integrity while acting bona fide in the company's interests.[82] But since the company has a direct and ultimate say in the appointment and removal of directors, it is disincentivised from acting independently or going against the board's decision.[83] AI, on the other hand, can enable independent directors to make compelling arguments, based on collected data sets, against a decision that might be unfavourable to the company, acting as an impartial arbiter without unjust enrichment or market manipulation.[84] But even if the independent directors have AI-driven data indicating that the board's decision does not favour the company, they may still choose not to oppose the policy for the same reasons. Even if they decide to oppose the policies based on AI results, there is always a possibility that the outcomes themselves would be compromised by algorithmic bias.

Studies conducted by Microsoft researchers have found significant racial and gender biases in technology-driven facial recognition systems, which were significantly less accurate at identifying people with darker skin tones.[85] Even criminal sentencing tools are proven to disproportionately label dark-skinned people as having a higher

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[81] India AI Governance Guidelines 2025, The AI Track (Nov. 2025), https://theaitrack.com/india-ai-governance-guidelines-2025/.
[82] The Companies Act, No. 18 of 2013, Schedule IV, Guideline I (Ind).
[83] Ria Verma & Sourika Jana, *AI-Powered Governance: Shaping the Future Landscape of Corporate Governance* (Nov. 15, 2024), SSRN, https://ssrn.com/abstract=5099460.
[84] *Id.*
[85] Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, in Proc. 1st Conf. Fairness, Accountability & Transparency 77 (2018).

probability of reoffending as compared to people with lighter skin tones.[86] Therefore, the use of AI calls for a decision-making process with proper checks and balances[87], and directors must be vigilant enough not to accept algorithmic conclusions unquestioningly.[88] The deployment of such a biased system is not merely a reputational risk or an ethical lapse; it can be framed as a direct breach of the director's statutory duty to the "community" under Section 166(2).[89]

3.2. Opacity

Most AI models operate as "black box" models, with their internal logic remaining largely opaque and incomprehensible, even to developers.[90] This increases the risk of latent errors in the data sets going undetected for a long time, as it is difficult to locate the problem in the opaque setup.[91] This further creates a direct conflict with directors' obligation under Section 166(3)[92], which requires them to exercise their duties with reasonable care and diligence, a requirement that is not possible when they don't even know the logical basis for the outcomes they rely on. Company directors are required to make informed decisions and critically examine algorithmic outcomes to make efficient decisions, but this is impractical given the "Black Box" nature of algorithmic processes. Therefore, there is a need for greater transparency as opaque algorithms pose various legal and ethical concerns.[93]

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[86] Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias: There's Software Used Across the Country to Predict Future Criminals and It's Biased Against Blacks*, ProPublica (May 23, 2016).
[87] Muzaffer Eroğlu & Meltem Karatepe Kaya, *supra* note *29*.
[88] Alfred R. Cowger, *supra* note 72.
[89] The Companies Act, No. 18 of 2013, §166(2) (Ind.)
[90] Berry Smith, *supra* note 25.
[91] Zurich Insurance Group & Microsoft Corp., *Artificial Intelligence and Algorithmic Liability: A Technology and Risk Engineering Perspective* (July 29, 2021), Zurich, https://www.zurich.com/knowledge/topics/digital-data-and-cyber/artificial-intelligence-gives-rise-to-algorithmic-liability.
[92] The Companies Act, No. 18 of 2013, §166(3)(Ind.).
[93] Mustafa Kenan Ustahaliloğlu, *Artificial Intelligence in Corporate Governance*, 7 Corp. L. & Gov. Rev. 123 (2025).

While there is a widespread belief that the most accurate AI models must be inherently uninterpretable and complex, this is inaccurate and has enabled companies to sell complex black-box models for high-stakes decisions even when simple models were available.[94] A thought experiment was conducted, and the audience was given a choice between a human surgeon (who could explain the procedure and had a 15% chance of death) and a robotic system (which could not explain its actions and had a 2% chance of death) for performing surgery. All but one person chose the robotic arm. This raises a fundamental question: Why does an AI system need to be a black box to ensure greater accuracy?[95] Studies have shown that complex black-box models are no more accurate than simple explainable models.[96]

The 2025 Guidelines replace the broad label "Explainable AI" with the more exacting mandate of "Understandable by Design." Under this principle, comprehensibility must be embedded in the system architecture from inception rather than supplied afterwards as an ex-post explanation; systems are therefore required to produce disclosures that are intelligible to both their target users and regulatory authorities.[97] This requirement is central to satisfying Section 166(3) of the Companies Act: where an AI system's internal operation remains a "black box" to the board or its regulators, a director cannot plausibly assert that they exercised genuinely "independent judgment." Consequently, transparency ceases to be a mere technical preference and becomes a statutory prerequisite for directors seeking to

[94] Cynthia Rudin and Joanna Radin, *Why Are We Using Black Box Models in AI When We Don't Need To? A Lesson from an Explainable AI Competition*, Harvard Data Science Review, 1(2) (2019).
[95] *Id.*
[96] Elaine Angelino, Nicholas Larus-Stone, Daniel Alabi, Margo Seltzer, Cynthia Rudin, *Learning Certifiably Optimal Rule Lists for Categorical Data*, Journal of Machine Learning Research 18(234):1-78, (2018).
[97] Government of India, Ministry of Electronics & Information Technology (MeitY), India AI Governance Guidelines, 05, (Nov. 5, 2025), https://static.pib.gov.in/WriteReadData/specificdocs/documents/2025/nov/doc2025115685601.pdf.

demonstrate the informed basis necessary to discharge their fiduciary obligations.

Even though, as the algorithms' opacity increases, it becomes more difficult to determine corporate liability when a company's reliance on AI-driven algorithms results in a violation of corporate governance principles[98], if a board stamps an AI's recommendation without interrogating the underlying assumptions, it undermines Section 166(3)'s duty of care and independent judgment. With inscrutable AI, reliance defences would fail unless directors can demonstrate active oversight and probe data provenance, validation, and limitations.

3.3. Automation Bias

Automation Bias is yet another vice. It refers to the human tendency to accept algorithmic outcomes even when they seem incorrect on their face.[99] This duty is further compounded by the risk of bias, in which psychological deference to a machine's output can lead a director to suspend their own critical judgment, a clear failure to apply the reasonable care the duty of care demands.[100] Directors must reach the outcomes only after proper deliberation, but cognitive bias can blur directors' reasoning and render them liable under Section 166(3) for failing to exercise "due and reasonable care".[101] These errors would not be protected under Section 463, as protection therein is only limited to acts done honestly and reasonably. It is not a simple error but a failure of the decision-making process.

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[98] Nisarg M. Desai & Shivani Gupta, *Vicarious Liability of Directors vis-à-vis a Company* (Mar. 3, 2025), Bar & Bench, https://www.barandbench.com/view-point/vicarious-liability-of-the-directors-vis-vis-a-company.

[99] Danielle Keats Citron, *Technological Due Process*, 85 Wash. U. L. Rev. 1249 (2008).

[100] Jason Borenstein et al., Pediatric Robots and Ethics, in Robot Ethics 2.0: From Autonomous Cars to Artificial Intelligence 127 (Patrick Lin et al. eds., Oxford Univ. Press 2017), *See also*, Berry Smith, Navigating AI in Corporate Governance: A Practical Look at Challenges and Opportunities — Part 2, Berry Smith (Oct. 22, 2024), https://www.berrysmith.com/news/navigating-ai-in-corporate-governance-a-practical-look-at-challenges-and-opportunities-part-2/.

[101] The Companies Act, No. 18 of 2013, §166(3)(Ind.).

As AI tools become more pervasive, corporate entities that don't upskill to utilise these tools efficiently will soon find themselves in breach of directors' obligations under Section 166.[102] Therefore, directors cannot fully delegate their responsibilities to algorithmic tools but ought to retain decision-making authority to avoid breaching their obligations.[103] Reports have shown that AI is not capable of balancing short-term and long-term priorities, and a human agency is better suited for long-term strategic planning.[104] Artificial fiduciaries were created to collect information and make decisions on behalf of the directors for their benefit.[105] In the case of excessive reliance by directors on AI, Artificial fiduciaries begin acting as super directors, superseding the board's decisions.[106] Therefore, it becomes increasingly important to establish a clear boundary between the roles of human and artificial fiduciaries. [107]

4. Inefficient Board Monitoring

As AI is increasingly employed in corporate decision-making,[108] it has tremendous potential to disrupt the routine information flows between directors and executives.[109] An optimal governance structure envisages a system in which Chief Executive Officers ("**CEOs**") approach the board to resolve problems they cannot solve.[110] When CEOs rely on algorithmic outcomes for decision-making, strategic planning, and idea

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102 Alfred R. Cowger, *supra* note 72.
103 *Id.*
104 Martin Petrin, *Corporate Management in the Age of AI, 2019 Colum.* Bus. L. Rev. 965, 986 (2019).
105 Zhaoyi Li, *Artificial Fiduciaries*, 81 Wash. & Lee L. Rev. 1299 (2024).
106 Michael Abbott et al., *Generative Artificial Intelligence (AI) and 401(k) Plan Fiduciary Implications*, Foley & Lardner LLP (Apr. 17, 2024), https://perma.cc/R3EG-3BNY.
107 *Id.*
108 Kenny, Graham, Kowalkiewicz, Marek, and Oosthuizen, Kim, *How CEOs Are Using Gen AI for Strategic Planning*, Harvard Business Review, September 11, 2024, https://hbr.org/2024/09/how-ceos-are-using-gen-ai-for-strategic-planning.
109 Ferreira, Daniel & Jin Li, *Artificial Intelligence in the Boardroom* (European Corporate Governance Institute – Finance Working Paper No. 1087/2025 & HKU Jockey Club Enterprise Sustainability Global Research Institute Paper No. 2025/132, Aug. 27, 2025) https://ssrn.com/abstract=5409542.
110 *Id.*

generation, this can directly reduce their reliance on the board of directors for advisory purposes and may disincentivise CEOs from sharing information with directors.[111] To restore information flow between CEOs and the Board of Directors, a CEO-friendly board is installed, which is inclined to retain the CEO even when better options are available, increasing the risk of CEO entrenchment. As the risk of their dismissal decreases, their pay decreases as well. In a nutshell, AI can potentially disrupt the board's independent monitoring mechanism, without benefiting the CEOs either.[112]

Assuming for analytical purposes that CEOs become more skilled at problem-solving as they rely more on AI, their productivity will increase, and firms will expect more effort from them with lower pay. But lower pay will itself incentivise CEOs to conceal information from the board, and therefore, reliance on AI will set up a vicious cycle of low pay and low monitoring. Even if the board adopts AI to counter the adverse effects of the CEO's AI use, it will become very difficult to restore optimal board monitoring. Thus, the use of AI has adverse impacts on overall corporate governance.

5. Comparative Analysis

Indian companies do not operate in a vacuum, and a comparative analysis of global norms on the use of AI in corporate governance is essential. The world's major economic blocs are charting distinct paths, with the EU adopting a prescriptive, rights-based model, the US favouring a market-driven, sectoral approach. India adopted a unique hybrid strategy,[113] also described in this article as 'light touch techno-

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[111] Larcker, David F.; Seru, Amit; Tayan, Brian; & Yoler, Laurie, The Artificially Intelligent Boardroom (Rock Center for Corporate Governance at Stanford University Working Paper No. CL110, March 17, 2025) https://ssrn.com/abstract=5182306.
[112] Ferreira, Daniel & Jin Li, *supra* note 113.
[113] Vikram Kulothungan & Deepti Gupta, *Towards Adaptive AI Governance: Comparative Insights from the U.S., EU, and Asia*, arXiv:2504.00652 (Apr. 1, 2025).

legal model', meaning a minimally prescriptive regulatory posture that integrates governance obligations within existing sectoral law rather than through a standalone AI Statute.

5.1. European Union

The European Union has pioneered comprehensive AI regulation with its Artificial Intelligence Act (Regulation (EU) 2024/1689)[114] ("**AI Act**"). The AI Act takes a risk-based, prescriptive stance. The Act categorises AI systems into four risk levels, namely, *unacceptable, high, limited,* and *minimal*, each carrying corresponding legal consequences.[115] Systems posing *unacceptable risks* are banned outright, and those classified as *high* risk may be deployed only under rigorous conditions. In contrast, limited-risk systems face minimal transparency obligations, and minimal-risk systems are subject to no special regulation. The Act's risk classification is driven by the system's intended purpose, capability and context of use rather than purely by technical architecture, so regulators determine risk by assessing what the system is meant to do and the foreseeable harms of that use; high-risk labels attach to specific uses, for example biometric identification or safety-critical applications and trigger technical and organisational requirements such as human oversight, logging, testing, conformity assessment and an EU declaration of conformity.[116] Many of these obligations are proactive, such as requiring providers of high-risk systems to satisfy conformity assessments, maintain quality-management systems, and document design-time safeguards before placing the system on the market or putting it into service.[117]

[114] Regulation (EU) 2024/1689 of the European Parliament and of the Council, 13 June 2024, (EU).
[115] Marco Almada & Nicolas Petit, *The EU AI Act: Between the Rock of Product Safety and the Hard Place of Fundamental Rights*, 62 Common Mkt. L. Rev. 85 (2025).
[116] Artificial Intelligence Act, Regulation (EU) 2024/1689, art. 6, Annex III (EU).
[117] *Id.*, art. 72 (EU).

At the same time, the Act regulates general-purpose or "foundation" models at the end as well as at the deployed-system level, imposing model-level duties that apply to the model itself, not only to a particular product packaging. Where a general-purpose model meets the Act's thresholds for systemic risk, providers face additional, continuous obligations and a notification requirement to the EU AI Office, often requiring action before full public release, and the Commission can designate models as systemic if it becomes aware they meet those thresholds.[118] Practically, this means both a deployed service such as "ChatGPT" and its underlying foundation model, such as "GPT-5", can fall within the Act's scope for different but overlapping reasons. The AI Act combines pre-release prevention through conformity checks, documentation, human-oversight design, and notification of systemic models with post-market surveillance, including monitoring, incident reporting, and corrective measures, so that regulation operates across the lifecycle rather than solely in a retrospective manner.[119]

As per Article 5 of the Regulations, *unacceptable-risk* uses that are prohibited include AI engineered to manipulate human behaviour subliminally, exploit vulnerabilities of vulnerable groups, conduct social scoring, predict criminal behaviour solely on profiling, expand facial recognition datasets indiscriminately, infer emotions in workplace or educational settings,[120] with certain medical exceptions, or perform biometric categorisation of personal traits such as race or political beliefs.[121] Enforcement against these prohibited practices became binding. *High-risk* AI systems, including those used in critical infrastructure, employment (such as hiring or worker management), credit scoring, education, public services, law enforcement,

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118 *Id.*, art. 53 (EU).

119 Emilija Leinarte, *The Classification of High-Risk AI Systems Under the EU Artificial Intelligence Act*, AIRe Journal of AI Law and Regulation, Vol. 3, 2024.

120 Regulation, *supra* note 113 at art. 5 (EU).

121 *Id.,* art. 5(f) (EU).

immigration, or legal administration, can only be deployed after completing ex-ante conformity assessments, i.e., pre-market evaluations.[122] Moreover, certain transparency obligations apply to *limited-risk* AI, such as informing individuals when they are interacting with AI (e.g., chatbots or generative content) and ensuring synthetic outputs are clearly labelled. The extraterritorial scope of the AI Act means that any Indian company offering products or services in the EU must comply with its standards. The so-called "Brussels Effect" thus effectively raises the bar for Indian firms and boards, making the EU's risk assessments and governance requirements a global standard.[123] This baseline is nonetheless shifting as the European Commission's Digital Omnibus on AI, formally adopted and entered on 27 July 2026, deferred the compliance deadline for high-risk obligations under Annex III from 2 August 2026 to 2 December 2027 and for AI embedded in regulated products under Annex I to 2 August 2028 amid concerns that the underlying harmonised standards were not yet ready. Indian boards benchmarking against the EU's risk classification should therefore track the Omnibus rather than the AI Act's original transitional timeline.[124]

5.2. United States of America

In stark contrast, the United States of America has not enacted an omnibus AI statute. Instead, it regulates by sector and by principles mandated, supplemented by executive guidance and voluntary

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122 Sandra Wachter, *Limitations and Loopholes in the EU AI Act and AI Liability Directives: What This Means for the European Union, the United States, and Beyond*, 26 Yale J.L. & Tech. 671 (2024).
123 Marco Almada & Anca Radu, *The Brussels Side-Effect: How the AI Act Can Reduce the Global Reach of EU Policy*, 25 German L.J. 646 (2024).
124 European Parliament & Council of the European Union, Regulation (Eu) 2026/1744 Amending Regulations (Eu) 2024/1689, (Eu) 2018/1139 and (Eu) 2023/1230 As Regards The Simplification Of The Implementation Of Harmonised Rules On Artificial Intelligence (Digital Omnibus On Ai) (2026), Https://Eur-Lex.Europa.Eu/Eli/Reg/2026/1744/Oj.

standards.[125] At the federal level, the White House has issued AI executive orders[126] and the National Institute of Standards and Technology issued the AI Risk Management Framework ("AI RMF 1.0"), a voluntary, consensus-based standard emphasizing functions to map, measure, manage, and govern AI risks across the lifecycle, such as transparency, accountability, validity, robustness, and privacy, among its core attributes.[127] Though nonbinding, the RMF has been widely adopted as a "soft law" benchmark and is increasingly referenced in procurement and compliance programs.[128] Meanwhile, Congress has repeatedly introduced the Algorithmic Accountability Act, which would require impact assessments for high-risk systems. Still, it has not passed, leaving agencies to rely on existing law.[129] In practice, the US currently relies on existing civil rights statutes and tort law to remedy AI harms. US investors and counterparties increasingly expect AI ethics and due diligence. For Indian boards, this means that if an AI system causes discrimination, plaintiffs might sue under negligence or anti-discrimination laws, just as they would a human driver or lender. Thus, even without domestic law, international developments shape what is considered "reasonable care" in an AI-driven business. This federal-state tension sharpened on 11 December 2025, when President Trump signed Executive Order 14365, "Ensuring a National Policy Framework for Artificial Intelligence", directing the Department of Justice to establish an AI Litigation Task Force to challenge state AI laws on preemption and interstate-

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[125] Jakob Mökander, Prathm Juneja, David S. Watson & Luciano Floridi, *The US Algorithmic Accountability Act of 2022 vs. The EU Artificial Intelligence Act: What Can They Learn from Each Other?*, 32 Minds & Machines 751 (2022).
[126] Exec. Order No. 14,178, Strengthening American Leadership in Digital Financial Technology, 90 Fed. Reg. 8,647 (Jan. 31, 2025).
[127] Kazeem Adedeji, *Artificial Intelligence Governance and Privacy Implications in the United States: Navigating the Regulatory Landscape* SSRN, (Apr. 14, 2025).
[128] Tatevik Davtyan, *The U.S. Approach to AI Regulation: Federal Laws, Policies, and Strategies Explained*, 16 J.L. Tech. & Int. (Case W. Res.) 1 (2025).
[129] Jakob Mökander, *supra* note 129.

commerce grounds.[130] This was followed on 20 March 2026 by White House legislative recommendations for a uniform federal framework; state laws such as Colorado's AI Act and California's frontier-model transparency statute nonetheless remain in force pending any federal statute or court ruling that actually displaces them.[131]

5.3. China

Focusing on Asia, China has a top-down regulatory framework for AI. In July 2023, China issued the Generative AI Regulations and earlier enacted the Algorithmic Recommendation Regulation in March 2022 and the Deep Synthesis Regulation in November 2022, targeting deepfakes.[132] These rules are broad and sector-wide, as they apply to internet companies that use AI for content recommendation, generative content, and the handling of personal information. In the context of corporate governance, the Chinese model requires that any firm using AI for consumer interactions register and comply with disclosure rules.[133] While China's approach has some similarities to India's sectoral style, it is more centralised and oriented toward social stability than corporate fiduciary duty. Compared to China's strict censorship-oriented rules, India has no direct restrictions on AI content or use.[134] China's sector-specific layering has continued to

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130 Exec. Office Of The President, Ensuring A National Policy Framework For Artificial Intelligence, Exec. Order No. 14365 (2025), Https://Www.Whitehouse.Gov/Presidential-Actions/2025/12/Eliminating-State-Law-Obstruction-Of-National-Artificial-Intelligence-Policy/.

131 Exec. Office Of The President, A National Policy Framework For Artificial Intelligence: Legislative Recommendations (2026), Https://Www.Whitehouse.Gov/Wp-Content/Uploads/2026/03/03.20.26-National-Policy-Framework-For-Artificial-Intelligence-Legislative-Recommendations.Pdf.

132 Lu Zhang & Mimi Zou, *Navigating China's Regulatory Approach to Generative Artificial Intelligence and Large Language Models*, Cambridge Forum on AI: L. & Gov., vol. 1, art. e8 (2025).

133 Akshaya Kamalnath & Lin Lin, *Corporate Governance, Technology, and the Law – Perspectives from China and India* (Oxford Business Law Blog, July 21, 2025), https://blogs.law.ox.ac.uk/oblb/blog-post/2025/07/corporate-governance-technology-and-law-perspectives-china-and-india.

134 Lu Zhang & Mimi Zou, *supra* note 132.

expand as Cyberspace Administration of China, together with four other departments issued Interim Measures for the Administration of AI Anthropomorphic Interactive Services on 10 April 2026 (effective 15 July 2026) extending the existing chain of algorithmic-recommendation, deep-synthesis, and generative-AI rules to emotionally interactive AI companions and chatbots, while a 2025 amendment to the Cybersecurity Law effective 1 January 2026 added a dedicated article bringing AI research, training data, and risk supervision within that foundational statute.[135]

India has not yet adopted a singular AI law; instead, it follows a hybrid, sector-led approach. The Companies Act and the DPDP Act set out general duties, and sector regulators such as SEBI, RBI, and IRDAI are expected to issue AI-specific guidelines in their respective areas.[136] The draft Complex Adaptive System framework for AI regulation, mentioned in an early DPDP draft, has not been implemented. In this fragmented landscape, companies bear the onus of self-regulation. For Indian corporate boards, AI governance cannot be treated as a matter of choice. International regulatory divergence means Indian companies will be subject to multiple compliance regimes simultaneously. The EU sets an effective baseline level through extraterritorial issuance of provisions; the US, through general law and contract, sets the trend towards broad liability. China develops its standards through comprehensive centralised approval processes. The Indian hybrid regime is still nascent and has privacy rules, but major gaps in fairness, accountability, and liability. Thus, Indian boards must take a comparative, anticipatory approach, adopt EU-level controls as the baseline, follow US-style liability management through contracts

135 Interim Measures for the Administration of AI Anthropomorphic Interactive Services (promulgated by the Cyberspace Admin. of China et al., Apr. 10, 2026, effective July 15, 2026) (China).

136 Pranjal Sharma, *AI Governance in India: Aspirations and Apprehensions*, Observer Research Foundation, Dec. 6, 2023.

and best practices, and prepare for potential China-style sectoral approvals.[137] By integrating these lessons into board policy through algorithmic audits, governance frameworks, risk registers, and stakeholder engagement, directors can align with their fiduciary duty of care and mitigate exposure to reputational risks and biases. This fragmented landscape may itself be transitional, as in December 2025, a Private Member's Bill on the Artificial Intelligence (Ethics and Accountability) Bill, 2025 was introduced in the Lok Sabha, proposing a statutory Ethics Committee, mandatory bias audits for high-risk systems, and penalties of up to ₹5 crore. MeitY Secretary S. Krishnan confirmed on 9 July 2026 that the government would begin stakeholder consultations and drafting work toward dedicated AI legislation, departing from its earlier stated preference to rely on existing statutes. Indian boards should accordingly treat the present hybrid regime as an interim rather than a settled state of affairs.[138]

6. The Way Forward

As directors rely more on AI technologies, concerns about AI's ability to fulfil its primary role of supporting human agents become apparent.[139] This primary enquiry underscores the significant role of boards in ensuring requisite oversight in an "AI" dominated corporate governance regime. These complications need to be addressed through proactive engagement by company directors in the efficient use of AI. Directors must ensure that AI literacy programs, especially designed to develop an understanding of AI's use in corporate governance and to build 'algorithmic competence', are implemented by the board. The programs should include an overview of basic AI concepts, such as machine learning and deep learning, and their use from a business

[137] Akshaya Kamalnath & Lin, *supra* note 133.
[138] The Artificial Intelligence (Ethics and Accountability) Bill, 2025, Bill No. 59 of 2025 (Ind.).
[139] Ria Verma, *supra* note 87.

perspective. Armed with knowledge, directors will be better positioned to detect blind spots by questioning data provenance or model validation and to integrate AI governance into the company's risk management. [140]

At the same time, firms should adopt technical safeguards to make AI decisions transparent. "Explainable-AI" ("**XAI**")[141] tools like LIME[142] or SHAP[143] can translate their output into human-understandable factors, and *"*human-in-the-loop*"* ("**HITL**")[144] processes ensure that critical decisions, such as hiring, lending, and financial reporting, always receive human oversight. These measures directly support directors' legal obligations.[145] For instance, an XAI system that reveals why an AI recommended a candidate or a loan decision helps satisfy a director's duty to act on a "fully informed basis". Regulators have emphasised this need. The EU notes that when "it is often not possible to find out why an AI system has made a decision, it may become difficult to assess whether someone has been unfairly disadvantaged".[146] In other words, without explainability, a biased AI could slip past governance checks. By contrast, regular model audits

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140 Sajid Ali and others, "*Explainable Artificial Intelligence (XAI): What we know and what is left to attain Trustworthy Artificial Intelligence*" (2023) Information Fusion 99 (2023) 101805.

141 Dan Byrne, *What Is Explainable AI?*, Corporate Governance Institute (accessed Aug. 29, 2025), https://www.thecorporategovernanceinstitute.com/insights/lexicon/what-is-explainable-ai/.

142 George Benneh Mensah, *Artificial Intelligence and Ethics: A Comprehensive Review of Bias Mitigation, Transparency, and Accountability in AI Systems* (Nov. 2023), ResearchGate, https://doi.org/10.13140/RG.2.2.23381.19685/1.

143 Khulud Salem Alshudukhi, Sijjad Ali, Mamoona Humayun *&* Omar Alruwaili*, Next-Generation Lightweight Explainable AI for Cybersecurity: A Review on Transparency and Real-Time Threat Mitigation,* 145 CMES - Computer Modeling in Engineering and Sciences 3029-3085 (2025), *https://doi.org/10.32604/cmes.2025.073705*.

144 Berry Smith, *supra* note *25*.

145 Datategy, *AI Governance Pathway: Challenges and Solutions* (Jan. 8, 2025), Datategy, https://www.datategy.net/2025/01/08/ai-governance-pathway-challenges-and-solutions/.

146 European Commission, *Regulatory Framework: Artificial Intelligence, Shaping Europe's Digital Future* (accessed Sept. 6, 2025), https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai.

and logs provide an audit trail that directors can review, much as they do for financial systems. This makes it possible to certify in the Board's Director Responsibility Statement[147] that internal controls are *"*adequate and operating effectively*,"* because the AI models themselves can be demonstrated to comply with applicable laws and policies.[148]

These practices link straight back to the Companies Act. Section 134(5) of the Directors' Responsibility Statement requires the board to affirm that they have designed appropriate compliance systems, which an opaque, untested AI would undermine. Likewise, Section 166(3) requires directors to exercise independent judgment and reasonable care. Unquestioningly ratifying an AI recommendation, especially from a black-box model, would fail this test. Instead, human oversight of AI, combined with the skill to interpret it, helps preserve the board's independent judgment. Section 166(2) also obliges directors to act in good faith and in the community's interest; since algorithmic bias can harm protected groups, reliance on unbiased AI is now a tangible dimension of that duty.

Recent enforcement shows why this matters. SEBI has started holding even non-executive directors personally liable for supervision failures. In *Bombay Dyeing*, five former independent directors were fined a total of ₹59 lakh for failing to carry out adequate due diligence and exercise independent judgment as audit committee members.[149] Likewise, at *LEEL Electricals*, two independent directors were each fined ₹10 lakh

[147] The Companies Act, No. 18 of 2013, §134(5)(f)(Ind.).
[148] Kirsten Martin *&* Ari Ezra Waldman, *Governing Algorithmic Decisions: The Role of Decision Importance and Governance on Perceived Legitimacy of Algorithmic Decisions*, 9 Big Data & Soc'y 1 (2022), https://doi.org/10.1177/20539517221100449.
[149] ET Bureau, *Sebi Penalises 9 Persons in Bombay Dyeing Case* (Nov. 1, 2022), ECON. TIMES, https://economictimes.indiatimes.com/markets/stocks/news/sebi-penalises-9-persons-in-bombay-dyeing-case/articleshow/95228784.cms.

for dereliction of duty on the audit committee.[150] These cases make clear that reliance on AI will not insulate directors if they rubber-stamp bad results. By contrast, using XAI and HITL safeguards can demonstrate proactive oversight; if a director can point to an independent model audit or a "why this decision?" explanation, they provide evidence of the diligence that SEBI now demands. SEBI's own June 2025 consultation paper on *"Responsible AI/ML usage in Indian Securities Markets"* envisions exactly this kind of governance. It recommends that firms establish dedicated AI oversight teams, maintain auditable documentation and model version control, and fully disclose AI-driven decisions to clients.[151] In other words, model documentation, third-party reviews, and investor disclosures become part of the board's toolkit and of SEBI's expectations for fulfilling directors' duties.

Further, the 2025 Guidelines effect a movement in AI governance from normative ethics toward evidence-based oversight by instituting a national repository of "AI incidents." This centralised database is designed to compile and interrogate empirical harms, ranging from algorithmic discrimination to disruptions of critical infrastructure, to inform risk frameworks calibrated to the Indian context.[152] From a doctrinal perspective, the mere existence of this repository materially reshapes a director's duty of care under Section 166(3). In a regulatory

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150 ETCFO Research, *How SEBI Is Tightening Norms for Independent Directors* (May 21, 2024), Econ. Times (CFO), https://cfo.economictimes.indiatimes.com/news/governance-risk-compliance/how-sebi-is-tightening-norms-for-independent-directors/110288188.

151 Sarthak Advocates & Solicitors, *Navigating Responsible Innovation: SEBI's Blueprint for AI/ML in Indian Securities Markets* (Aug. 26, 2025), Mondaq, https://www.mondaq.com/india/new-technology/1669938/navigating-responsible-innovation-sebis-blueprint-for-ai-ml-in-indian-securities-markets. *See also,* Consultation Paper on Guidelines for Responsible Usage of AI/ML in Indian Securities Markets, June 20, 2025.

152 Government of India, Ministry of Electronics & Information Technology (MeitY), India AI Governance Guidelines (Nov. 5, 2025), https://static.pib.gov.in/WriteReadData/specificdocs/documents/2025/nov/doc2025115685601.pdf.

environment where technological failures are logged and accessible, a board's failure to monitor that national register for industry-specific risks may well constitute prima facie evidence of negligence, as it reflects a neglect to address foreseeable harms already identified by the regulator.

Augmenting this data-driven oversight is India's distinctive "techno-legal" posture, which seeks to instantiate legal obligations within system design. A central element of this approach is adapting the Data Empowerment and Protection Architecture to AI training workflows. Leveraging India's Digital Public Infrastructure ("**DPI**"), the model deploys permissioned consent tokens and secure audit trails to achieve "compliance-by-design" at the earliest stages of development. For corporate boards, such architectures represent a potent governance mechanism: they shift the compliance burden from intermittent, human-led reviews to continuous, auditable technical controls, thereby enabling the digital architecture to enforce legal requirements.

7. Conclusion

Even though AI has become inseparable from corporate governance, this paper has demonstrated that AI is not a substitute for human judgment, which lies at the heart of directors' fiduciary responsibilities. The provisions of the Companies Act, 2013, which codify directors' duties to act in good faith and exercise due care, clearly indicate that directors ought to treat AI as a tool and not delegate decision-making powers to algorithms. The risks associated with the blind usage of AI, such as bias, opacity and automation bias, can constitute a direct breach of directors' duties.

While the comparative analysis of global approaches to AI governance reveals more structured legal frameworks, for instance, the EU and China have dedicated legislation governing the use of algorithms.

However, India does not have any codified regulation for the usage of AI and reliance on the Companies Act and other laws on directors' fiduciary responsibilities becomes relevant. Therefore, responsible AI use in corporate governance is significant, and corporate boards must invest in directors' AI literacy, adopt a human-in-the-loop system to ensure more transparent algorithmic outcomes, and ensure that their use of AI does not breach their fiduciary obligations. Therefore, the corporate entities must strike a balance between accountability and the reliance on modern technologies to ensure that AI strengthens without undermining the very bedrock of corporate governance. As of August 2026, India's regulatory posture on this question remains in motion as the government has signalled that dedicated AI legislation is now being drafted. Until such a law is enacted, the Companies Act's existing duties of good faith, due care, and independent judgment remain the principal and, for the present, the only statutory anchor for director accountability in the deployment of AI.

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ARTICLE

FACIAL RECOGNITION TECHNOLOGY: INHERENT BIASES, IMPACT AND REGULATORY FRAMEWORK

Jasleen Kaur Sandhu*

Abstract

Facial Recognition Technology ("FRT") is being rapidly deployed worldwide for purposes ranging from smartphone authentication to law enforcement surveillance. While often framed as enhancing efficiency and public safety, FRT raises serious concerns about privacy, bias, and the erosion of civil liberties. This paper critically examines the implications of FRT use in India, with particular attention to its inherently discriminatory effects and inadequate regulatory safeguards. The operational mechanisms of FRT reveal the technology's reliance on biased training datasets and algorithmic assumptions that disproportionately misidentify and target individuals from marginalised communities. These risks are exacerbated by the lack of robust data protection laws in India and the sweeping exemptions granted to state agencies under the Digital Personal Data Protection Act ('DPDP Act'), 2023, which weaken meaningful accountability by carving out broad exemptions for such entities and limiting the applicability of key data protection obligations and rights. Drawing on instances such as the Delhi Police's use of FRT during the anti-CAA protests and mass data collection through initiatives like Digi Yatra, the paper explores the convergence of surveillance technology and systemic bias. It concludes with suggestions for regulatory reform, drawing from Indian constitutional jurisprudence on the right to privacy, and global frameworks such as the EU's General Data Protection Regulation ('GDPR'), and Law Enforcement Directive ('LED'), particularly their emphasis on accountability, purpose limitation, data minimisation and independent oversight mechanisms. Urgent safeguards are essential to prevent FRT from becoming a tool of unchecked state control.

Keywords: Facial Recognition Technology; Mass Surveillance; Data Protection; Discriminatory Policing; DPDP Act.

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* Student, National Academy of Legal Studies & Research (NALSAR), University of Law, Hyderabad.

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1. Introduction

Facial Recognition Technology ("**FRT**") is being deployed across the globe at a scale never seen before for a variety of tasks, ranging from unlocking smartphones using Face Identification (ID) to mass surveillance by law enforcement agencies. It is all around us, embedded in everyday life. The argument for adopting FRT is that it enhances public safety and security while making systems more efficient.[1] However, critical scholars argue that FRT is susceptible to demographic bias because it is trained on datasets that often reflect societal prejudices. Studies demonstrate that it has higher failure rates when identifying people from marginalised communities, especially women with darker skin tones.[2] One such study, conducted by researchers at MIT, found that commercial facial recognition systems exhibited error rates of up to 34.7% for darker-skinned women, compared to just 0.8% for lighter-skinned men.[3]

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[1] Rosalie A. Waelen, *The struggle for recognition in the age of facial recognition technology,* 3 AI and Ethics 215, 216 (2023).
[2] Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 PMLR 77, 78 (2018).
[3] Sidney Perkowitz, *The Bias in the Machine: Facial Recognition Technology and Racial Disparities*, MIT Case Studies, In: *Social and Ethical Responsibilities of Computing* (2021).

Moreover, these technologies are increasingly being incorporated into policing systems that already have a history of bias and inequality[4][5]. Given the current legal landscape in India, which lacks comprehensive data protection safeguards and remains inadequate for meaningful regulation of such technologies, this is particularly concerning. The deployment of FRT by law enforcement agencies during events like protests illustrates how such technologies can be used to track and arrest individuals, disproportionately affecting minority communities.[6] The widespread use of FRT for public surveillance in cities like Hyderabad and Delhi further raises concerns about the erosion of privacy and civil liberties.[7]

This paper aims to critically examine the implications of using FRT in India. The key questions addressed are: (i) how FRT functions and the privacy concerns that emerge from its use; (ii) how it contributes to and exacerbates existing societal biases; (iii) the adequacy of the legal frameworks governing its use in India; and (iv) the reforms necessary for the protection of civil liberties.

To address these questions, **Section 2** explains how FRT operates and the associated privacy concerns. **Section 3** examines its discriminatory impact, particularly in relation to race, caste, class, and religion, using instances of its deployment in India. **Section 4** analyses existing legal frameworks governing FRT, followed by **Section 5**, which discusses potential measures to promote objectivity and accountability in the use of such technologies, ensuring alignment with constitutional principles of privacy, equality, and dignity. This paper argues that the risks posed

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[4] *Id.*
[5] *Id.*
[6] Jignasa Sinha, *Face recognition software used in 137 of 1,800 arrests in Northeast Delhi riots, says Police,* The Indian Express (20 February 2021), https://indianexpress.com/article/cities/delhi/delhi-riots-police-cctv-7196291/.
[7] Devdutta Mukhopadhyay, *Problems with facial recognition systems operating in a legal vacuum,* Internet Freedom Foundation (20 February 2020), https://internetfreedom.in/problems-with-facial-recognition-systems-operating-in-a-legal-vacuum/.

by the State's deployment of FRT arise not merely from technical inaccuracies but from the interaction among algorithmic limitations, existing biases in policing and data systems, and inadequate legal safeguards. India's existing legal framework does not adequately address these risks, particularly in the absence of dedicated legislation governing the State's use of FRT. The paper therefore argues for a rights-oriented regulatory framework grounded in legality, necessity, proportionality, independent oversight, and safeguards against discriminatory and arbitrary deployment.

2. Understanding Facial Recognition Technology: Operational Mechanisms And Privacy Concerns

FRT, like other artificial intelligence ("**AI**") tools, relies on machine learning algorithms trained on large datasets typically composed of labelled headshot photographs. Each image in the dataset is assigned a label, which might include information such as an individual's age or gender. The problem of bias begins at this stage, and the overall effectiveness of a system depends heavily on the quality and diversity of this training database.[8] If the data contains an overrepresentation of certain face types, the technology will be relatively inaccurate at identifying individuals outside that group.

Moreover, the subjective beliefs of labellers often get inculcated into the technology. For instance, if the labeller finds people with blue eyes more attractive, then the technology will also associate blue eyes with attractiveness. This results in the FRT adopting the labeller's personal tastes, conscious and unconscious biases, and cultural preferences.[9]

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[8] Edward Santow, *Can Artificial Intelligence Be Trusted with Our Human Rights?*, 91 AQ 10, 17 (2020).
[9] *Id.*

Consequently, FRT systems risk replicating and amplifying both structural and individual biases present in society.

This becomes especially problematic when an FRT trained on such biased datasets is used to predict an individual's personality traits, emotions, or even sexual orientation. Thus, bias in FRT can arise either from a biased training dataset that over- or underrepresents certain groups or from the biases of technologists themselves, making the machine only as smart as its training data.[10]

FRT systems are used for two main types of tasks: one-to-one verification and one-to-many identification. One-to-one verification involves matching a single headshot photograph with another photograph of the same person, such as when unlocking a smartphone. In contrast, one-to-many identification involves matching a single headshot to a larger stored database of images to identify an unknown person, as is often done by law enforcement agencies.[11]

Biases in FRT can lead to false positives or false negatives. A false positive occurs when a face is wrongly matched to another face in the database, for example, when a person's face is incorrectly matched with a criminal's face from an existing database, resulting in the wrongful arrest of an innocent person. A false negative, on the other hand, occurs when a face that should be matched to one in the database is not, for example, when a person's face is not matched to their own face in an existing database.[12] The practical stakes of these errors are significant: a 2019 study by the National Institute of Standards and Technology ("**NIST**") found that many facial recognition algorithms

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[10] Lindsey Jacques, *Facial Recognition Technology and Privacy: Race and Gender - How to Ensure the Right to Privacy Is Protected*, 23 San Diego Int'l L.J. 111, 120 (2021).
[11] Edward Santow, *Can Artificial Intelligence Be Trusted with Our Human Rights?*, 91 AQ 10, 13 (2020).
[12] *Supra* note 3.

had false positive rates up to 100 times higher for African-American and Asian faces in the worst-performing algorithms compared to Caucasian faces, underscoring how technical failures translate directly into discriminatory outcomes.[13]

One notable case that illustrates these risks is that of Robert Williams, an African-American man who was wrongfully arrested in Detroit in 2020 when FRT incorrectly matched his driver's license photo with an image from a surveillance video.[14] Despite the absence of reliable corroborating evidence, this match was used to justify his arrest, and Williams was detained for over thirty hours before the error was acknowledged and charges were dropped.[15] The case subsequently led to a civil rights lawsuit, culminating in a 2024 settlement that mandated significant procedural safeguards governing law enforcement's use of FRT.[16] Notably, the settlement requires that facial recognition results be treated only as investigative leads and prohibits arrests based solely on such matches, instead mandating the presence of independent and reliable evidence before establishing probable cause.

The above FRT mechanism makes it clear that facial recognition can identify a person only if their face is in a database. For law enforcement agencies, this could be a database of prior offenders. Building such databases is expensive and time-consuming. As a result, both private and public entities frequently resort to practices such as surveilling communities already discriminated against by the algorithmic system or scraping data without consent.[17]

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13 Patrick Grother, Mei Ngan & Kayee Hanaoka, *Face Recognition Vendor Test (FRVT) Part 3: Demographic Effects*, National Institute Of Standards And Technology, NISTIR 8280, at 45 (2019).
14 *Supra* note 3.
15 American Civil Liberties Union, Williams v. City of Detroit: Face Recognition False Arrest, ACLU, https://www.aclu.org/cases/williams-v-city-of-detroit-face-recognition-false-arrest.
16 Williams v. City of Detroit, Settlement Agreement, No. 2:21-cv-10827 (E.D. Mich. 28 June 2024).
17 Sarah Myers West, *Redistribution and Rekognition: A Feminist Critique of Algorithmic Fairness*, 6 Catalyst: Feminism, Theory, Technoscience 1, 7 (2020).

3. The Discriminatory Impact of Facial Recognition Technology

The way in which FRT functions has grave consequences in real life, particularly when used by law enforcement agencies. It exacerbates systemic discrimination based on race, caste, class, gender, and religion, resulting in severe violations of citizens' rights. Its deployment in highly sensitive socio-political contexts, such as protests, highlights its capacity to reinforce existing inequalities and marginalise vulnerable communities. This burden of algorithmic exclusion is often borne by women, gender minorities, people of colour, those of lower socioeconomic status, and those with disabilities. Even more severe is the impact on people at the intersection of these multiple marginalised identities.[18]

This concern is particularly pronounced in the Indian context, where the composition of policing databases reflects long-standing structural biases.[19] This effectively means that the FRT used in cities like Delhi is trained on datasets that contain historical prejudices and are likely to be biased against certain communities. For instance, the colonial-era Criminal Tribes Act of 1871[20] labelled entire communities as "criminal tribes." This resulted in the over-policing of these tribal communities. Although the Act was repealed, its legacy persists in the form of the Habitual Offenders Act of 1956,[21] under which the police maintain lists of so-called habitual offenders who are often subjected to harassment without conviction. A study reveals that areas housing government and diplomatic offices, and those with a proportionally higher Muslim

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[18] *Id.*

[19] Jai Vipra, *The Use of Facial Recognition Technology for Policing in Delhi*, Vidhi Centre For Legal Policy (16 August 2021), https://vidhilegalpolicy.in/research/the-use-of-facial-recognition-technology-for-policing-in-delhi/.

[20] Criminal Tribes Act, 1871, No. 27, 1871.

[21] Habitual Offenders (Control and Reform) Act, 1956, No. 20, Acts of Parliament, 1956.

population, are policed more than others and have significantly more CCTV cameras.[22] Thus, the data is also highly likely to be disproportionately drawn from these areas, further skewing the datasets.

This discriminatory potential of FRT is not incidental; rather, it is a structural consequence of the biased datasets and policing frameworks within which it operates. The following subsections illustrate this.

3.1. In Protests

In India, FRT was extensively deployed by the Delhi police during the anti-CAA protests and the subsequent violence in Northeast Delhi. Police personnel were seen filming the demonstrators, who predominantly consisted of women, minorities and students, along with asking for their names and affiliations. It was only when the police began arresting many participants that the scale of this surveillance came to light. Student activists from Jamia Millia Islamia, a university with a strong Muslim history, were targeted. Moreover, two-thirds of the victims in the Northeast Delhi violence were Muslims. Here again, the Delhi police used video footage to arrest 755 people: 231 with CCTV footage, and 137 identified using FRT.[23]

The accuracy of the system deployed is deeply concerning. In a 2018 affidavit submitted to the High Court, the Delhi Police reported that their FRT system had an accuracy rate of less than 2%. By 2019, this had dropped to less than 1%, with the system failing to even distinguish between boys and girls.[24] A Right to Information ("**RTI**") application filed by the Internet Freedom Foundation revealed that the

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[22] *Supra* note 19.
[23] Darren Loucaides, *The changing face of protest,* Rest of the World (20 March 2024), https://restofworld.org/2024/facial-recognition-government-protest-surveillance/.
[24] Anushka Jain, *Is the illegal use of facial recognition technology by the Delhi Police akin to mass surveillance? You decide. #Project Panoptic*, Internet Freedom Foundation (03 July 2020), https://internetfreedom.in/is-the-illegal-use-of-facial-recognition-technology-by-the-delhi-police-akin-to-mass-surveillance-you-decide-project-panoptic/.

Delhi police use convict photographs and dossier photographs to train its FRT, and that the system's accuracy depended on factors such as lighting conditions, distance, and facial angle. It further revealed that all matches with more than 80% similarity are considered "*positive*" by the police, while those below 80% are considered false positives. However, these are also used to arrest individuals if enough "corroborative evidence" is available.[25]

A similar pattern was observed during the farmers' protests, where participants were identified using FRT, CCTV cameras, and drones. In Ambala, authorities initiated procedures to revoke the passports and visas of individuals identified as "troublemakers" using FRT.[26] Use of FRT against protesters sets a chilling precedent. In both the CAA protests and the farmers' protest, FRT was used against those belonging to minority or marginalised groups. This further highlights the discriminatory potential of FRT, particularly in contexts of dissent, where its use can lead to wrongful targeting of those belonging to minority and marginalised communities. Without strong legal safeguards, FRT becomes a tool for mass surveillance that disproportionately targets marginalised communities, reinforcing existing social inequalities.

More recently, the deployment of FRT during the student protests at Jantar Mantar in July 2026 brought these concerns into sharper focus. Delhi Police deployed AI-assisted facial recognition through the 'Ikshana' surveillance van, which processed live CCTV footage of the protest and matched faces against police databases.[27] The police

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25 Anushka Jain, *Delhi Police's claims that FRT is accurate at 80% are 100% scary, Internet Freedom Foundation* (17 August 2022), https://internetfreedom.in/delhi-polices-frt-use-is-80-accurate-and-100-scary/.

26 Rishab Jain, *Special Report: India Using AI To Target Religious And Ethnic Minorities,* Religion Unplugged (09 April 2024), https://religionunplugged.com/news/2024/3/19/ai-targets-religious-and-ethnic-minorities-across-india.

27 Soumyarendra Barik, *Live video feeds, AI-aided facial recognition: How police are surveilling protesters at Jantar Mantar*, The Indian Express (24 July 2026),

maintained that the system was intended to identify known criminals and persons with criminal antecedents, rather than ordinary protesters. The system reportedly identified 2,873 individuals with criminal antecedents during the protests, although this identification did not establish that they had committed any offence.[28] The deployment has since become the subject of constitutional litigation. An Article 32 petition challenging the use of FRT and other biometric-surveillance measures at protest sites was filed before the Supreme Court, which agreed to hear the matter in August 2026.[29] The pending challenge brings into sharp focus the unresolved questions surrounding the statutory basis, privacy implications, and constitutional limits of FRT deployment at public demonstrations.

Another striking example of FRT deployment is Hong Kong. During the pro-democracy protests that began in mid-2019, FRT was used by the state to track and punish activists. Protesters had to resort to strategies like wearing face masks or carrying umbrellas to conceal their identities.[30] The state subsequently invoked colonial-era emergency powers to prohibit the use of facial coverings in "*public meetings, processions, unlawful or unauthorised assemblies, and riots*".[31] Notably, this extended even to peaceful, lawfully authorised gatherings, not merely to unlawful assemblies or riots. This willingness of the state to override

https://indianexpress.com/article/explained/delhi-police-facial-recognition-ai-surveillance-jantar-mantar-10801778/.

[28] Nripendra Misra, *Jantar Mantar protest facial recognition: Delhi Police says 2,873 had criminal records. But how to decide they committed crime during protest*, India Today (30 July 2026), https://www.indiatoday.in/amp/india/story/jantar-mantar-protest-facial-recognition-delhi-police-2873-criminal-records-decide-they-committed-crime-protest-2960196-2026-07-30.

[29] Amisha Shrivastava, *Supreme Court Agrees To Hear MP's Plea Against Police Use of Facial Recognition & Biometric Surveillance Tools At Protest Sites*, Live Law (13 August 2026), https://www.livelaw.in/top-stories/supreme-court-agrees-to-hear-mps-plea-against-police-use-of-facial-recognition-biometric-surveillance-tools-at-protest-sites-545594.

[30] Tatum Millet, *A Face in the Crowd: Facial Recognition Technology and the Value of Anonymity,* Columbia Journal Of Transnational Law (18 October 2020), https://www.jtl.columbia.edu/bulletin-blog/a-face-in-the-crowd-facial-recognition-technology-and-the-value-of-anonymity.

[31] Prohibition on Face Covering Regulation, Cap. 241K, § 3(1) (H.K.) (2019).

liberties to enable mass surveillance tools illustrates the extent to which it has become dependent on such technology.

3.2. In Public Spaces

FRT poses a significant threat to democratic rights and human dignity not only because of its harmful use by the state to suppress protests but also because of its widespread deployment in other forms of surveillance, particularly in public spaces and transport systems. For instance, the Digi-Yatra initiative, launched in December 2022, is widely promoted by the government, and its adoption is encouraged at airports nationwide.[32] Although it is meant to be 'voluntary', passengers are often coerced or tricked into scanning their faces by the airport staff. According to reports, 29% of passengers at Delhi airport signed up for Digi Yatra without fully realising it.[33]

The deployment of FRT in such contexts raises serious concerns as these systems capture and process the facial data of millions of unsuspecting commuters without their knowledge or consent. Such pervasive use of FRT transforms public spaces into environments of constant monitoring, in which individuals are scrutinised without their awareness. Therefore, there is an urgent need to regulate data collection, as such unethical practices leave individuals vulnerable to the misuse of their biometric data, which can be stored and shared with other entities, including governments and corporations.[34]

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[32] Aggam Walia *&* Soumyarendra Barik, *Digi Yatra: IT wanted guard rails against data misuse, aviation said app will be new normal,* The Indian Express (18 September 2024), https://indianexpress.com/article/express-exclusive/digi-yatra-it-wanted-guard-rails-aviation-said-app-will-be-new-normal-9571500/.
[33] *Majority use Digi Yatra in Delhi airport unknowingly or under compulsion: survey*, The Hindu (31 January 2024), https://www.thehindu.com/data/majority-use-digi-yatra-in-delhi-airport-unknowingly-or-under-compulsion-survey-data/article67792561.ece#.
[34] Lindsey Jacques, *Facial Recognition Technology and Privacy: Race and Gender - How to Ensure the Right to Privacy Is Protected*, 23 San Diego Int'l L.J. 111, 124 (2021).

Additionally, the Delhi Police has created a photo dataset of over 1.5 lakh "history-sheeters" for routine crime investigation. During political campaign rallies, attendees' faces are captured on camera at the metal detectors without their knowledge and are then added to these datasets.[35] A crucial point to note is that, since there are no regulations governing data storage and privacy in India, the police are not required to delete this data once the rally is over. Instead, the snapshot of a person's face becomes a permanent part of the system.

The Indian Railways has also, over the years, floated regular tenders for the installation of FRT-enabled CCTV cameras inside trains and at railway stations.[36] Facial data of all passengers, including children, can be collected and stored without their consent. Not just that, but data on anyone who enters a railway station or boards a train, on local vendors and coolies, on passengers' families, on railway staff, and on sanitation workers can also be collected.[37] This makes unsuspecting individuals vulnerable to privacy risks and raises concerns about data security.

The expansion of FRT into public surveillance is further evident in its integration within India's Smart Cities Mission. A 2022 report by the

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[35] Jay Mazoomdaar, *Delhi Police film protests, run its images through face recognition software to screen crowd*, The Indian Express (28 December 2019), https://indianexpress.com/article/india/police-film-protests-run-its-images-through-face-recognition-software-to-screen-crowd-6188246/.

[36] PTI, *Railways floats tender for supply, installation of more than 89K CCTV cameras for 6k stations*, The Economic Times, (27 August 2018), https://economictimes.indiatimes.com/industry/transportation/railways/railways-floats-tender-for-supply-installation-of-more-than-89k-cctv-cameras-for-6k-stations/articleshow/65565504.cms?from=mdr.
Dheeraj Bengrut, *Face recognition cameras to be installed at Pune railway station*, The Hindustan Times, (18 July 2024), https://www.hindustantimes.com/cities/pune-news/face-recognition-cameras-to-be-installed-at-pune-railway-station-101721322568367.html.
Arun Kumar Das, *Railways Finalises Rs 15,000 Crore Project To Install 75,000 AI-based CCTV Cameras In Coaches, Locos As Safety Measure,* Swarajya, (02 September 2024), https://swarajyamag.com/infrastructure/railways-finalises-rs-75000-crore-project-to-install-75-lakh-ai-based-cctv-cameras-in-coaches-locos-as-safety-measure.

[37] Disha Verma, *We will not be tracked! Indian Railways' plans to introduce FRT surveillance in train coaches is a big departure from the right to privacy,* Internet Freedom Foundation (12 March 2024), https://internetfreedom.in/indian-railways-frt-surveillance/.

Internet Freedom Foundation documented that at least 19 Indian cities had deployed or were in the process of deploying such surveillance systems, often through procurement processes that lacked transparency and public consultation.[38] Notably, these deployments occur in the absence of any publicly accessible legal framework, clear purpose limitations, data retention standards, or independent oversight mechanisms.

These systems enable continuous, real-time monitoring of public spaces through interconnected networks of CCTV cameras, many of which are equipped with facial recognition capabilities. Such deployment significantly expands the scope of state surveillance beyond targeted law enforcement to routine urban governance. In the absence of adequate safeguards, such systems risk becoming instruments of pervasive and unaccountable surveillance. The resulting normalisation of constant monitoring undermines the expectation of anonymity in public spaces, creating an environment in which individuals may alter their behaviour due to the perception of being watched. Consequently, such measures can have a chilling effect on the exercise of fundamental freedoms, including the rights to free speech, assembly, and movement, guaranteed under Articles 19(1)(a) and 19(1)(b) of the Constitution of India.[39]

4. Legal Frameworks Governing FRT

The concerns regarding FRT's discriminatory impact, discussed above, have attracted some legislative attention, though the response has remained inadequate. A private member's Bill titled the *Facial Recognition Technology (Regulation of Police Powers) Bill, 2023,* was introduced in the Rajya Sabha in December 2023, seeking to regulate

[38] Anushka Jain, The status of CCTV policing in India: 2023, Internet Freedom Foundation (01 May 2023), https://internetfreedom.in/the-status-of-cctv-policing-in-india-2023/.
[39] INDIA CONST. art. 19.

the use of FRT by law enforcement agencies and requiring prior magisterial approval before deployment.[40] However, it was not taken up for discussion. In December 2024, the Minister for Information Technology informed Parliament that significant consensus was required before any AI law could be formulated.[41] Consequently, despite growing scrutiny, India continues to lack a dedicated legislative framework specifically addressing the use of FRT, raising serious concerns about privacy violations and mass surveillance. The recent deployment of FRT at the Jantar Mantar protests further illustrates the practical significance of this legislative gap. The constitutional challenge now pending before the Supreme Court questions the legal basis for the use of FRT and other biometric-surveillance measures at protest sites.

The Supreme Court of India, in the Puttaswamy judgement, recommended establishing a comprehensive data protection regime to safeguard the right to privacy while balancing the state's interests.[42] After several attempts to develop such a framework, India enacted the *Digital Personal Data Protection Act (DPDP Act) in 2023*.[43] However, this too appears inadequate for safeguarding personal data, particularly regarding the state's use of FRT, given the extensive exemptions granted to the state and law enforcement agencies under section 17 of the act.

For instance, section 17(1)(c) makes most provisions of Chapter II which relate to obligations of data fiduciary, and those of Chapter III which includes rights and duties of data principal inapplicable in

[40] Facial Recognition Technology (Regulation of Police Powers) Bill, 2023, introduced in Rajya Sabha, Dec. 2023; *Regulation of FRT through India's Facial Recognition Technology Bill, 2023 and its admissibility under BS*A, 4 J. Forensic Justice 54, 55 (2026).
[41] Amber Sinha, *Facial Recognition Technologies: A Window into India's Approach to AI Regulation*, Ctr. for the Advanced Study of India (2025), https://casi.sas.upenn.edu/iit/amber-sinha.
[42] Faizan Mustafa & Utkarsh Leo, *On Facial Recognition and Fundamental Rights in India: A Law and Technology Perspective*, SSRN Journal (2021).
[43] The Digital Personal Data Protection Act, 2023, No. 22, Acts of Parliament, 2023.

situations where "personal data is processed in the interest of prevention, detection, investigation or prosecution of any offence or contravention of any law for the time being in force in India;"

Furthermore, section 17(2)(a) of the Act states:

> "(2) The provisions of this Act shall not apply in respect of the processing of personal data—
>
> (a) by such instrumentality of the State as the Central Government may notify, in the interests of sovereignty and integrity of India, security of the State, friendly relations with foreign States, maintenance of public order or preventing incitement to any cognizable offence relating to any of these, and the processing by the Central Government of any personal data that such instrumentality may furnish to it"

Thus, the DPDP Act fails to provide substantial safeguards to protect individuals from the discriminatory use of FRT by law enforcement agencies. Neither does it offer significant data protection and security provisions. Instead, it effectively grants a free pass to the state and its agencies regarding the collection, handling, processing, and transfer of citizens' personal data. Critics have noted that exemptions under Section 17 replicate the pattern of Section 69 of the Information Technology Act, 2000, which similarly grants the state expansive surveillance powers subject to minimal procedural constraints.[44] The result is a statutory framework that is structurally incapable of regulating the state's use of FRT in any meaningful sense. By prioritising state interest over individual rights, the Act effectively leaves individuals without statutory recourse when they are most vulnerable.

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[44] Anirudh Burman, *Understanding India's New Data Protection Law*, Carnegie Endowment For International Peace (October 2023), https://carnegieendowment.org/research/2023/10/understanding-indias-new-data-protection-law.

The Information Technology Act, 2000[45] and the rules framed under it are used to regulate the collection, disclosure, and sharing of personal data by corporates. However, this, too, like the DPDP Act, confers broad powers on the state to infringe on privacy in the name of the sovereignty, integrity, or security of the State and does not apply to government agencies that use facial data.[46]

The frequent engagement by state agencies in arbitrary and discriminatory targeting of citizens through the deployment of FRT raises serious constitutional concerns under Article 14 of the Constitution of India, which guarantees the right to equality and prohibits arbitrary state action. The Supreme Court, in *E.P. Royappa v. State of Tamil Nadu*[47], held that equality is antithetical to arbitrariness. In *Shayara Bano v. Union of India*[48], the doctrine of manifest arbitrariness was applied to strike down state action that is excessive, capricious, or without an adequate determining principle. Accordingly, the deployment of FRT systems with documented error rates, biased training data, and limited regulatory safeguards raises concerns both on account of privacy and dignity and regarding their potential failure to satisfy the requirements of non-arbitrariness under Article 14.

Considering the limitations of the DPDP Act, the constitutional framework established by the Supreme Court in *K. S. Puttaswamy v. Union of India,* while affirming the right to privacy, assumes immense significance. The court had held that any interference with an individual's privacy by the state should be done in a manner that is "*fair, just and reasonable*".[49] Justice D.Y. Chandrachud, laying down a

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45 The Information Technology Act, 2000, No. 21, Acts of Parliament, 2000.
46 Gagandeep Kaur, Sammed Akiwate & Ishani Paul, *Facial Recognition Technology & Legal Implications in India: An Analysis*, In: *Law & Technology: New Perils in Justice and Accountability* 239, 245 (Kanchal Gupta & Rupendra Singh eds., Redshine Publication 2023).
47 E.P. Royappa v. State of Tamil Nadu, (1974) 4 SCC 3.
48 Shayara Bano v. Union of India, (2017) 9 SCC 1.
49 Smriti Parsheera, *Adoption and regulation of facial recognition technologies in India: Why and why not?,* Data Governance Network Working Paper 05, (2019).

three-fold test which must be satisfied for violations of privacy to be justifiable, held:

> "An invasion of life or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them (...) and dangers to privacy in an age of information can originate not only from the state but from non-state actors as well. We commend to the Union Government the need to examine and put into place a robust regime for data protection."[50]

Applied to FRT, these requirements raise questions about whether the collection and processing of facial data through initiatives such as Digi Yatra satisfy the requirements of legality, necessity, and proportionality. In particular, where facial data is collected without individuals' meaningful knowledge or consent and without a clear statutory framework governing its use, retention, and processing, the constitutional justification for such processing becomes difficult to establish.

The relevance and scope of this framework were further elaborated in *K.S. Puttaswamy (Retd.) v. Union of India* (the Aadhaar case).[51] Applying the three-fold test to large-scale biometric data collection by the State, the Court held that, to satisfy the requirement of proportionality, the means employed must bear a rational nexus to the specific aim pursued and cannot be justified based on broad or generalised security objectives alone. The majority upheld the Aadhaar framework on the basis that it involved minimal collection of biometric and demographic data, incorporated purpose limitations, and provided procedural safeguards such as restricted storage and encryption. However, several provisions of the Act were struck down or read down for failing to

[50] K. S. Puttaswamy v. Union of India, (2017) 10 SCC 1.
[51] Justice K.S. Puttaswamy (Retd.) v. Union of India, (2019) 1 SCC 1.

meet constitutional standards. This makes it clear that the mere existence of a legitimate State aim is insufficient; the means adopted must also be necessary and not excessive.

Another thing to take note of is Justice Chandrachud's dissent, which offers an expansive account of the relationship between informational privacy, the right of individuals to control information about themselves, and biometric governance. He holds the former to be an essential part of the fundamental right to privacy, intrinsically linked to dignity and personhood. He cautions that once biometric data is compromised, the harm is effectively irreversible. This underscores the need to address privacy concerns at the stage of system design itself, with individuals retaining meaningful rights to access, correct, and delete their data. He further invokes a "*do no harm*" principle that prohibits the state from using biometric and digital identity systems in ways that harm individuals, while mandating rigorous evaluation and continuous oversight of such systems.[52] Although a dissenting view, it provides a compelling normative framework for evaluating the deployment of FRT.

Seen in light of the *Puttaswamy* framework, it can be reasonably said that the way FRT is currently being deployed in India raises serious questions about whether such deployments meet the constitutional threshold. Firstly, there is no specific legislation authorising law enforcement agencies to deploy such technologies.[53] Secondly, the state frequently uses FRT even when there is no legitimate state aim. The deployment of FRT-enabled CCTV cameras throughout cities like Delhi and Hyderabad illustrates this. Thirdly, the proportionality requirement is not met in most cases, as the possibility of equally effective alternative investigative measures is seldom explored, and the use of FRT disproportionately affects victims' rights, particularly in

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[52] *Supra* note 51.
[53] *Supra* note 46.

cases of misidentification and wrongful arrests. These concerns are further compounded by the fact that facial data collected in public spaces is often retained indefinitely, without the knowledge or consent of affected individuals and without any mechanisms for access, correction, or deletion.

The inadequacy of India's regulatory framework becomes particularly apparent when contrasted with the European Union's data protection regime. While the General Data Protection Regulation ('**GDPR**') governs personal data processing generally,[54] processing by competent authorities for law enforcement purposes is separately regulated under the Law Enforcement Directive ('**LED**').[55] The LED prohibits profiling that results in discrimination against individuals based on special categories of personal data, while also requiring competent authorities to maintain logs recording the date and time of processing operations such as collection, consultation, and disclosure. It further affords the right to receive compensation for damage suffered as a result of unlawful processing.[56]

Article 4(1)(b) of the LED requires that personal data be collected for specified, explicit, and legitimate purposes and not processed in a manner incompatible with those purposes.[57] Article 4(1)(c) further requires that personal data be adequate, relevant, and not excessive in relation to the purposes for which they are processed.[58] Applied to

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54 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1.

55 Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data by Competent Authorities for the Purposes of the Prevention, Investigation, Detection or Prosecution of Criminal Offences or the Execution of Criminal Penalties, and on the Free Movement of Such Data, and Repealing Council Framework Decision 2008/977/JHA (Law Enforcement Directive), 2016 O.J. (L 119) 89.

56 Directive (EU) 2016/680, arts. 11(3), 25, 56, 2016 O.J. (L 119) 89 (EU).

57 Directive (EU) 2016/680, art. 4(1)(b), 2016 O.J. (L 119) 89 (EU).

58 *Id.* art. 4(1)(c).

FRT, this directly addresses some of the concerns documented in Sections 2 and 3. Such provisions would, for instance, restrict the indiscriminate collection of facial data from unsuspecting individuals in public spaces and the practice of data scraping.

Moreover, both Article 51 of the GDPR and Article 41 of the LED require that each member state establish an independent supervisory authority to monitor compliance.[59] These authorities operate free from executive control, providing individuals with a meaningful forum for complaints and ensuring ongoing institutional accountability. In contrast, the Data Protection Board established under the DPDP Act is constituted by, and accountable to, the Central Government, thereby lacking independence.[60]

Internationally, the regulatory landscape is beginning to respond to these concerns. The EU's Artificial Intelligence Act, 2024, represents a significant step in this direction. The Act adopts a risk-based approach to regulating AI systems, including facial recognition technologies. It imposes heightened obligations on specified biometric systems based on their intended use and risk classification, including conformity assessments, human oversight, and requirements for data quality and accuracy.[61] The use of real-time remote biometric identification systems in publicly accessible spaces for law enforcement purposes has been prohibited, subject only to narrowly defined exceptions such as the search for specific victims of serious crimes, the prevention of imminent threats to life, or the detection of serious criminal offences. It further prohibits the indiscriminate scraping of

[59] Regulation (EU) 2016/679, art. 51; Directive (EU) 2016/680, art. 41.
[60] *Supra* note 43.
[61] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending certain Union legislative acts (Artificial Intelligence Act) (2024) OJ L 1689/1, arts. 5, 6, Annex III.

facial images from the internet or from CCTV footage for the creation of biometric databases.[62]

Therefore, given the inadequacies of India's existing data protection and regulatory framework, coupled with the lack of informed consent and violations of fundamental rights, the danger posed by technologies such as FRT to citizens' privacy, civil liberties, and human rights is significant. Its continued deployment raises a real possibility of normalising surveillance-heavy models of governance, thereby increasing the risk that the country will evolve into a surveillance state. If left unchecked, it risks undermining the democratic framework of this nation, which guarantees equal treatment and protection of the law to all citizens. In the interest of preserving democratic values and constitutional guarantees, adequate measures must be taken to address these issues.

5. Suggested Reforms

One idea frequently proposed by scholars and experts in various studies is to impose a moratorium on the use of FRT until strong legislative frameworks are developed to regulate these technologies. Clare Garvie is one such scholar who argues that this moratorium should remain in place until regulations requiring "*minimum photo quality standards, accuracy testing, and publicly available reports ... on how the government uses facial recognition tech*" are enacted.[63] However, a moratorium can only be an interim measure. In the long run, the law must keep pace with technological innovations and develop frameworks that ensure public safety and security while allowing technologies such as FRT to be

[62] Bruno Zulehner, *EU Artificial Intelligence Act: Regulating the Use of Facial Recognition Technologies in Publicly Accessible Spaces*, Stanford-Vienna Transatlantic Technology L. Forum, European Union Law Working Paper No. 91, 14–16, 26–27 (2024).
[63] Peter N. K. Schuetz, *Fly in the Face of Bias: Algorithmic Bias in Law Enforcement's Facial Recognition Technology and the Need for an Adaptive Legal Framework,* 39 Minn. J.L. & Ineq. 221, 248 (2021).

genuinely used to make people's daily lives more convenient, satisfactory, and secure.

Any such framework for regulating FRT must address the issues of privacy, security, accuracy, transparency, and bias discussed in this paper. It must ensure that the datasets used to train such models are reliable, diverse across race, gender, ethnicity, caste, religion, and other relevant dimensions, and free of historical biases. Furthermore, the safety of the datasets must be ensured. Maintaining logs for each system application, as required under the GDPR, could be an effective way to ensure accountability. Another useful model is San Francisco's. The city has banned government agencies from using FRT for general surveillance while allowing its use in critical law enforcement situations where it is necessary.[64]

To ensure that the purpose is indeed necessary, regulatory frameworks could, in consultation with civil society activists, privacy advocates, academics, and members of the legal fraternity, be developed to include well-defined provisions on the situations or kinds of cases in which FRT could be deployed. Another alternative could be to allow the use of FRT in police investigations, only after a judicial order. These measures would limit the scope of FRT use by law enforcement agencies. Additionally, government agencies should not be allowed to contact any individual based on FRT matching without first performing mandatory human verification.

Experts in the field of AI advocate a more expansive approach to algorithmic accountability by proposing an "*Algorithmic Bill of Rights*" that includes the "*Right to freedom from Bias*" and "*Independent Oversight*".

[64] *Supra* note 60.

These would ensure that algorithms are regularly tested for bias and that independent third-party organisations perform such tests.[65]

Another approach to FRT regulation is for companies and developers of such technologies to self-regulate and adopt ethical principles to guide the development and sale of their systems. For instance, Microsoft has adopted a set of six principles- fairness, transparency, accountability, non-discrimination, notice and consent, and lawful surveillance- which would guide its FRT. Following this, it was also reported that the company refused to sell its technology to governments on two occasions where it believed that the use would be contrary to these principles.[66]

Thus, while the deployment of FRT by state agencies must satisfy the tests laid down by the Supreme Court in the Puttaswamy case, proactive solutions must be instituted to reduce the gap between legal theory and technological realities. Unless proper regulation is developed, FRT will continue to have grave consequences. With effective regulatory frameworks and measures for data protection and security, it is possible to make FRT work for the betterment of society rather than as a tool of systemic discrimination and marginalisation of communities.

6. Conclusion

By analysing the inherently biased nature of FRT and its disproportionate impact on historically marginalised sections of society, this paper has sought to demonstrate that technology does not develop or function in a vacuum. Instead, it amplifies and reinforces social inequalities, reflecting societal patterns of exclusion and erasure.

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[65] Peter N. K. Schuetz, *Fly in the Face of Bias: Algorithmic Bias in Law Enforcement's Facial Recognition Technology and the Need for an Adaptive Legal Framework,* 39 Minn. J.L. & Ineq. 221, 249 (2021).
[66] *Supra* note 49.

The deployment of FRT by law enforcement agencies and the State in ways that disproportionately affect particular communities, and its use for mass surveillance, is a matter of grave concern, making it imperative to develop strong legal frameworks for its regulation. Without effective safeguards, FRT has the potential to undermine the democratic framework that forms the cornerstone of our society. Arbitrary and targeted arrests can cause people to lose faith in the justice system.

In light of these concerns, there is an urgent need for a comprehensive and rights-oriented regulatory framework governing the use of FRT in India. As discussed in Section V, this must include, at a minimum, a temporary moratorium on its deployment in public spaces until adequate safeguards are in place, the establishment of independent oversight mechanisms, and the incorporation of clear limitations on data collection, retention, and use. Additionally, procedural safeguards such as mandatory human verification, transparency in deployment, and accessible grievance redressal mechanisms are essential to prevent misuse and wrongful identification.

Therefore, the gap between technology and the law must be bridged to uphold the principles of equality and justice for all. Constitutional principles of privacy, equality, and dignity must guide the regulation of FRT. Without such safeguards, its continued expansion risks entrenching surveillance-driven governance in ways that are incompatible with the foundational values of a democratic society.

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ARTICLE

REVISITING OBSCENITY: MOVING BEYOND THE COMMUNITY STANDARDS TEST TO ACTUAL HARM

Sudiksha Jha*

Abstract

The recent controversy over sexual jokes in 'India's Got Latent' has sparked polarising opinions, demonstrating a lack of uniform moral consensus in a culturally diverse Indian society. This challenge becomes more difficult in the digital age, where content is segmented into push and pull media. Despite this, the continued reliance by Indian courts on the Community Standard Test ("**CST**") to determine obscenity is problematic. CST is based on contemporary societal morality, which is inherently difficult to determine in a pluralistic society. It reflects the State's paternalistic attitude, rooted in the Victorian morality imposed during the colonial era. Therefore, its application leads to excessive judicial discretion and risks the imposition of majoritarian morality on minority communities. Hence, the author argues that CST is ill-suited to Indian democratic values. This paper aims to critically examine the judicial tests used to determine obscenity: the Hicklin test, the Roth test, and the CST. To address the limitations of the contemporary test, the author proposes the application of a more context-specific and stricter framework using JS Mill's framework of the 'Harm Principle'. The author argues that the assessment of harm must be based on substantiated harm, such as psychological injury, incitement to violence, or harm to dignity. Through a comparative analysis and Mill's framework, the author develops a two-pronged test suited to culturally diverse India in the digital age: the nature test and the degree-of-harm test to determine obscenity. It would create a rights-based approach to determine obscenity in an Indian pluralistic society.

Keywords: Obscenity; Community Standard Test; Victorian Morality; Harm Principle.

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* Third-Year B.A. LL.B (Hons.) student at National Law University Delhi. Author can be contacted at sudiksha.jha24@nludelhi.ac.in.

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1. Introduction

Recently, Samay Raina's popular show '*India's Got Latent*' brought to light the laws on obscenity. The jokes centred around sexuality triggered polarised reactions among various sections of society. While some celebrated it as bold dark humour, others condemned it as offensive.[1] These contrasting opinions underscore that morality in contemporary society is far from uniform. In the digital world, content must be judged by its specific targeted audience. Thus, these divergent views called into question the very

[1] Cherylann Mollan, *YouTuber's 'dirty' comments spark massive row in India*, BBC News (Aug. 22, 2026) https://www.bbc.com/news/articles/cvg4g8q51xdo.

foundation of CST, which is premised on a consistent moral point that is further eroded in the digital age, where content is not restricted to a particular community but is accessible to national and global audiences.

In recent times, the courts, in a few instances, have determined obscenity based on the video's context for the 'targeted' audience. For instance, in the recent *College Romance Case*, the Supreme Court ("**SC**") held that the context of the entire web series must be considered.[2] More importantly, the Court noted that the content was 'pull media', in which the audience actively chose to watch it.[3] It further held that to determine obscenity in pull media content, it must be judged with a higher threshold. Although the Court considered the material in the context for a specific audience, it did not explicitly shift the judicial test for determining obscenity from the perspective of a particular set of audiences. Courts are also taking significant steps in holding liability for psychological harm caused by obscene acts. Recently, the Court held that texts like 'You are slim', 'You are smart', attract obscenity.[4]

In light of these developments with the court's shift in understanding that obscenity cannot be determined for the general public at large and needs to be narrowed down to context and target community, it becomes relevant to revisit the laws on obscenity. Therefore, in this paper, the author argues, *firstly*, that the CST relies on vague notions of uniform morality across culturally diverse India. *Secondly*, it has become outdated, especially in the digital age, where content delivery varies across and within platforms, with some content openly accessible and others paywalled. As a result, these problems call for a test which is consistent in its approach to determine liability. Hence, to address the limitations of the CST, the author proposes the 'Harm Test' as

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[2] Apoorva Arora v. State (NCT of Delhi), (2024) 6 SCC 181.
[3] *Id.*
[4] Narsingh Gude v. State of Maharashtra, (Criminal Appeal 272 of 2022).

an alternative. This test is based on JS Mill's framework and drawn from comparative analysis of other jurisdictions. This test would keep the liability threshold high, preserving artistic freedom while remaining consistent with the constitutional principles relevant in the digital world.

Section II of this paper analyses the laws on obscenity in the Pre-Independence and Post-Independence eras, as well as special legislation. In this section, the author argues that the post-colonial laws on obscenity are still based on Victorian morality and reflect the paternalistic attitude of the state. In Section III, the author critically analyses the three judicial tests: the Hicklin test, the Roth test, and the CST. Section IV of this paper identifies the nature of the offence of obscenity using the consensus theory. In this section, the author aims to illustrate Durkheim's argument that, in modern times, it is difficult to determine shared values across society due to the emergence of individualism. As society evolves, especially in the digital age, it is crucial to determine what constitutes obscenity based on the harm it causes. Finally, Section V of the paper recommends the 'Harm Test' as an alternative to the contemporary CST test. Section VI analyses some challenges in its adoption in India. Section VII draws on a comparative analysis of UK, Canadian, and Australian jurisprudence to propose a two-pronged test for determining liability under the Harm Principle, thereby bolstering a rights-based framework in India in the digital age.

2. Laws on Obscenity

The laws on obscenity in India date back to the 'Victorian era'[5](1837-1901) when India was a colony of the British Empire. The mid-19th century saw strict adherence to high moral values in

[5] Ratika Gaur, '*What Can a Comma Do?': Re-Examining Victorian Criminalisation of Obscenity through the Flawed Interlinking of 'Decency or Morality' Under the Strain of Modern Liberal Consciousness*, 36(2) NLSIR 1 (2025).

both action and rhetoric across all British colonies.[6] This came to be known as 'Victorian morality'. It played an integral role in defining what constitutes accepted standards in society and was enforced through legislation. Some of the popular codes included sexual repression, family values, chastity, and so on. The structure was overtly patriarchal. Women were expected to be servile and sexually docile.[7] Sexuality for both women and men was to be repressed in public life.[8]

Primarily, religious beliefs of Catholicism, Evangelicalism and Liberalism influenced Victorian morality.[9] Different doctrines associated with different religions governed all aspects of Victorian life.[10] The clergy, through their sermons on faith, used to spread the 'Word of God' to followers.[11] The rise of Evangelicalism during the late 18th and early 19th centuries further strongly influenced the Victorian code. It is believed that the Bible is impeccable.[12]

These accepted standards of morality not only influenced Western ethical norms but also influenced the legislation regulating obscenity during the colonial era.[13]

2.1. Pre-independence laws on obscenity

The British Raj in India under Queen Victoria was not untouched by the strict imposition of Victorian morality, with its emphasis on sexual conservatism, modesty, and propriety. The authorities were

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6 IAN C. BRADLEY, THE CALL TO SERIOUSNESS: THE EVANGELICAL IMPACT ON THE VICTORIANS (Lion Hudson Limited 2006).
7 Into the Rose Gardens, *The Victorian Era: Sexuality and the Family*, https://intotherose-garden.com/2013/02/10/the-victorian-era-sexuality-and-the-family/ (last visited Dec. 22, 2025).
8 *Id.*
9 Diane Aiken, *Middlemarch: Religion*, British Literature Wiki (22 Dec. 2025),https://sites.udel.edu/britlitwiki/religion/#:~:text=The%20different%20doctrines%20associated%20with,by%20religious%20thoughts%20and%20teachings.
10 *Id.*
11 *Id.*
12 Randall McGowen, *The Age of Atonement: The Influence of Evangelicalism on Social and Economic Thought, 1795-1865 by Boyd Hilton*, 21(1), Albion: A Quar. J. Concerned with Brit. Studies , 129, 129-130 (1989).
13 Supriyo v. Union of India, 2023 SCC OnLine SC 1348.

desperate to regulate sexual content, curb public indecency, and protect the perceived moral standards of the time.

Lord Macaulay's first draft of the Indian Penal Code ("**IPC**") in 1837 also had a provision penalising those who insulted the modesty of a woman by any sound or gesture.[14] However, it did not explicitly mention the offence of obscenity.

The Obscene Books and Publications Act of 1856[15] also filled the void of obscenity laws in India. It aimed to prevent the sale and exposure of obscene books and pictures.[16] It was modelled on the lines of the 'English Town Police Clauses Act, 1847',[17] which prohibited the distribution, sale, offer for sale, or public exhibition of any obscene "book, paper, print, drawing, painting, or representation; as well as the singing, reciting, or utterance of obscene songs, ballads, or words in places of public resort.[18]

Likewise, in England, there was no specific legislation on this subject until the British Parliament introduced the 'Obscene Publications Act, 1857'.[19] It authorised the magistrate to destroy any material found to be obscene.[20] It is interesting to note that obscenity was one of the few laws that were treated alike in England and British India.[21]

Furthermore, Section 292 was introduced in the IPC by the 'Obscene Publications Act, 1925' (8 of 1925), to give effect to Article I of the 'International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications', which was

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[14] Indian Law Commission, '*A Penal Code Prepared by Indian Law Commissioners and Published by Command of the Governor Council of India*', G.H. Huttmann (1837) cl. 486.
[15] Obscene Books and Publications Act, 1856 (Repealed) No. 1, Legislative Council of India, 1856 (India).
[16] *Id* §1.
[17] Town Police Clauses Act 1847, 10 & 11 Vict. c. 89, Parliament of the United Kingdom, 1847(Eng).
[18] *Id.*
[19] Obscene Publications Act, 1857, 20 & 21 Vict c 83, Parliament of the United Kingdom, 1857 (Eng.)
[20] *Id.* §1.
[21] *In Re: B.* Chandrasekaran v. Unknown, (1957) 2 MLJ 559.

signed by India in Geneva.[22] Sections 292, 293, and 294 have been enacted to 'protect and safeguard the public morals by making the sale, distribution, and hire of obscene material penal' in general and to young persons in particular.[23] The offences are bailable, cognisable, and not compoundable (subject to state amendments).[24]

The constitutional validity of Section 292 was challenged in '*Ranjit Udeshi v State of Maharashtra*, 1965'.[25] In this case, the appellant was one of the four partners of a firm that owned a book stall in Bombay. They were found in possession for sale, copies of an obscene book named '*Lady Chatterley's Lover*' (unexpurgated edition).[26] The Court held that the novel contained obscene material that offended public decency and morality. The Court rejected the appeal of Udeshi and ruled that Section 292 of the IPC constituted a 'reasonable restriction' under Article 19(2) of the Constitution.[27] This provision places restrictions on 'freedom of speech' in the interest of 'public decency' and 'morality'. Therefore, courts have held that laws on obscenity are constitutionally valid.

2.2. Transition from IPC to BNS

On July 1, 2024, the Bhartiya Nyaya Sanhita ("**BNS**")[28] was enacted to replace the IPC. Section 295 of the BNS (Section 294 of IPC) has curtailed the scope of punishment by replacing 'person under the age of twenty years' with 'child'.[29] The notable change, keeping in mind the technological developments of modern society, is that

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[22] 1 ABHINAV CHANDRACHUD, REPUBLIC OF RHETORIC: FREE SPEECH AND THE CONSTITUTION OF INDIA, 110 (Penguin Random House India 2017).
[23] Indian Penal Code, 1860, §§ 292–294, No. 45, Acts of Parliament, 1860 (India).
[24] Code of Criminal Procedure, 1973, sch. 1, No. 2, Acts of Parliament, 1974 (India).
[25] Ranjit D. Udeshi v. State of Maharashtra, 1964 SCC OnLine SC 52.
[26] *Id.*
[27] India Const. art. 19, cl. 2.
[28] Bhartiya Nyaya Sanhita,2023, § 294 No. 45, Parliament of India, 2023.
[29] *Id*, § 295.

Section 294 of BNS (Section 292 of IPC) has been amended to include 'including display of any content in electronic form'.[30]

The BNS was introduced to provide justice rather than punishment.[31] Although it acknowledges the inclusion of 'electronic form', it does so in a generic way, without considering the complexities of the digital age, such as content creation and circulation. In the digital age, content delivery across and within platforms differs fundamentally. For instance, the content can be categorised as gated sites that require user registration and age verification, or as paywall access, which is exclusively reserved for subscribers of verified legal age who have paid for their subscriptions.

The SC in the *College Romance Case* has held that the determination of obscenity in pull media or paywalled content must be made at a higher threshold.[32] However, the BNS does not differentiate between paywalled and freely accessible content. It fails to clarify if the circulation of both unrestricted and restricted content attracts the same penalty. Therefore, BNS misses the critical opportunity to align obscenity laws with constitutional protections and perpetuates a similarly vague moral framework to that of the IPC.

2.3. Special legislation on laws of obscenity

The Indecent Representation of Women (Prohibition) Act, 1986, prohibits the indecent description of women in any form which is derogatory, denigrating, or harmful to public morality.[33] This act does not specifically use the term 'obscenity'; however, it considers indecent representation of women based on public morality.

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30 *Id.*
31 The Economic Times, '*Focus on Nyay Instead of Dand: Amit Shah Welcomes swadeshi criminal laws'* (last visited July 13, 2025) https://economictimes.indiatimes.com/news/india/criminal-justice-system-becoming-completely-swadeshi-amit-shah-on-new-criminal-laws/articleshow/111399264.cms?from=mdr.
32 Apoorva Arora v. State (NCT of Delhi), (2024) 6 SCC 181.
33 Indecent Representation of Women (Prohibition) Act, 1986, No. 60, Acts of Parliament, 1986 (India).

Section 67 of the Information Technology Act, 2000, punishes the publication or transmission of obscene materials in electronic form.[34] The definition of obscenity is based on Section 294 of the IPC.

Notably, even after independence, the laws on obscenity have remained largely unaltered. It continues to reflect the Victorian morality of paternalism by considering a piece obscene "*if it tends to deprave and corrupt those who are open to such immoral influences*".[35] Just as during the Victorian era, the State used to define and impose standards of morality, in post-Independence India, courts determine obscenity based on 'non-existent' shared norms in a pluralistic society. Therefore, the foundations of obscenity laws remain heavily influenced by a paternalistic attitude, a characteristic feature of the colonial era.

3. Nature of the Offence of Obscenity

The current reliance on CST is based on societal consensus. Therefore, this section will explain the nature of the offence of obscenity through the lens of consensus criminological theory.

The Consensus Theory, propounded by Emile Durkheim, assumes that traditional societies are inherently integrated, where individuals share values.[36] Such traditional societies have a value consensus, which is primarily generated through socialisation.[37] Socialisation, both primary and secondary, helps individuals to internalise social norms. However, in a traditional society, any individual who deviates from this consensus is punished.[38] Punishment reinforces social order and keeps society's shared norms intact.

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[34] Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India).
[35] Ranjit D. Udeshi v. State of Maharashtra, 1964 SCC OnLine SC 52.
[36] NICOLA MARCUCCI, , *From Practices to Justice*, in DURKHEIM AND CRITIQUE 191 (Springer Nature, 2021).
[37] *Id.*
[38] *Id.*

However, Durkheim argues that the nature of consensus has changed in modern societies. Modern societies have given rise to individualism, scientific truth and justice.[39] This has weakened consensus in society.[40] As the division of labour increases and society becomes more diverse, common beliefs, the primary foundation of social solidarity, weaken.[41] However, Durkheim argues that even when consensus has weakened, the rise of self-regulating constitutive forces can still create consensus. However, constitutive forces are locally relevant and developed in contexts such as occupation.[42]

Durkheim argues that in modernity, people no longer share the same religion or culture; therefore, consensus in modern societies is only created through secondary groups. In these conditions, moral diversity cannot be prevented.[43] While pluralism holds that diverse groups can also share overlapping consensus and societal norms, the mere existence of 'some shared value' is not sufficient to penalise obscenity based on fluctuating community standards.[44] The reliance on such an arbitrary consensus risks unwarranted censorship.

The laws on obscenity are not based on universal standards.[45] It is a grey offence, where boundaries of legality cannot be rigidly determined. Its criminalisation varies across regions, as do morality

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[39] Anne Warfield Rawls, '*Durkheim's theory of modernity: Self-regulating practices as constitutive orders of social and moral facts'* Journ. of Classical Sociology (25 Dec. 2025), 479 (2012) https://journals.sagepub.com/doi/full/10.1177/1468795X12454476?casa_token=2ribxEzkGZcAAAAA%3AgDNt3QnXzOK8nyYMEdxyniENmfVnhbMiA5M8yFQlpUerEAp0ZO28clic1uXVrxh1ESjVgaTzH_gE.
[40] *Id*, 480.
[41] *Id*, 481.
[42] *Id*, 482.
[43] *Id*, 493.
[44] Adam Gurri, '*Pluralism as a Consensus Rationing*', LIBERALTARIANISM (Oct 24, 2025, 8:55 PM), https://www.libertarianism.org/columns/pluralism-consensus-rationing.
[45] Huzaifa Malik, '*An Analysis of Laws Relating to Obscenity: Problems & Prospects'* , 2(2) INT'LL JOURN. OF INTEGRATED LR (Dec 25, 2025, 1:00 PM), https://www.ijilr.org/wp-content/uploads/An-Analysis-of-Laws-Relating-to-Obscenity.pdf.

and culture. This has been well appreciated in foreign and Indian jurisprudence.[46]

However, the contemporary laws on obscenity under the BNS are framed on the offence principle. The offence principle holds that criminality is based on acts that affront societal morality.[47] However, in the digital age, the mode of content delivery differs. It includes both pull and push media. It is argued that pull media cannot be subjected to the same penal laws as push media. Von Hirsch argues that the offence principle penalises three different types of wrongs: intrusion of privacy, insult, and pre-emption of common spaces.[48]

In the context of pull media, *firstly*, the subscriber actively chooses to access the private content; their privacy cannot be invaded. *Secondly*, insult, which involves the deliberate act of violating someone's dignity. But paying for pull media content itself implies that the user agrees to view it. *Thirdly*, the question of pre-emptive common spaces does not arise because the content is inaccessible to those who have not registered, verified or paid. Therefore, the threshold of determining obscene content in pull media needs to be higher, and the harm test in such cases can determine obscenity through a definitive lens.

The Consensus Theory reveals that in modern pluralistic societies, CST is fundamentally misaligned with reality. Hence, rather than determining obscenity based on the fiction of moral consensus, it is important to reorient obscenity laws on demonstrable harms, compatible with constitutional values.

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[46] Pope v. Illinois (1987) 481 U.S. 497; Bobby Art International v. Om Pal Singh Hoon, (1996) 4 SCC 1.

[47] Andrew von Hirsch, *The Offence Principle in Criminal Law: Affront to Sensibility or Wrongdoing?*, 11(1) King's Law Journal, 78, 83 (2026).

[48] *Id.*

4. Judicial Tests to Determine Obscenity

4.1. Hicklin test

The Hicklin test was established as the first legal threshold to determine obscenity. It arose from a judicial decision at the Queen's Division Bench of the England and Wales High Court ("**HC**") of Justice in 1868.[49] In this case, the accused, Hicklin, created a pamphlet to convince people that the Roman Catholic Church's priesthood was depraved and that the church abused females during the confessional process.[50] Consequently, he was charged with the crime of creating an obscene publication.[51] The defendant pleaded that he had published the material for the positive purpose of trying to prevent the church's depravity and corruption.[52] But the Court held him guilty.[53] This gave rise to the famous Hicklin test, which served as a threshold for obscenity.

According to the test, even if just a tiny percentage of the population is vulnerable to such an impact, the content might nonetheless be labelled obscene.[54] The standards of a reasonable man did not judge the material. However, the judgment did not define or specify the kind of material that has the potential to deprave and corrupt people's minds. Therefore, it gave judges the authority to interpret the material in isolation, without understanding the context in which it was published.

In India, the Hicklin Test was affirmed in *Ranjit Udeshi D. v State of Maharashtra*.[55] The test was based on constitutional provisions. Article 19(2) allows the state to impose reasonable restrictions.[56]

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[49] The Queen, On the Prosecution of Henry Scott, *Appellant, v. Benjamin Hicklin and another,* Justices of Wolverhampton, Respondents (1868) [L.R.] 3 Q.B. 360 (United Kingdom).
[50] *Id*, at 371.
[51] *Id.*
[52] *Id.*
[53] *Id*, 378.
[54] Adarsh Kumar, *Study on the Hicklin Test and its Impact on Obscenity laws in India,* SSRN, 1, 3 (2023) http://dx.doi.org/10.2139/ssrn.4498153
[55]Ranjit D. Udeshi v. State of Maharashtra, 1964 SCC OnLine SC 52.
[56] India Const. art. 19, cl. 2.

Article 39(f) of the Indian Constitution confers the duty on the state to protect the young against exploitation and moral and material abandonment.[57] Thus, these provisions enable the state to enact laws restricting obscenity.

However, the SC distinguished itself from the Hicklin judgment in significant ways. *Firstly*, it noted that the adoption of this test does not mean that even a stray word would suffice to constitute obscenity.[58] *Secondly*, the Court noted that the mere inclusion of sexuality and nudity alone could not be an indicator of obscenity.[59] *Thirdly*, in cases where obscenity and art are mixed, art must be so preponderating to suppress obscenity, or the obscenity itself should be insignificant that it can be overlooked.[60] This marked a discernible shift from Victorian morality, where all acts of sexuality and nudity were suppressed. Although it was a nuanced shift, the courts did not formally abandon the Hicklin test. This reluctance led to many inconsistencies in its application in future cases.

It can be observed that although the Court considered the material from the perspective of those likely to be depraved and corrupt, it also did so in light of contemporary social morality. This approach is in line with the Roth test, which also examines the material according to the standards of contemporary society's morality. This approach was adopted in subsequent cases, such as *Shri Chandrakant Kalyandas Kakodkar v State of Maharashtra*[61]*,* in which the complainant found the appellant's book obscene. The court, while following the Hicklin Test as laid down in *Ranjit D. Udeshi v State of Maharashtra*,[62] observed that:

"*The duty of the Court is to consider the obscene matter by taking an overall view of the entire work and to determine whether the obscene passages are so*

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[57] *Id*, art. 39, cl. f.
[58] Ranjit D. Udeshi v. State of Maharashtra, 1964 SCC OnLine SC 52.
[59] *Id*, at para 16.
[60] *Id*, at para 21.
[61] Chandrakant Kalyandas Kakodkar v. State of Maharashtra, (1969) 2 SCC 687.
[62] Ranjit D. Udeshi v State of Maharashtra, 1964 SCC OnLine SC 52.

likely to deprave and corrupt those whose minds are open to such influences and in whose hands the book is likely to fall and in doing so one must not overlook the influence of the book on the social morality of our contemporary society."[63]

The Delhi HC, in *Om Pal Singh Hoon v Union of India*,[64] admitted that the Hicklin test has been diluted with the Roth test.[65] But in a diverse land like India, social morality cannot be defined. Although the Court noted that morality differs from country to country,[66] it failed to take into account the diversity of Indian society, where the morality of a village in Bihar differs from that of Patna itself. Thus, the social morality of society was to be determined by judges, and, just as with Victorian morality, an imposed social morality crept into the *Indianised* version of the Hicklin test. Similarly, in *Samaresh Bose and another v Amal Mitra and another*,[67] the SC held that the courts must take an overall assessment of the material along with the matter charged as obscene.[68] This interpretation of the determination of standards of obscenity was further affirmed in *K.A. Abbas v Union of India,*[69] where the petitioner challenged the pre-censorship of his film and was subjected to proposed cuts.[70] The SC upheld the pre-censorship but emphasised that censorship must preserve artistic freedom and creativity.[71] The Court remarkably introduced considerations such as artistic merit and social morality, under which a film could no longer be censored solely for containing sensitive or offensive topics, provided these elements are handled with genuine artistic depth or serve a redeeming social interest.[72] The Court clarified that taboo subjects are essential for creative art; a movie scene should not be only cut

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[63] Chandrakant Kalyandas Kakodkar v. State of Maharashtra, (1969) 2 SCC 687.
[64] Om Pal Singh Hoon v. Union of India, 1996 SCC OnLine Del 235.
[65] *Id*, at para 33.
[66] *Id.*
[67] Samaresh Bose and another v. Amal Mitra and another, (1985) 4 SCC 289.
[68] *Id*, at para 29.
[69] K.A. Abbas v. Union of India, (1970) 2 SCC 780.
[70] *Id*, at para 9.
[71] K.A. Abbas v. Union of India, (1970) 2 SCC 780.
[72] *Id*, at para 49.

because of scenes of sexual immorality, instead, the court must look at the theme of the movie.[73]

However, the Court did not abandon the Hicklin test. Further, the hybrid model of the Hicklin test and the Roth test did not suit the Indian pluralistic society. As a result, the determination of obscenity was to be made by the judges, reinforcing a paternalistic mindset. Nonetheless, the test was applied both in British India and the Republic of India for decades.

4.2. Roth test

In '*Roth v United States*, 1957', the SC of the United States shifted away from the 'Hicklin test', stating that obscenity must be judged based on its effect on a reasonable person based on contemporary community standards.[74] It declared that the entire material, taken as a whole, was to be considered obscene.

The American Roth test differed from the Hicklin test in three ways. *Firstly*, the Roth test considered the book, picture, or publication as a whole to determine obscenity. The specific material is not to be detached from the whole.[75] *Secondly*, the effect of the material was to be considered not upon any particular class, but upon all those whom it is likely to reach.[76] *Thirdly*, its effect on the entire community is to be judged according to present standards of morality.[77] The Indian courts, while applying the Hicklin test, had already considered the entire material in light of contemporary community standards.[78]

Sixteen years later, in 1973, the Roth test was modified to the Miller test in *Memoirs v. Massachusetts*[79] and *Miller v. California*[80]. In the

[73] *Id.*
[74] Roth v. United States (1957), 354 U.S. 476.
[75] *Id*, at 476.
[76] *Id*, at 490.
[77] *Id*, at 476.
[78] Ranjit D. Udeshi v. State of Maharashtra, 1964 SCC OnLine SC 52.
[79] Memoirs v. Massachusetts (1966) 383 U.S. 413.
[80] Miller v. California, 1973 SCC OnLine US SC 156.

Memoirs case, the Court modified the original Roth test by introducing an independent element of 'patent offensiveness' that must coalesce before the book can be declared obscene.[81] Further, in *Miller*, the requirement that the work taken as a whole must be utterly without redeeming social value was added.[82] The primary reason for replacing the Roth test was that the SC could not define the vague terms.[83] For instance, in *Manual Enterprises v Day*,[84] Justice Harlan and Justice Stewart argued that magazines were not obscene because they lacked 'patent offensiveness', which is an element of obscenity although not explicitly mentioned in the Roth test.[85] This problem resurfaced in Jacobellis v. Ohio, where the question of whether community standards should be judged locally or nationally could not be resolved by the majority of the judges.[86] All this culminated in confusion around the test, which led to the development of Miller's test through *Memoirs v Massachusetts*[87] and *Miller v California*.[88] The 'Miller's test' narrowed down the criteria of the Roth test by introducing the three-pronged test in 1973.[89] The three prongs to determine liability include:

- "Prurient Interest: The average person applying contemporary community standards would find the work, taken as a whole, appeals to the prurient interest.
- Patently offensive: whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;

[81] Memoirs v. Massachusetts,(1966) 383 U.S. 413.
[82] Miller v. California, 1973 SCC OnLine US SC 156.
[83] Alan D. Miller, *The Problem of Obscenity*, 16(2) Washington Uni. Jurisprudence Rev 185, 214 (2004).
[84] Manual Enterprises, Inc. v. Day, (1962) 370 U.S. 478.
[85] Miller *supra* note 84, at 215.
[86] Miller, *supra* note 84 , at 215.
[87] Memoirs v. Massachusetts, (1966) 383 U.S. 413.
[88] Miller v. California, 1973 SCC OnLine US SC 156.
[89] *Id.*

- Lack of serious value: and whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[90]

The difference between the Hicklin test and the Miller test is substantial: the former is broad, while the latter is context-specific. The Hicklin test is applied if the material has the 'tendency to deprave and corrupt minds'. On the other hand, the Miller test is used when the material is 'patently offensive'. Secondly, the Hicklin test is wide enough to cover everyone open to immoral influences.[91] However, the Miller test covers only those materials that are explicitly laid down by the state law as 'sexual conduct'. The key difference is that the Miller test is applied according to the reasonable man test, which considers an average, prudent person to consider literary, artistic, political, or scientific value.[92]

In India, the Miller's test was applied in '*K.A. Abbas v Union of India.[93]* However, when Miller's test was developed in the United States, the Hicklin test was already in its initial stages in India, and courts were focused on solidifying its application. Therefore, the Indian courts have not adopted Miller's test. However, the Indian courts have often seemed to confuse the Hicklin test and the Miller test. For instance, Justice Lakshmanan, while quoting Miller's test in '*Ajay Goswami v Union of India & Others*', actually titled it as the Hicklin test.[94]

As a result, it can be analysed that Indian courts have inconsistently applied the Hicklin and Miller tests without distinguishing between them, leading to confusion. The Miller Test and Roth Test were

[90] *Id*, at 6 para 17.
[91] Tejas RK Motwani, *Obscenity as a Restriction in India*, 2 Int'l Journ. of Legal Studies and Research, 160, 169-170 (2013).
[92] Miller, *supra* note 84.
[93] K.A. Abbas v. Union of India, (1970) 2 SCC 780.
[94] Motwani, *supra* note 93.

never formally recognised. This haziness was resolved after the adoption of the CST, as discussed in the next section of the paper.

4.3. CST

The Indian Courts currently use the CST to determine liability in obscenity cases. This test was introduced in '*Aveek Sarkar v State of West Bengal*' in 2014.[95] The SC explicitly applied this test by examining the material from the artist's perspective and the message it intends to convey to the broader public.[96] A worldwide circulated German magazine published an article with a picture of a world-renowned tennis player posing nude with his dark-skinned fiancée. This film actress was photographed by none other than her father.[97] The complainant argued that the photograph would corrupt both children and youth in this country and run counter to our society's cultural and moral values.[98]

The Court took cognisance by applying the CST and rejected the 'Hicklin test' while interpreting *Ranjit Udeshi v. State of Maharashtra*[99] through a different light. It noted, "*a Constitution bench of this court in the year 1965 indicated that the concept of obscenity would change with time and what might have been seen as 'obscene' at one point in time would not be considered as 'obscene' at a later period.*"[100] Similarly, the Court derived authority from the *Chandrakant Kalyandas Kakodar* case,[101] "the standards of contemporary society are fast changing".[102] Therefore, the transition from the Hicklin test to the CST can be considered a jurisprudential evolution in response to changing societal needs and perspectives.

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95 Aveek Sarkar v. State of W.B., (2014) 4 SCC 257.
96 *Id*, para 24.
97 *Id*, at para 1.
98 *Id*, at para 4.
99 Ranjit D. Udeshi v. State of Maharashtra, 1964 SCC OnLine SC 52.
100 Aveek Sarkar v. State of W.B., (2014) 4 SCC 257.
101 Chandrakant Kalyandas Kakodkar v. State of Maharashtra, (1969) 2 SCC 687.
102 *Id*, at para 14.

The Court also took cognisance of the contemporary mores of the society[103] as laid down in *Roth v United States.*[104] K. S. Radhakrishnan J., who penned the judgment, opined that regard must be given to the contemporary mores and national standards.[105] Thus, the Court considered the piece in the context rather than in isolation,[106] as suggested in '*Bobby Art International & Ors. v Om Pal Singh Hoon.*[107] As a result, the Court examined the context in which the photograph was taken and, applying the CST, found the defendant not guilty.

This transition from the 'Hicklin' test to the CST has not been smooth and has not been completely applied by the courts. Recently, the Delhi HC in '*Apoorva Arora v State NCT of Delhi*'[108] erred in determining obscenity in the web series titled '*College Romance*'. It took into account isolated specific material of profanity like swear and vulgar expletives that "*will affect and will tend to deprave and corrupt impressionable minds*". This suggests that even though the application of the CST marks a doctrinal shift toward contextual contemporary social morality, its uneven application raises questions about judicial coherence.

5. Critique of the CST

This section will analyse the application of the CST on three grounds: *firstly*, whether it is suited to Indian society; *secondly*, whether it provides a consistent approach, i.e., free from subjective biases; *thirdly*, whether the test is adaptable in a changing technological era.

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103 *Id.*
104 Roth v. United States, 1957 SCC OnLine US SC 106.
105 Aveek Sarkar v. State of W.B., (2014) 4 SCC 257.
106 *Id*, at para 24.
107 Bobby Art International v. Om Pal Singh Hoon, (1996) 4 SCC 1.
108 Apoorva Arora v. State (NCT of Delhi), (2024) 6 SCC 181.

5.1. Cultural unsuitability in a pluralistic society

To answer the first parameter, the CST takes into cognisance society's contemporary morality, as reflected in national standards.[109] However, this understanding of contemporary mores does not acknowledge the cultural diversity of Indian society. The accepted level of tolerance would differ from state to state because the nature of customs varies from village to village, not even within a state. These customary practices develop into local mores of that society and not the nation. In *Chandrakant Kakodkar v State of Maharashtra*,[110] the SC noted that obscenity varies across countries.[111]

Similarly, the United States SC in *Pope v. Illinois*[112] has duly acknowledged that obscenity differs across regions in the country: "*it was not reasonable to require the people of Maine or Mississippi to accept what was acceptable in Las Vegas or New York City*".[113] Therefore, in a pluralistic society, the society's morality cannot be ascertained. Thus, a material can be obscene in one area and not in others, which is not taken into account by the CST.

Such notions of singular morality lead judges to refuse the minority expression. For instance, in the *Little Sisters case*,[114] while applying the Community Standards of Tolerance test, the Court refused to accept the 'distinct' queer sexual expression, created by and for the queer community.[115] The Court tied community tolerance to societal harm, measured by the contemporary Canadian community.[116] This approach relies on a 'mainstream cognitive lens' that prioritises the comfort of society at large and treats

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109 Aveek Sarkar v. State of W.B., (2014) 4 SCC 257.
110 Chandrakant Kalyandas Kakodkar v. State of Maharashtra, (1969) 2 SCC 687.
111 *Id*, at para 12.
112 Pope v. Illinois, (1987) 481 U.S. 497 .
113 *Id.*
114 Little Sisters Book and Art Emporium v. Commissioner of Customs and Revenue and Minister of National Revenue, (2007) SCC OnLine Can SC 2.
115 Richard Jochelson and James Gacek, *Reconstitutions of Harm: Novel Applications of the Labaye Test Since 2005*, 56(4) Alberta Law Review 991, 999 (2019).
116 *Id.*

minority communities as 'others' whose practices are only tolerated as long as 'our' interests are not harmed.[117]

5.2. Conceptual Inconsistency and Judicial Subjectivity

Secondly, 'community standards' is not a well-defined concept. The approach of 'contemporary community standards' can be traced back to a dictum in *United States v Kennerley*,[118] in which Judge Hand noted that the definition of obscenity should reflect "*the average conscience of the time*".[119] The Ninth Circuit Court of Appeals has held that "*community standards are aggregates of the attitudes of average people*".[120] Further, in *Skyywalker Records, Inc. v Navaarro*, it was held that the "*community standard is a legal concept whereby a single perspective is derived from the aggregation of everyone's attitudes in the area, including persons with differing degrees of tolerance.*"[121]

This notion of average standard implies the existence of a spectrum of tolerance that can be ranked along a single dimension.[122] But a single dimension of tolerance does not exist.[123] Therefore, the term "community standards" imposes enforced morality on the public, a characteristic of Victorian morality. This enforced morality has the risk of imposing standards of morality based on majoritarian opinion on minority communities. It gives judges the authority to apply their notions of morality. For instance, in October 2024, the division bench of Bombay HC noted that the Assistant Customs Commission's decision relied on its notions of obscenity.[124]

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[117] *Id.*
[118] United States v. Kennerley, (1913) 209 F. 119, 121 (S.D.N.Y. 1913).
[119] Mark Cenite, *Federalizing or Eliminating Online Obscenity Law as an Alternative to Contemporary Community Standards* 9(1) Comm. Law and Pol'y 25, 30 (2004).
[120] United States v. Danley, (1975) 523 F.2d 369 (9th Cir. 1975).
[121] Miller, *supra* note 84, at 197*; Skyywalker Records, Inc. v. Navarro*, (1990) 739 F. Supp. 578, 589 (S.D. Fla. 1990).
[122] Boyce, *Obscenity and Community Standards* 33 Yale J. Int'll 299, 349 (2008).
[123] Miller, *supra* note 84, at 197.
[124] *B.K. Polimex India (P) Ltd. v. Union of India*, 2024 SCC OnLine Bom 3460; Narsi Benwal, *Every Nude Painting or Depiction of Sexual Intercourse Poses Is Not Obscenity: Bombay High Court Slams Customs for Confiscating Paintings* LIVE LAW (Dec. 22, 2025, 1:31 PM) https://www.livelaw.in/high-court/bombay-high-court/bombay-high-court-every-nude-painting-not-obscene-273774.

Similarly, in *R v Labaye*,[125] the Canadian court held that it is very likely that judges and jurors would consider themselves to be reasonable, representative members of the community.[126] This signals the state's paternalistic attitude. Therefore, although a doctrinal shift led to the emergence of the CST, its application has vestiges of Victorian morality.

The limitations of the CST have led to its abandonment in many jurisdictions. The Community Standards Tolerance test, based on the dominant theme of community standards, was also applied in Canada, as noted in *Aveek Sarkar v State of West Bengal.*[127] It was introduced in *Brodie v The Queen*.[128] Notably, courts in Canada have discontinued their application in the historic *R v Labaye.*[129] Interestingly, the Court did not diverge from past opinions but expounded the 'harm test ' as a reassessment of the community standard of tolerance test.[130] The majority defined the harm as 'harm to society by predisposing others to anti-social conduct'.[131]

Furthermore, the Community Standard of Tolerance Test received considerable criticism from academics.[132] The judges observed that the application of this test was highly subjective and varied according to the judge's personal moral values and tolerance.[133] Further, in cases like *Little Sisters*,[134] scholars argued that as the test applied a national, majoritarian average, it inherently marginalised and suppressed alternative sexualities within the queer

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125 R v. Labaye*,* 20053 S.C.R. 728.
126 Richard Jochelson and Kirsten Kramar*, Governing through Precaution to Protect Equality and Freedom: Obscenity and Indecency Law in Canada after R. v. Labaye* 36(4) The Canadian Journal of Sociology, 283, 298-299 (2011).
127 Aveek Sarkar v. State of W.B., (2014) 4 SCC 257.
128 Brodie v. The Queen, (1962) S.C.R. 681(Canada).
129 R v. Labaye*,* (2005) 3 S.C.R. 728.
130 Richard Jochelson, *After Labaye: The Harm Test of Obscenity,* 46(3) Alberta Law Review, 741, 758 (2010).
131 R v. Labaye*,* (2005) 3 S.C.R. 728.
132 Boyce, *supra* note at 124, at 303.
133 Jennifer Kusz, *How to Assess Obscenity: A Legal Realism Interpretation of the Legal Standards for Obscenity, 53* U.B.C. L. Rev. 705 (2021).
134 Little Sisters Book and Art Emporium v. Commissioner of Customs and Revenue and Minister of National Revenue, (2007) SCC OnLine Can SC 2.

community.[135] Hence, a majoritarian view often silenced minority voices. They argued that it imposes the majoritarian view of 'obscenity' on minority communities, and that the test of 'community reasonable standard' is applied by judges based on their morality and prejudices.

The above critique applies to India's case as well, and the vagueness of the terms gives judges considerable leeway. For instance, when a judge is dealing with a case, they would consider their subjective assessment of the extent of indecency. Thus, this test is not based on 'national standards'; rather, it is based on the extent of tolerance of immorality by those in power. Furthermore, nobody has defined what 'national standards' we follow, in an age where every new reel on social media has the potential to change public sentiment.

Even if 'national standards' were defined, there is no assurance that they would take into account minority communities like "lesbians, gays and many more". One of the reasons for academic commentators and interveners to criticise this test was due to the fear that it would allow majoritarianism to operate at the heart of obscenity and impose sexual heterosexual norms on minority sexual communities.[136] At the same time, others argued that community standards ought not tolerate gender-based sex inequality, even when the participants are gay or lesbian.[137] Thus, this test acts as a threat to the minorities, whose right to expression has the potential to be suppressed by the majoritarian view of 'national and reasonable standards'.

5.3. Technological Innovation

In the age of digital media, the application of the CST in India is highly problematic. It presumes a shared moral code. However, in a digitised society, content is shared and circulated across linguistic,

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135 Jochelson *supra* note 117, at 999.
136 Jochelson, *supra* note 132.
137 *Id.*

cultural, and regional boundaries. Every reel has mixed opinions, demonstrating the impossibility of shared norms and morality. In such a scenario, a uniform response to the content is impractical. The CST rests on fixed morality in a fluid, pluralistic society.

Furthermore, the segregation of content into paywalled and freely accessible platforms further increases the complexity. Paywalled content is limited to a few. This raises an important question: if, in such cases, morality would be judged according to broader societal values, which are accessible to the content or only to a restricted group. The CST does not consider these complexities.

Therefore, the very premise of the CST based on a consistent moral viewpoint collapses due to technological innovation. As a result, this test is not adaptable to changing times and needs.

Therefore, the author opines that the CST is not the best means of determining obscenity in India. The need of the day is to have a consistent test that is based on specified harm to the overall functioning of society.

6. Harm Test

The Harm Principle is a central tenet of liberal political philosophy, proposed by the English philosopher John Stuart Mill. He argued that the only purpose for which the state can rightfully exercise power over any individual against his will is to prevent harm to others.[138] J.S. Mill considers the Harm Principle a jurisdictional principle that limits social coercion, whether in the form of law or informal social sanctions.[139] Unless a person's act does not cause a definitive risk of harm to others, who either have not consented to the risk or have the capacity to consent, it is outside society's jurisdiction.[140] It is crucial to analyse whether this principle limits

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[138] JOHN STUART MILL, ON LIBERTY (Dover Publications 2002).
[139] Melina Constantine Bell, *John Stuart Mill's Harm Principle and Free Speech: Expanding the Notion of Harm*, Cambridge Uni. Press 162, 164 (2021).
[140] *Id.*

not only acts that have caused harm but also those that have the potential to cause harm. Thus, it is based on Mill's fundamental ideas about the breadth of individual liberty and the limits of state intrusion.[141]

John Fienberg further builds on Mill's analysis by adding 'offence to others' as a good reason for prohibiting an act.[142] This distinction of harm in the Harm Principle between Fienberg's and Mill's ideas is not surprising because they used it for different notions.[143] For instance, Mill considered harm to be the only justification for a personal zone of social interference. On the other hand, Fienberg considered the harm principle to determine criminal liability.[144]

There are several benefits of developing the normative framework of the Harm Principle into judicial tests. *Firstly*, the Harm Test would be based on the harm the impugned material has caused and not on notions of state-imposed morality. It can be argued that when morality is harmed, state intervention could lead to a paternalistic attitude. However, this kind of paternalism has strong textual support in Mill's work.[145] He reasons that the state is responsible for respecting citizens' desire to pursue what they desire when that capacity is threatened freely. In such cases, interventionist policies by the state are not interference.[146] Mill argues, "liberty consists in doing what one desires".[147] It enforces the 'reactive approach' of the state rather than the 'proactive approach'. Thus, it shifts the enforcement of morality from the superstructure to evidence-based harm. This approach marks a

141 *Id.*
142 Vidhi Srivastava, 'Rethinking our Perspectives to Criminal Obscenity- From Moralism to Harm Principle' Crim. L. Blog (Aug. 1, 2022) https://criminallawstudiesnluj.wordpress.com/2022/08/01/rethinking-our-perspectives-to-criminal-obscenity-from-moralism-to-harm-principle/.
143 Bell, *supra* note at 141, at 165.
144 *Id.*
145 Michael Joel Kesseler, *A Puzzle of Obscenity*, 4(1) A Journ. of Philosophical, Theological and Applied Ethics , 5, 21 (2017).
146 *Id.*
147 *Id.*

departure from Victorian morality, which was entrenched in moral paternalism.

Secondly, it would provide a clear and consistent approach to determining liability by evaluating a piece's contents based on tangible harm rather than on variable societal norms. This reduces the scope of ambiguity and arbitrariness. This test would ensure that no voices are unheard. Every cultural practice holds value in the eyes of the law, and it cannot be swathed due to the majority opinion.

Thirdly, it aligns with the constitutional values of 'freedom of speech and expression'. The test allows individuals to express themselves without the fear of suppression unless their act causes concrete harm to society. In *Aveek Sarkar v. State of West Bengal*[148] and *S. Khushboo v. Kanniammal*,[149] the SC has emphasised the freedom of speech and expression. In *S. Khushboo v Kanniammal*,[150] the SC quashed proceedings against S. Khushboo, who wrote an article supporting pre-marital sex.[151] Therefore, this liberal approach of Indian courts aligns with the harm principle. This would also support a more tolerant society. As the harm test would set a high bar for obscenity, based on real and substantiated grounds, it would lead to more artistic freedom in the twenty-first century, especially in a digitised world, as discussed in the next section.

Moreover, this test has become more relevant in the growing digital world, where digital platforms allow content creators to disseminate content instantaneously without any borders. The audience is not localised but national and global. The Harm test would protect the creative autonomy of content-makers rather

148 Aveek Sarkar v. State of W.B., (2014) 4 SCC 257.
149 S. Khushboo v. Kanniammal, (2010) 5 SCC 600.
150 *Id.*
151 *Id.*

than creating a chilling effect on non-conforming voices. It would also ensure freedom is the norm and censorship the exception.

Thus, the 'Harm Test' seeks to balance individual autonomy with society's right to be protected from harm.

6.1. *Comparative Analysis*

One of the most prominent shifts in how obscenity is determined from a harm perspective can be examined in the United Kingdom ("UK"). In the UK, publications which show or depict infliction of serious harm are considered for obscenity. Harm in such cases is to be assessed according to contemporary standards, but each case is assessed on its own facts and circumstances.[152] Thus, even though we are still grappling with vestiges of Victorian morality, the UK has moved beyond examining material only when they cause 'serious harm'.

The Harm test was introduced in Canada in *R v Labaye*[153] after the abandonment of the CST. This test was the culmination of two important cases on the Community Standards of Tolerance: *R v Butler*[154] and *Little Sisters*[155]. In the *Butler* case, the Canadian SC held that the standard of tolerance is restricted to "conduct which society formally recognises as incompatible with its proper functioning".[156] In the *Little Sisters* case, the court reiterated that the focus is on conduct that may be harmful to society.[157]

Further, in *R v Labaye*,[158] the court established a two-stage process to establish liability: the nature test and the harm test.[159] *Firstly*, the

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152 CROWN PROSECUTION SERVICE, *Obscene Publications'* https://www.cps.gov.uk/prosecution-guidance/obscene-publications (last visited Dec. 22, 2025).
153 R v. Labaye, 2005 3 S.C.R. 728.
154 R v. Butler, [1992] 1 SCR 452.
155 Little Sisters Book and Art Emporium v. Commissioner of Customs and Revenue and Minister of National Revenue, (2007) SCC OnLine Can SC 2.
156 R v. Butler, [1992] 1 SCR 452.
157 Little Sisters Book and Art Emporium v. Commissioner of Customs and Revenue and Minister of National Revenue, (2007) SCC OnLine Can SC 2.
158 R v. Labaye, 2005 3 S.C.R. 728.
159 Jochelson, *supra* note 132, at 760.

nature test identifies whether any harm can be established, or whether there is significant harm grounded in societal norms or formally recognised in the constitution or fundamental rights.[160] This is similar to the UK's test for establishing whether it causes serious harm. *Secondly*, it asks if the degree of harm is incompatible with the proper functioning of society.[161] Both elements are to be proved using evidence beyond a reasonable doubt. These tests state that the gravity of harm should be such that it "interferes with the proper functioning of the society."[162]

However, the absolute requirement to provide evidence in every case has made it difficult and expensive for the prosecution to substantiate harm, given the existence of competing expert opinions.[163] This was observed in cases post-Labaye.[164] For instance, in R *v Latreille*,[165] in which the photographs of a naked woman were circulated, the Appellate Court acquitted the accused because there was no evidence that the woman had not consented.[166]

On the contrary, in R *v Smith*, the accused was involved in distributing photographs and films of naked women, the Crown called psychological and psychiatric experts, who gave evidence about the risk of harm to society; attraction of the material to persons predisposed toward sexual violence; effects on women's sense of safety, equality and self-esteem.[167]

Further, in Australia, although the determination of what constitutes obscenity is dependent solely upon the judicial arbiter, courts take due consideration of the audience for whom the

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[160] *Id.*
[161] *Id.*
[162] Janine Benedet, *The Paper Tigress: Canadian Obscenity Law 20 Years After* R *v Butler*, 93(1) Canadian Law Review 1, 9 (2015).
[163] *Id,* at 23.
[164] R v. Latreille, 2007 QCCA 1330, [2007] JQ No 11274.
[165] Benedet *supra* note 164 , at 19.
[166] R v. Smith, (2002) OJ No 5018 (Sup Ct).
[167] Benedet *supra* note 164, at 28.

material is published.[168] This becomes more relevant in distinguishing free and paywalled online content.

Further, as internet-accessible content is borderless, Canada, in *Haaretz v. Goldhar*, applied the substantial harm test to determine jurisdiction in a defamation case.[169] As with defamation, obscenity can occur wherever the material is downloaded and viewed; in such cases, there can be multi-jurisdictional claims. The substantial harm test in such cases confers jurisdiction on the state with the most significant connection to the act; thus, domestic courts would lack jurisdiction if substantial harm occurred in another country.

6.2. Challenges in the application of the Harm Test

This section will highlight three major challenges in applying the Harm Test.

Firstly, we need to examine what constitutes harm. The critics of JS Mill's harm principle have argued that 'harm' has not been well defined, and thus it is broad and vague. The author agrees with this critique and considers the harm principle to be only a justification for authority to decide social and authoritarian interference into the freedom of the individual. It is an anti-paternalism principle in which notions of morality are not imposed on individuals but rather determined by the act itself. This is so because Mill sought to limit paternalistic interference with individual liberty, particularly in the context of the Church's authority.[170]

However, this abstraction in the definition of harm could lead to paternalistic notions. For instance, in *R v Labaye*, the Canadian Court defined harm in terms of political values of liberty, autonomy, and equality.[171] This has given judges the leeway to assume societal risk to protect their own ideas of proper

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[168] Dickey Anthony, Legal Concept of Obscenity, 10(3) Western Australian L. R. 223 (1972).
[169] Haaretz v. Goldhar, (2018) 2 SCR 3.
[170] Mill, *supra* note at 140.
[171] R v. Labaye, (2005) 3 S.C.R. 728 .

functioning.[172] Therefore, it is important to contextualise the harm principle in India to determine criminal liability.

Secondly, we analyse how harm must be established. Harm must be determined objectively, taking into account India's cultural diversity. There have been instances faced in Canada, where the judges increasingly use the 'obviousness' exception.[173] By declaring that certain conduct, such as sexual acts in public, carries 'obvious' or 'inherent' risks to public order, judges can convict without requiring any expert testimony.[174] Such decisions would reinforce majoritarian normative ideas and suppress minority expression.

Considering that Indian Courts have long relied on vague notions of contemporary morality, such exceptions of obviousness can creep in. Therefore, the burden must now shift towards the identifiable harm based on evidence. This has to be supported by empirical studies, expert testimony, or evidence of injury.

Thirdly, the wider circulation of the content may pose challenges to a neutral assessment of its impact.

In a digital age, where reels are disseminated on a wider scale in a few seconds, it is important to recognise that the scale of circulation should not be equated with harm. It is equally important for the courts to take a context-specific approach and thus distinguish between paywalled content and unsolicited circulation of content.

The next section of the paper analyses the Canadian jurisprudence to gain insights to contextualise the Harm Test in India.

[172] Benedet *supra* note 164.
[173] Jochelson *supra* note 117, at 1016; R *v. Sheikh*, (2008) CanLII 17311 .
[174] Jochelson *supra* note 117, at 1016.

7. Application of the Harm Test in India

The Harm Test aligns with the constitutional principles under Article 19(2) to impose reasonable restrictions in the interests of decency or morality.[175] However, these restrictions would be based on tangible social harms.

The Indian SC has always called for purposive interpretation. For instance, in *Maneka Gandhi v Union of India*, the court redefined 'procedure established by law' as "just, fair, and reasonable and not fanciful, oppressive or arbitrary".[176] Similarly, morality or decency under Article 19(2)[177] calls for purposive interpretation to guard freedom of speech and expression against the oppressive Victorian interpretation of morality.

While the comparative analysis provides insights, India must adopt a Harm Test, drawing on international practices, learning from the shortcomings of its application in Canada, and adapting the framework to the realities of a digital society.

This section aims to provide solutions to the shortcomings from the perspective of the culturally diverse Indian society. Therefore, first, the author proposes the Harm Test suited to India, based on its constitutional values. Secondly, the author applies the proposed test in the controversy involving India's Got Latent.

7.1. The Proposed Harm Test

To contextualise the harm principle in India and to truly move away from Victorian morality, it is crucial to rule out the possibilities of a colonial mindset creeping in. Therefore, the author suggests that the Harm Test in India should adopt a two-

[175] India Const. art. 19, cl. 2.
[176] Maneka Gandhi v. Union of India, (1978) 1 SCC 248.
[177] India Const. art. 19, cl. 2.

pronged approach, drawing on comparative analysis and addressing its shortcomings.

Firstly, under the Canadian model, the nature of the act must be determined. It must be examined whether the publication of the material has *caused harm* or *threatened to cause harm*. This examination should not be based on contemporary moral standards.

In addition to the Canadian model, where the harm is examined through social harm such as sexual harm, psychological harm, harm to dignity, or incitement to violence, the Indian approach must also assess harm keeping in view the constitutional values such as dignity, privacy, consent, etc. For instance, recently, the court noted that texts like 'You are slim' cause psychological harm.[178] Similarly, harm to dignity can be characterised as content that reinforces casteist or sexist comments.

Further, in the digital age, non-consensual deepfake sexual imagery can cause traumatic experiences and reputational damage. It can undermine a person's dignity. Such an approach would ensure that the Harm test is grounded in constitutional values rather than being treated solely as an independent empirical question.

In other instances, where the harm is not apparent from the nature and context of the material, objective evidence, including empirical studies or social impact data stating a link between the offence and social harm, could be examined, as done in Canada. For instance, it has been argued that pornography causes acts of sexual violence.[179] In the case of pornography, when it is openly available, it would lead to the exposure of pornographic material to children.

Secondly, the level of harm caused has to be identified. It must be understood that, in the light of the Canadian experience, simply identifying harm cannot justify limiting the freedom of speech and

[178] Narsingh Gude v. State of Maharashtra, (Criminal Appeal 272 of 2022).
[179] Gemma Mestre-Bech et al, *Pornography Use and Violence: A Systematic Review of the Last 20 Years,* Trauma Violence Abuse, 1088 (2024).

expression. The harm that is caused must be of such a nature that it is inconsistent with the functioning of society.

However, in addition to the Canadian model, the determination has to take into account the constitutional value. Therefore, the question that needs to be answered here is whether the harm is sufficiently serious to justify the limitation of a fundamental right. This will prevent minor or speculative harm from being used as an excuse to limit freedom of speech. For instance, in the digital sphere, where content can easily reach a *wide audience instantly*, the *extent of dissemination* cannot be considered a factor in severe harm.

Any potential influence on the person's behaviour cannot be a ground for limitation of freedom of expression in the absence of a real danger of damage that could be proved and was significant enough. Harm in this case should be estimated in accordance with such criteria as the gravity and probability of harm, vulnerability of people who were affected, the ways and extent of the distribution of the content and its proximity to the harm.

Importantly, for paywalled content, the Australian model could be adopted, in which the material would be evaluated from the target audience's perspective. This implies that paywalled content for adults should be judged only from the perspective of adults in the targeted group. It would help to rule out Victorian paternalistic notions to justify the ban on freedom of speech and expression. For instance, a ban should not be imposed only because it would offend people.

Thus, the liability for obscenity would not be based on vague principles of morality, which fluctuate at the instance of a reel in this digitised world. It makes the penalty proportional to the harm. This approach addresses the challenges highlighted in the previous section.

7.2. Application Of The Harm Test in India's Got Latent Case

The application of the Harm Test in the case involving controversy around '*India's Got Talent*' would have led to proportional punishment. The SC, although in this case put a stay on all criminal proceedings, put an unreasonable restriction on Ranveer Allahabadia to not air any podcasts or episodes. These restrictions are unreasonable because his remarks cannot be considered obscene. To attract obscenity under BNS, 2023, it should overtly provoke sexual desire, appeal to the prurient interest, and further corrupt or deprave individuals who are likely to engage with it.

However, at most, his remarks caused disgust among some sections of society. The Court failed to understand the distinction between vulgarity and obscenity, as illustrated by the SC in the *College Romance* case[180], a distinction recently addressed in *Sivakumar v State*[181]. The Court took a paternalistic attitude by describing his remarks as '*disgusting*', '*filthy*', and '*insulting*', without engaging with how they cause obscenity.

On the issue of the paywall, the Court took cognisance of snippets circulating across social media without understanding the difference between circulation and the content's impact. The circulation of snippets of paywalled content does not imply social harm. Such snippets are not contextualised and not fully available to the general public. It was meant for a specific audience who had signed up for it.

However, this does not imply that paywalled content in itself is the deterministic factor in assessing obscenity. Paywalled content is a commercial barrier, not a moral one. Therefore, paywalled content should not be exempt from scrutiny; rather, its restriction should depend on the nature and degree of harm, as established through

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[180] Apoorva Arora v. State (NCT of Delhi), (2024) 6 SCC 181.
[181] Sivakumar v. State, 2026 SCC OnLine SC 529.

sufficient evidence. Thus, cases like this underscore the necessity of the two-pronged test based on the harm principle.

8. Conclusion

To sum up, the contemporary laws on obscenity reflect Victorian Morality, rooted in the British colonial era. It fails to suit India's current cultural dynamics, which are diverse, progressive, and democratic. The CST was adopted as the progressive test, diverging significantly from testing obscene material from the perspective of 'depraved and corrupt minds' to 'a reasonable man'. However, it inherently assumes consistent morality in society, demonstrating colonial vestiges of a paternalistic attitude. It gives a restrictive approach to obscenity in the modern day of digital content creation and artistic freedom. Therefore, the laws need to be viewed through a new lens to keep them aligned with changing mores.

This gap can be filled by adopting the 'harm principle'. This principle not only acknowledges the pluralistic nature of Indian society but also provides a clearer and more consistent approach to determining 'obscenity', as it relies on concrete harm rather than flickering and dominating morality. Hence, by adopting this test, India could achieve a more transparent and fair system that embraces its commitment to protecting societal values and safeguarding individuals' rights in an increasingly diverse and evolving nation. Thus, laws on obscenity need to be revisited and revised to assess contemporary local cultural dynamics fairly and in a balanced manner.

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ARTICLE

INITIAL COIN OFFERINGS AND TOKENISED SECURITIES – A REGULATORY ODYSSEY

Ayush Dutta* & Sunayna Sen**

Abstract

The issue of the crypto-rebellion in decentralised financial systems poses a glaring challenge for securities law in jurisdictions worldwide. Initial coin offerings have opened a new avenue for businesses to raise capital by selling tokens that usually represent fractions of traditional assets. It has made investments more accessible to investors with smaller budgets. With the issue gaining some traction with recent developments, it must be aligned with a holistic legal understanding of what it really means to regulate a 'security' in the modern day and age. This article aims to clarify the discourse and develop a mechanism for the effective regulation of tokenised securities, with a focus on protecting investors' interests. It first explores the distinction between crypto-assets that are securities and those that are not, and further acknowledges that investments can morph from non-securities into securities and back again. Here, the authors contend that such tokenised securities should be regulated at the stage of the initial coin offering. Thereafter, the shortcomings of the status quo are highlighted alongside the frameworks of the countries that have tackled those very challenges. At the end of the comparative analysis, a model framework is conceived for India, and the best-practice features to be incorporated therein are discussed. This article attempts to demystify crypto-assets and support the secured and regulated growth of the alternative financial market. It argues against overregulating crypto-assets, since they were designed to be a decentralised mechanism, while simultaneously depriving the economy of the full benefits of transactions through tokenised securities.

Keywords: SEBI; Crypto-assets; Securities; Initial Coin Offerings.

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* Ayush Dutta, Student, Hidayatullah National Law University, Raipur. Author can be contacted at ayushdutta315@gmail.com.

** Sunayna Sen, Student, Kalinga Institute of Industrial Technology School of Law. Author can be contacted at sunaynasen17@gmail.com.

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1. Introduction

The phenomenon of Initial Coin Offerings ("**ICOs**") and Tokenised Securities has provided companies with an alternative avenue for capital formation today. Gujarat International Finance Tec-City ("**GIFT City**"), Gandhinagar's experiments in digital asset issuance and cross-border trading in India, through the International Financial Services Centre Authority's ("**IFSC**") consultation papers in February 2025, marked a paradigm shift in the regulatory approach towards tokenisation of real-world assets.[1] While recent developments in India have indicated a favourable attitude towards developing a functional framework for the regulation of crypto-assets, the Securities and Exchange Board of India ("**SEBI**") remains open to extending oversight over securities-like crypto-assets in the domestic market.[2]

A crypto-asset has been defined as a "*cryptographically secured digital representation of value or contractual rights that uses a form of distributed ledger technology and can be transferred, stored, or traded electronically*", which may include tokenised securities.[3] Tokenisation refers to the division of traditional securities, usually high-value assets such as valuable artworks, real estate, or firm equity, into tokenised securities, crypto-assets created using blockchain technology. Each token represents a percentage of ownership in the underlying asset, thereby enabling investors to invest without purchasing the entire asset.[4] ICOs are a modern route for raising capital, typically used by early-stage ventures, through the issuance of digital tokens in exchange for other crypto-assets or fiat currencies.[5] They are a '*decentralised method of financing, whereby a firm calls for funding by issuing coins (tokens including tokenised*

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[1] *Consultation Paper: Regulatory Approach towards Tokenization of Real-World Assets,* INTERNATIONAL FINANCIAL SERVICES CENTRES AUTHORITY (Feb. 26, 2025), https://ifsca.gov.in/Document/ReportandPublication/ifsca-consultation-paper-on-regulatory-approach-towards-tokenization-of-real-world-assets03032025111644.pdf.

[2] Nikunj Ohri, *Exclusive: India's SEBI Open to Oversight of Crypto Trade, in Contrast to Reserve Bank*, REUTERS (May 16, 2024), https://www.reuters.com/world/india/indias-sebi-open-oversight-crypto-trade-contrast-reserve-bank-2024-05-16/ [hereinafter "OHRI"].

[3] *Policy paper Economic Crime and Corporate Transparency Act: Cryptoassets — Key Terms and Definitions,* GOV.UK (Mar. 1, 2024) https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-act-2023-factsheets/economic-crime-and-corporate-transparency-act-cryptoassets-key-terms-and-definitions.

[4] Meet Thakkar, *Tokenization of Assets in IFSC: IFSCA's Proposed Legal Framework*, TAXMANN (Jul. 16, 2025), https://www.taxmann.com/research/fema-banking-insurance/top-story/105010000000026878/tokenization-of-assets-in-ifsc-ifscas-proposed-legal-framework-experts-opinion.

[5] Angelos Delivorias, *Understanding Initial Coin Offerings: A New Means of Raising Funds Based on Blockchain*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE (Jul. 13, 2021), https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/696167/EPRS_BRI(2021)696167_EN.pdf.

securities) to online investors."[6] Although ICOs are relatively new within the Indian financial regulatory framework, the legal challenges they pose are not entirely unprecedented. Some foreseeable challenges, including the erosion of disclosure quality, threats to market integrity, and concerns regarding the custody of client assets, have long been central to Indian securities law discourse. However, what is distinctive is the mode of delivery, which collapses the distance between promoter and public through self-executing code, and the decentralised nature of the platforms that perpetuate such tokenised securities.

In the face of such developments, Indian regulatory responses have remained strictly ambivalent. The Reserve Bank of India ("**RBI**") highlights the systemic and prudential risks posed by crypto-assets. At the same time, SEBI has signalled openness to supervising security-like token transactions, particularly where their economic substance mirrors that of securities. The IFSCA, for its part, has consulted on tokenisation of real-world assets within the GIFT-IFSC, but its mandate explicitly excludes cryptocurrencies. Taken together, these fragmented signals leave the core question of investor protection underdeveloped. While the classification of tokenised securities as securities and the broader challenge posed by decentralised financial systems are glaring challenges for securities law in jurisdictions around the world, the investor protection dimension remains largely unacknowledged.

This article first aims to clarify the debate over whether tokenised securities fall within the scope of 'securities' under Indian securities law. It then evaluates the appropriate stage at which regulation should intervene in tokenised securities markets, particularly given the decentralised nature of blockchain-based systems. Thereafter, the

[6] William Huang, Michele Meoli & Silvio Vismara, *The Geography of Initial Coin Offerings*, 55 SMALL BUS. ECON. 77, 79 (2020).

article identifies persistent issues with the *status quo* and examines how existing frameworks of crypto-asset regulation across jurisdictions address these obstacles. It seeks to balance the need for investor protection with the risks of regulatory overreach and proposes a model regulatory framework. The article also anticipates potential limitations of the proposed framework and suggests measures to address them. As regulatory discussions around crypto-assets continue to evolve, any policy framework must be grounded in a clear legal understanding of what constitutes a "security" in the contemporary financial landscape.

2. Crypto-Assets: Securities, or Not Securities? That is the Question

Concerns regarding investor protection in crypto-asset markets naturally raise the question of regulatory oversight. However, determining which regulatory authority oversees crypto-assets remains a contested issue. This dilemma is resolved with the very intuitive assertion that if crypto-assets do qualify as 'securities', SEBI would gain undisputed regulatory authority over this paradigm.[7]

The discussion hereinafter must acknowledge RBI's disputed circular titled "Prohibition on Dealing with Virtual Currencies," which prohibited banks from dealing with businesses engaged in crypto-asset activities. The Supreme Court of India struck down the circular on the ground that it disproportionately restricted the fundamental right to practice any profession or carry on any occupation, trade, or business under Article 19(1)(g) of the Constitution.[8] Although the judgment did not directly address the status of crypto-assets as securities, it implicitly acknowledged that a blanket banking prohibition was not the appropriate regulatory response. This recognition of SEBI's potential

[7] OHRI, *supra* note 2.
[8] Internet And Mobile Association of India v. Reserve Bank of India, AIR ONLINE 2020 SC 298.

jurisdiction over crypto-assets that involve securities-like incidents supports a harmonious reading of the Securities Contracts (Regulation) Act, 1956 ("**SCRA**"). The SCRA has defined the term 'securities' under Section 2(h) to include "*shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate.*" Considering that the term 'marketable' has been repeatedly interpreted by courts[9] in the context of the stock exchange, crypto-assets may not immediately appear to be 'of a like nature' to the traditional securities listed in the provision. At the same time, a case can also be made for the regulation of crypto-assets, taking into consideration the repeated application of the expansive interpretation of the phrase 'other marketable securities'.[10] Many blockchain-issued instruments grant governance rights, profit participation, or asset-backed claims that are indistinguishable from conventional securities. They are transferable, fungible, and marketable on digital exchanges. Yet their issuance often originates from decentralised teams or foreign foundations rather than companies incorporated under the Companies Act, 2013. The absence of a body corporate nexus weakens the straightforward application of Section 2(h), unless the residual clause "*other marketable securities of a like nature*" is interpreted broadly.

Resolving this issue may require a workable judicial test for determining whether crypto-assets qualify as securities. The 1999 Dave Committee Report on Collective Investment Schemes[11] relied on the

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[9] Norman James Hamilton v. Umedbhai S. Patel (1979) 49 Comp. Cas. 1 (Bom); Dahiben Umedbhai Patel v. Norman James Hamilton (1985) 57 COMP. CAS. 700 (Bom.).

[10] Sudipto Bhattacharya, *Are Cryptocurrencies Securities? Post-GIFT City Regulations & SEBI's Viewpoint*, TAXGURU (Apr. 10, 2025), https://taxguru.in/sebi/cryptocurrencies-securities-post-gift-city-regulations-sebis-viewpoint.html#_ftn13.

[11] *Dr. S.A. Dave Committee (Final) Report on Collective Investment Schemes,* SECURITIES AND EXCHANGE BOARD OF INDIA (Apr. 5, 1999) https://www.sebi.gov.in/reports/reports/apr-1999/dr-s-a-dave-committee-final-report-on-collective-investment-schemes_23442.html.

Howey Test, a judicial innovation in American securities law jurisprudence, to define Collective Investment Schemes, which was implemented vide the Security Laws (Amendment) Act, 1999. Thereafter, in 2003, the Allahabad High Court[12] applied the *Howey* Test again to determine the meaning of 'collective investment schemes' under the SEBI Act, 1992.

Under the *Howey* test, articulated in *Securities and Exchange Commission v. W. J. Howey Co.* ("***Howey***"), when an individual makes a capital investment in a common enterprise with the expectation of earning profits primarily from the actions of others or third parties, that transaction qualifies as an investment contract.[13] Justice Frankfurter's dissent in *Howey* clarified that the majority's conception of the investment contract relies on the specific context of a given situation.[14] The facts and circumstances of the transaction must therefore be examined to determine whether it constitutes a security.[15] Accordingly, regulatory approaches should avoid blanket classification of all crypto-assets and instead distinguish between those that function as securities and those that do not.[16]

The problem of regulation seems fairly rudimentary if we conceive this distinction to be a straightforward process of sifting crypto-assets into pigeon-holes of 'security' or 'non-security'. In fact, South Korea's ban on all forms of ICOs seems to reflect a very similar interpretation.[17]

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[12] M/S. Paramount Bio-Tech Industries Ltd. And Anr. v. Union of India and Ors. (2003) Civil Misc. Writ Petn. No. 51911 of 1999.

[13] Securities and Exchange Commission v. W. J. Howey Co., 328 U.S. 293 (1946) at 298–99.

[14] *Id.* at 301.

[15] Vincent v. Moench, 473 F.2d 430, 435 (10th Cir. 1973); Lino v. City Investing Co., 487 F.2d 689 (3d Cir. 1973); Goodman v. Epstein, 582 F.2d 388, 406 (7th Cir. 1978).

[16] Jai Massari, *Why Cryptoassets Are Not Securities*, HARVARD L. SCH. FORUM ON CORP. GOV. (Dec. 6, 2022), https://corpgov.law.harvard.edu/2022/12/06/why-cryptoassets-are-not-securities/#4b [hereinafter "MASSARI"].

[17] WooJung Jon & Wonsuk Yang, *Mapping South Korea's Digital Asset Regulatory Landscape: From Criminal Code to the Recently Implemented Virtual Asset User Protection Act*, 57 COMPUT. L. & SEC. REV. 106140 (2025),

Their framework chooses to statutorily label certain tokens as 'securities', allow transactions in them via Security Token Offerings ("**STOs**"), and ban all forms of ICOs for tokens that are not recognised as 'securities'. However, such a policy is inadequate because restricting the proliferation of certain crypto-assets under regulation deprives the economy of potential revenue. Thus, a truly progressive framework must strike a balance between extending regulatory jurisdiction to all tokenised securities and blatant overregulation.

3. Catching the Bull By its Horns: ICOs as the Point of Regulation

It is now crucial to determine at which stage the crypto-assets should be regulated, using the *Howey* test. In this regard, a traditional approach would be redundant, given the unique way crypto-assets behave. A crypto-asset may evolve from a non-security into a security, and potentially revert to a non-security depending on the structure and governance of the underlying project. The United States Securities and Exchange Commission ("**US SEC**") has acknowledged that 'a token that was once a security could, under the right circumstances, cease to be a security at some point in the future'.[18] A crypto-asset would change its nature from a security when it is first sold to investors by the project's sponsors, and/or from a non-security when the blockchain project is sufficiently decentralised.[19] While they may be issued as securities, repeated transfers between users and subsequent

https://www.sciencedirect.com/science/article/pii/S2212473X25000136#:~:text=Korean%20financial%20authorities,National%20Assembly.50.

[18] Lewis R. Cohen, Gregory Strong, Freeman Lewin & Sara Chen, *Discussion Draft: The Ineluctable Modality of Securities Law: Why Fungible Crypto Assets Are Not Securities*, DLX LAW PLLC (Nov. 10, 2022), https://cclg.rutgers.edu/wp-content/uploads/Lewis-Cohen-Paper-March-3-2023-Presentation.pdf [hereinafter "COHEN ET AL."].

[19] MASSARI, *supra* note 17; William H. Hinman, *Digital Asset Transactions: When Howey Met Gary (Plastic)*, Remarks at Yahoo Finance All Markets Summit: Crypto, U.S. SECURITIES & EXCHANGE COMMISSION (Jun. 14, 2018), https://www.sec.gov/newsroom/speeches-statements/speech-hinman-061418.

decentralisation of the network would render them a consumer token.[20] Fundraising sales of crypto-assets, particularly ICOs, validly constitute *securities* transactions since they amount to investment contract transactions, even when conducted through agents of the issuing entity.[21] It is during the ICO that a tokenised security is first sold to investors, making it essentially a capital-raising transaction. The treatment of other crypto-assets needs to be distinguished from "*capital raising transactions by blockchain project sponsors or other insiders in which a cryptoasset may be sold, which are typically securities transactions.*"[22] In *Securities and Exchange Commission v. Shavers*, the United States District Court for the Eastern District of Texas held an ICO to be a 'security', and the use of Bitcoin as 'money' to be sufficient under the *Howey* test.[23] The case for regulating ICOs becomes even clearer when three major regulatory concerns are considered.

Firstly, the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 ("**ICDR**") mandate detailed prospectus-level disclosures, including financials, governance risks, and promoter background.[24] Tokenised offerings, however, are conducted either offshore or via decentralised protocols, entirely bypassing SEBI's disclosure obligations. This creates significant information asymmetry in the market, often leading retail investors to rely on whitepapers that contain vague promises without enforceable commitments.[25] Indian

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[20] J. Hennelly, *The Cryptic Nature of Crypto Digital Assets Regulations: The Ripple Lawsuit and Why the Industry Needs Regulatory Clarity*, 27 (1) FORDHAM J. CORP. & FIN. L. (2022).
[21] Securities & Exchange Commission v. Telegram Grp., Inc., 448 F. Supp. 3d 352 (S.D.N.Y. 2020).
[22] COHEN ET AL., *supra* note 19.
[23] Securities & Exchange Commission v. Shavers No. 4:13-CV-416, 2014 WL 12622292, (E.D. Tex. Aug. 26, 2014*)* at 6-8*;* Securities and Exchange Commission, *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO*, Exchange Act Rel. No. 81207 (July 25, 2017), https://www.sec.gov/files/litigation/investreport/34-81207.pdf.
[24] SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018, No. SEBI/LAD NRO/GN/2018/31 (India).
[25] Johannes Fuchs and Paul P. Momtaz, *Token Governance in Initial Coin Offerings: Implications of Token Retention and Resale Restrictions for ICO Success*, 64 SMALL BUS. ECON. 1321 (2025).

courts have long underscored that adequate disclosure is the bedrock of investor protection, as in *Sahara India Real Estate Corp. Ltd. v SEBI*, where the SC held that raising funds from millions of investors without prospectus-level transparency constituted a violation of securities law.[26] Yet ICOs and token offerings to Indian investors often proceed without any such discipline, exposing them to mis-selling and fraud. This makes regulating such securities at the ICO stage essential.

Secondly, under the SEBI (Custodian) Regulations, 1996, intermediaries such as depositories, stock exchanges, and brokers are subject to stringent custody and segregation obligations, whereby investor assets are to be distinguished from intermediary assets and maintained with clear audit trails.[27] Additionally, it requires participants to open separate accounts for each beneficial owner. In stark contrast, digital asset platforms commonly pool customer tokens in omnibus wallets, sometimes even using them for proprietary trading. The collapse of foreign exchanges such as FTX in 2022, which left Indian investors uncompensated, illustrates the systemic risk of inadequate custody norms.[28] Beyond the ICO, the contractual and disclosure obligations created at issuance can help investors choose safer platforms. Norms requiring issuers to commit to segregated wallets with no omnibus pooling and to third-party audit of wallet balances can easily tackle this challenge at the ICO stage.

Thirdly, surveillance-based enforcement becomes significantly more difficult in token markets conducted on offshore or decentralised venues. Investors are therefore exposed to self-trade practices such as

[26] Sahara India Real Estate Corp. Ltd. & Ors. v. Securities and Exchange Board of India & Anr., (2012) 10 SCC 603.
[27] SEBI (Custodian) Regulations, 1996, Regulation 16, Gazette of India, pt. II sec. 3(ii) (May 16, 1996).
[28] Rohan Goswami, *Crypto.com lays off 20% of workforce after FTX collapse blunted ambitious growth*, CNBC (Jan. 13, 2023), https://www.cnbc.com/2023/01/13/cryptocom-lays-off-20percent-of-workforce-after-ftx-collapse.html.

pump-and-dump schemes,[29] rug pulls,[30] and wash trading,[31] which SEBI does not tolerate in conventional exchanges. Self-trades are transactions in the stock market in which the same participant acts as both buyer and seller and do not signify a genuine shift in beneficial ownership of the security. Mandating ICOs to disclose token distribution, planned liquidity arrangements, and market-making practices will ensure investors have better information to spot red flags. Even if SEBI cannot patrol every offshore trade, such *ex ante* disclosure requirements would enable regulators to pursue fraudulent issuers who mislead investors during the fundraising stage.

The discussion on enforcing regulation of ICOs remains incomplete without situating the shortcomings of the *status quo* and regulatory dilemmas against the backdrop of global approaches. As of now, it has been established that the proposed framework should target ICOs as the critical point of regulation, since regulatory intervention at this stage can impose disclosure, custody, and governance safeguards before secondary trading begins. A comparative lens will not only illuminate the possible trajectories India may adopt but also highlight the pitfalls that a purely transplant-oriented approach must avoid.

4. Pitfalls in the Status Quo and their Regulatory Resolution in Foreign Jurisdictions

Jurisdictions around the globe have responded differently to developments in the crypto-asset paradigm. However, analysing some

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29 *SEBI Raids Multiple Locations in 'Pump and Dump' Scam Probe*, TAXMANN (Jun. 30, 2025), https://www.taxmann.com/post/blog/sebi-raids-multiple-locations-in-pump-and-dump-scam-probe.

30 Parva Khare, Purushotham Kittane, Alipak Banerjee, Vaibhav Parikh and Vyapak Desai, *Tracking NFTs from Code to Court: Legal Considerations and Disputes*, NISHITH DESAI ASSOCIATES, (Feb. 2024), https://nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Tracking-NFTs-from-Code-to-Court.pdf.

31 Jitesh Maheshwari, *SEBI's Policy on Self-Trades*, INDIACORPLAW (Sept. 4, 2017), https://indiacorplaw.in/2017/09/04/sebis-policy-self-trades/.

of these regulatory mechanisms is crucial to derive a functional roadmap towards a plausible framework design for India. Investor protection in the digital securities market cannot rest on *ex post* enforcement alone; it must be embedded *ex ante* in this framework. To assess the efficacy of these foreign jurisdictions, they have been analysed alongside the three key shortcomings in the status quo that their frameworks address most effectively.

4.1. Lack of A Functional Taxonomy

The earliest proactive efforts towards a progressive regulation of ICOs were seen in Switzerland. Instead of directly engaging with security laws, the Swiss Financial Market Authority ("**FINMA**") issued ICO guidelines in 2015 to map existing financial market laws onto token offerings and asset tokens (equivalent to tokenised securities).[32] Central to the Swiss approach is a functional taxonomy: payment tokens (used primarily as a means of exchange and carrying no claim on the issuer), utility tokens (providing digital access to an application or service), and asset or investment tokens (on-chain representations of debt, equity, or cash-flow rights).[33] Crypto-assets or investment tokens are treated as "securities," which pulls them into prospectus-grade disclosure and conduct controls at the public-offer stage.[34] This early,

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[32] Olivier Favre, Caroline Clemetson, Pascal Hubli and Tarek Houdrouge, *Regulation of Swiss Initial Coin Offerings (ICOs)*, MONDAQ (Mar. 28, 2018), https://www.mondaq.com/fin-tech/687388/regulation-of-swiss-initial-coin-offerings-icos.

[33] *Regulatory Aspects of Initial Coin Offerings (ICOs) in Switzerland,* BAKER MCKENZIE (Mar. 7, 2018), https://www.bakermckenzie.com/-/media/files/people/mauchle-yves/br_zurich_regulatoryaspectico_mar2018.pdf.

[34] *Guidelines for enquiries regarding the regulatory framework for initial coin offerings (ICOs),* FINMA (Feb. 16, 2018), www.finma.ch/en/~/media/finma/dokumente/dokumentencenter/myfinma/1bewilligung/fintech/wegleitung-ico.pdf; Financial Market Infrastructure Act (FMIA), art. 2(b), SR 958.1 (2015) (Switz.).

substance-over-form sorting narrows mislabelling and channels retail-facing ICOs into the securities law perimeter.[35]

Investor protection is buttressed by the Swiss prospectus[36] and retail Key Information Document duties[37], which apply when a token sale amounts to a public securities offering, thereby standardising disclosure content, publication requirements, and liability for misstatements.[38] This creates actionable disclosures at the exact moment funds are solicited from the public. Parallel Anti-Money Laundering ("**AML**") laws apply when ICO organisers or intermediaries act as financial intermediaries, incorporating KYC, monitoring, and suspicious activity reporting into the subscription flow. Altogether, these levers target the primary market risks without a blanket ban on ICOs.[39] After this, the Swiss Federal Act on the Adaptation of Federal Law to Developments in Distributed Ledger Technology ("**DLT Act**") introduced the concept of 'ledger-based securities,' which gave tokenised claims clear legal status and on-chain transferability with legal effect, substantially reducing settlement/ownership disputes and making investor rights enforceable immediately after allocation. This legal certainty complements the offer-stage safeguards and reinforces investor protection from issuance through the immediate post-offer window.

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35 *FINMA Publishes ICO Guidelines,* FINMA (Feb. 16, 2018), https://www.finma.ch/en/news/2018/02/20180216-mm-ico-wegleitung/.

36 Benjamin Leisinger, *Prospectus Requirements for Public Offerings of Securities in Switzerland under the FinSA: Exemptions for Offerings to Employees*, CAPLAW (Dec. 13, 2023), https://caplaw.ch/2023/prospectus-requirements-for-public-offerings-of-securities-in-switzerland-under-the-finsa-exemptions-for-offerings-to-employees/.

37 Tanja Steiner-Müller, *The Key Information Document – the Prospectus for Retail Clients*, MME (Aug. 11, 2020), https://www.mme.ch/en/magazine/articles/the-key-information-document-the-prospectus-for-retail-clients.

38 *CMS Expert Guide to STO Regulation and Law,* CMS (Apr. 26, 2019), https://cms.law/en/int/expert-guides/cms-expert-guide-to-security-token-offerings/switzerland.

39 Yves Mauchle, *Regulatory Aspects of Initial Coin Offerings (ICOs) in Switzerland*, BAKER MCKENZIE (Apr. 2018), http://www.bakermckenzie.com/en/-/media/files/people/mauchle-yves/al_zurich_regulatoryaspectsico_apr2018.pdf.

A similarly effective response is found in Thailand, where the strength of the regulatory model for ICOs lies in its pragmatism: rather than banning ICOs, it accepts them as a viable fundraising mechanism but insists that they operate within a controlled legal framework. The Thai framework permits fundraising through ICOs but channels them into a tightly supervised environment. The framework requires all ICOs to be conducted through an ICO portal approved by the Securities and Exchange Commission of Thailand ("**SECT**")[40], which is a licensed intermediary with minimum capital requirements and professional management, responsible for conducting due diligence on issuers, verifying disclosures and source code, and ensuring strict Know Your Customer ("**KYC**") or AML compliance[41]. Only after the portal recommends a project does the SECT review the issuer's detailed filing.[42] Regulatory approval typically takes up to ninety days.[43]

Crucially, Thailand distinguishes between investment tokens, which are regulated as securities, and ready-to-use utility tokens, which may be exempt from regulation. This classification prevents regulatory arbitrage while supporting genuine innovation. Investor protection is layered into the system: accredited investors may invest without limit, but retail investors are capped at THB 300,000 (≈USD 8,000) per ICO. They must undergo knowledge tests and risk profiling.[44] In addition to

[40] *A Complete Guide to Digital Asset Law in Thailand 2025,* BAKER MCKENZIE (Feb. 20, 2025), https://www.bakermckenzie.com/en/-/media/files/insight/guides/2025/a-complete-guide-to-digital-asset-law-in-thailand-2025.pdf at 10.
[41] *Id.* at 26.
[42] *Overview of Thailand's Recent Developments in Digital Tokens and Initial Coin Offerings*, MAHANAKORN PARTNERS (Jul. 24, 2024), https://mahanakornpartners.com/overview-of-thailands-recent-developments-in-digital-tokens-and-initial-coin-offerings/#:~:text=Issuing%20an%20Initial%20Coin%20Offering,within%20a%20six%2Dmonth%20window.
[43] *Id.*
[44] *SEC Announces New Regulatory Framework on Issuing and Selling Digital Tokens through Initial Coin Offering (ICO) and Approval of ICO Portal,* SECURITIES AND EXCHANGE COMMISSION (THAILAND) (July 4, 2018), https://www.sec.or.th/EN/Pages/News_Detail.aspx?SECID=8286.

stringent disclosure rules and restricted marketing, [45] recent amendments have even introduced corporate governance standards for issuers, thereby aligning blockchain fundraising with mainstream securities practice.[46]

4.2. Weak Enforcement Due to the Lack of Legal Recognition of ICOs

The United States of America ("**US**") has adopted a distinct regulatory approach to addressing ICO-related risks. Similar to Switzerland, it has regulated ICOs primarily by applying existing federal securities laws rather than by enacting an ICO-specific statute.[47] An essential shortcoming in India is the lack of a legal definition of ICOs, tokens, or crypto-assets. Until legislative change is initiated, judicial recognition of terms, *inter alia,* an application of the *Howey* test, could be utilised. The efficacy of a proactive legal enforcement in this regard can be observed in the US, where ICOs may find themselves subject to at least three regulatory bodies: the US SEC, the Commodity Futures and Trading Commission (**"CFTC"**), and the Financial Crimes Enforcement Network (**"FinCEN"**), with the Bank Secrecy Act.[48] The US SEC treats many token sales as offerings of "investment contracts" under the *Howey* test, focusing on whether buyers contribute value to a common enterprise with the expectation of earning profits

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[45] Pornpan Wichawut, Napassorn Lertussavavivat, Rujaporn Paritsantik and Athistha (Nop) Chitranukroh, *Thailand Amends ICO Regulation*, LEXOLOGY (TILLEKE & GIBBINS) (Apr. 30, 2024), https://www.lexology.com/library/detail.aspx?g=a7eeb70c-f780-411a-8b0c-818da0a7ab15.

[46] *SEC Amends Regulations on ICO Governance*, SECURITIES AND EXCHANGE COMMISSION (THAILAND) (Apr. 17, 2024), https://www.sec.or.th/EN/Pages/News_Detail.aspx?SECID=10723.

[47] *SEC Clarifies the Application of Federal Securities Laws to Crypto Assets*, UNITED STATES SECURITIES & EXCHANGE COMMISSION (Mar. 17, 2026), https://www.sec.gov/newsroom/press-releases/2026-30-sec-clarifies-application-federal-securities-laws-crypto-assets.

[48] Gina Conheady, *The EU Approach to ICO Regulation: A Friendlier Regulatory Framework for ICOs?*, BLOOMBERG LAW (Apr. 2018), https://www.bloomberglaw.com/external/document/XD5P9P1K000000/capital-markets-professional-perspective-the-eu-approach-to-ico- .

based on the managerial efforts of others.[49] This functional analysis, articulated in the US SEC's 2017 Decentralised Autonomous Organisations ("**DAO**") Report lineage[50] and the Division of Corporation Finance's 2019 "Framework"[51], pulls security-like ICOs into the registration, disclosure, and anti-fraud regime; and squarely targets mis-selling at issuance while remaining technology-neutral.

In practice, investor protection flows through three levers at the offer stage. *First*, unregistered public ICOs are actionable: the US SEC frequently alleges violations of the Securities Act[52] for unregistered offers and sales, which require registration or a valid exemption, thereby compelling prospectus-grade disclosure or limiting marketing and resale.[53] *Second*, anti-fraud provisions[54] attach to ICO communications, creating liability for material misstatements or omissions. *Third*, the US SEC's enforcement program provides ex post deterrence: in 2024, 58% of its crypto actions involved unregistered-offering violations[55] and 73% involved fraud[56], with most ICO cases invoking *Howey*, evidencing sustained scrutiny of primary token sales.

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[49] Philipp Maume and Mathias Fromberger, *Regulation of Initial Coin Offerings: Reconciling U.S. and E.U. Securities Laws*, CHI. J. INT'L L. (2019), https://cjil.uchicago.edu/print-archive/regulation-initial-coin-offerings-reconciling-us-and-eu-securities-laws#heading-7.

[50] United States Securities and Exchange Commission*, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO*, Release No. 81207 (July 25, 2017), https://www.sec.gov/files/litigation/investreport/34-81207.pdf.

[51] *Framework for "Investment Contract" Analysis of Digital Assets (Withdrawn) [Superseded by Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets,* U.S. SECURITIES AND EXCHANGE COMMISSION (Mar. 17, 2026), https://www.sec.gov/about/divisions-offices/division-corporation-finance/framework-investment-contract-analysis-digital-assets.

[52] Securities Act of 1933, 15 U.S.C., §§ 77e(a), 77e(c), 1933 (USA).

[53] Cornerstone Research, *SEC Cryptocurrency Enforcement: 2024 Update*, Appendix, at 16–18 (2025), https://www.cornerstone.com/wp-content/uploads/2025/01/SEC-Cryptocurrency-Enforcement-2024-Update.pdf [hereinafter "CORNERSTONE"].

[54] Securities Act of 1933, 15 U.S.C. § 77q(a), 1933 (USA); Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1934); 17 C.F.R. § 240.10b-5, 2025 (USA).

[55] CORNERSTONE, *supra* note 54, at 1.

[56] *Id.*

Although the SEC's 2019 Framework is staff guidance and not a Commission rule,[57] courts have repeatedly applied the *Howey* test to token transactions,[58] reinforcing the substance-over-form principle and signalling that 'utility' labels do not avoid securities laws when investment-contract elements are present. This enforcement-led model thus protects investors by forcing ICOs into registration/exemption channels, policing disclosures and promotions via anti-fraud rules, and maintaining flexible, facts-and-circumstances tests that adapt to evolving token designs.

The Lummis-Gillibrand Responsible Financial Innovation Act Bill[59] "*touches on tax, securities, commodities, consumer protection, payments, and banking laws and provides guidance on how federal agencies should interact with one another when considering digital assets.*"[60] It has made an innovative attempt at integrating the *Howey* test with a distinction between "*assets sold in investment contract transactions which are not otherwise "*securities*", and the transactions by which these assets are sold, which sometimes are*".

4.3. Information Asymmetry

The EU has taken an approach similar to that of the US SEC and regulates ICOs through the Markets in Crypto Assets Regulation ("**MiCA**"), a horizontal statute that standardises pre-offer and offer-stage duties for most crypto-assets while reserving special regimes for stablecoins and service providers. The EU framework directly addresses the problem of information asymmetry between issuers and

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[57] Ezra Goldschlager, *The SEC Framework for Analysis of Digital Assets: Explanation and Five General Takeaways*, SSRN (Apr. 8, 2019), https://ssrn.com/abstract=3368624.
[58] Securities and Exchange Commission v. Ripple Labs, Inc., No. 1:20-cv-10832 (S.D.N.Y. Aug. 7, 2024)*,* Lino v. City Investing Co., 487 F.2d 689 (3d Cir. 1973); Goodman v. Epstein, 582 F.2d 388, 406 (7th Cir. 1978).
[59] Lummis-Gillibrand Responsible Financial Innovation Act, S.2281, 118th Cong. (2023), https://www.congress.gov/bill/118th-congress/senate-bill/2281/text.
[60] *Responsible Financial Innovation Act: A Proposed Digital Asset Regulation With Implications for Products and Regulatory Frameworks,* SIDLEY AUSTIN LLP (Jun. 9, 2022) https://www.sidley.com/en/insights/newsupdates/2022/06/responsible-financial-innovation-act.

investors. The lack of information often results in a flawed and uncertain token valuation. Investors with little to no technical education, who are unaware of both the risks related to and their rights, are the most susceptible to cyber-attacks, fraud, and scams.[61]

For a crypto-project to go public or be listed, the issuers must publish a MiCA-compliant whitepaper, inform the regulator, and ensure their marketing is fair, transparent, and aligned with what's promised in the whitepaper.[62] Liability for misleading or inaccurate information is expressly imposed on responsible persons[63], thereby giving investors actionable rights at the time of fundraising. This disclosure-plus-liability framework directly targets risks in primary token offerings. Investor protection is reinforced by conduct and market-integrity rules adapted to crypto-assets. MiCA extends prohibitions on insider dealing,[64] unlawful disclosure,[65] and manipulation to crypto-asset markets[66] and requires the implementation of effective systems and controls[67]. Similarly, the European Securities and Markets Authority ("**ESMA**") has issued guidelines on market-abuse prevention/detection and on staff knowledge and competence to raise frontline standards in retail channels.[68] These measures align ICO

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[61] *Initial Coin Offerings (ICOs) for SME Financing,* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT 34, 37-38 (2019), https://www.oecd.org/content/dam/oecd/en/publications/reports/2019/01/initial-coin-offerings-icos-for-sme-financing_1eb36248/ee35cc9a-en.pdf; Rüdiger Fahlenbrach & Marc Frattaroli, *ICO Investors*, 35 FIN. MKTS. PORTFOLIO MGMT. 1, 27, 29 (2021).

[62] Jérôme Dubois & Sophie Brenard, *The MiCa Regulation Explained: What Has Changed Since June 2024*, STIBBE (July 31, 2024), https://www.stibbe.com/publications-and-insights/the-mica-regulation-explained-what-has-changed-since-june-2024.

[63] Regulation (EU) 2023/1114, of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937, O.J. L 150, 9.6.2023, Art. 6, 2023 (EU) [hereinafter MiCA Regulations].

[64] MiCA Regulations, Art. 89.

[65] MiCA Regulations, Art. 90.

[66] MiCA Regulations, Art. 91.

[67] *Id.*

[68] European Securities and Markets Authority, *Guidelines on Supervisory Practices to Prevent and Detect Market Abuse under MiCA*, ESMA75-453128700-1039 (July 9, 2025), https://www.esma.europa.eu/sites/default/files/2025-07/ESMA75-453128700-

communications and immediate post-allocation trading with traditional EU investor protection baselines. From a broader market perspective, MiCA introduced a harmonised "passporting" system. Once an issuer meets the rules in one member state, it can access the entire EU market without needing fresh approvals in every country.[69] This reduces compliance friction while still keeping regulators in the loop. The EU framework deliberately mirrors mainstream securities regulation, embedding ICOs within familiar disclosure and governance standards, yet it leaves space for utility tokens and experimental designs.

Switzerland, the US and the EU have each tackled a different piece of the same puzzle. Switzerland built the foundation by creating a clear token taxonomy, while following a simple principle: you cannot regulate what you cannot define. However, static classification alone proved insufficient, as tokens frequently change their nature after issuance. Now, the US addressed this gap through the *Howey* test, which assesses tokens on a facts-and-circumstances basis rather than relying on issuer-assigned labels. This prevents regulatory arbitrage but produces legal uncertainty, since enforcement is largely litigation-driven rather than rule-based. Finally, the EU's MiCA resolves that uncertainty by codifying disclosure obligations and issuer liability into a single statute. It also directly addresses the information asymmetry that the earlier two frameworks left underserved.

Thus, each framework seems to correct the blind spot of the one before it. Together, they suggest that effective ICO regulation requires three things: definitional clarity, substance-over-form flexibility, and

1039_Guidelines_on_supervisory_practices_to_prevent_and_detect_market_abuse__MiCA_.pdf.

[69] Dr. Jan Boeing and Tanner J. Wonnacott, *The Regulation on Markets in Crypto-Assets Becomes Fully Applicable in All Member States of the European Union*, K&L GATES (Jan. 24, 2025), https://www.klgates.com/The-Regulation-on-Markets-in-Crypto-Assets-Becomes-Fully-Applicable-in-All-Member-States-of-the-European-Union-1-24-2025.

codified investor-facing obligations. Having examined these shortcomings and how other jurisdictions have addressed them, a path forward must be delineated that integrates the prudent features of these foreign frameworks.

5. Envisioning a Model Framework

Regulatory reforms could be brought about through judicial activism, legislative action, or both. However, the legal clarity of legislative reforms consolidates their protection under the black letter of the law rather than through the court's discretion. To illustrate, in the US, even though the SEC has consistently abided by the Howey test, the same consistency is not reflected when determining the exact nature of the crypto-asset.[70] Such a reliance on judicial interpretation has created a climate of legal uncertainty, in which projects face the risk of retrospective liability without clear ex-ante guidance. Hence, the proposed framework would be most effective with legislative support.

Hereafter, various facets of the model have been analysed, exploring the challenges of taxonomy, reconciling regulations, and ultimately enforcing it to ensure effective investor protection.

5.1. Scope and Definitions

In India, the SCRA already contemplates securities "tokenised as equity or debt,"[71] but it is ambiguous whether a blockchain register counts as a statutory share register. To remove doubt, the Securities Contracts (Regulation) Act, 1956 (**"SCRA"**) is required to be amended to recognise on-chain registers. The definition of "securities" shall expressly include digital "investment contracts" and create a new

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[70] Jay B. Sykes, *SEC Issues Crypto Guidance as Congress Considers Market-Structure Legislation*, CONGRESS RESEARCH SERVICE - LSB11415 (2026), https://www.congress.gov/crs-product/LSB11415.

[71] Securities Contracts (Regulation) Act, 1956, § 2(h), No. 42, Act of Parliament, 1956 (India).

category, "crypto-asset public offer" or "initial coin offering," for tokens marketed to Indian persons for investment. This statutory clarity avoids the ambiguity of the phrase "may apply" in Indian law, which currently lacks legal certainty for tokenised assets.

The model adopts a clear three-fold token taxonomy, paralleling international practice. *Payment tokens* (such as cryptocurrencies) function solely as means of payment or value transfer. *Utility tokens* grant digital access to a platform or service; by definition, they are fully functional at issuance and carry no claim on the issuer's profits. *Security tokens* (asset tokens) represent a debt or equity claim on the issuer and are treated as securities. This explicit taxonomy avoids vagueness because payment tokens would fall under AML rules but not securities law; utility tokens would escape securities registration if the service is live at launch; security tokens would trigger classic securities rules (e.g., SEBI registration or prospectus requirements); and hybrid tokens would be assessed by their dominant function.

5.2. Regulatory Authorities and Coordination

Under this model, SEBI would be the primary regulator for ICOs of tokenised securities, overseeing compliance with disclosure, custody, and market-integrity rules, which is consistent with its mandate over public issues and secondary markets. Other regulators would supervise crypto-asset activities strictly in their domains: for example, the RBI would regulate fiat-backed stablecoin schemes or any token deemed to be a payment instrument under the Payment and Settlement Systems Act[72], and Insurance Regulatory and Development Authority (**"IRDAI"**) and Pension Fund Regulatory and Development Authority (**"PFRDA"**) would supervise insurance or pension-related

[72] Nishith Desai Associates, *Initial Coin Offerings (ICOs): New Swiss and German ICO Guidelines Released; Analysis vis-a-vis Indian law*, MONDAQ (Mar. 12, 2018), https://www.mondaq.com/germany/fin-tech/681674/initial-coin-offerings-icos-new-swiss-and-german-ico-guidelines-released-analysis-vis-a-vis-indian-law.

digital offerings, as SEBI itself has recommended[73]. This multi-agency approach (with no unified "crypto regulator") mirrors the consensus view of SEBI reports, which propose that each regulator oversee tokens in its sector.[74]

However, the framework must address the jurisdictional frictions posed by "hybrid" tokens. These are tokens that simultaneously embody investment features along with payment or insurance functions. To resolve this, the framework should designate SEBI as the primary regulator and grant it predominant authority whenever a token qualifies as a "security" under the SCRA. This is justified by SEBI's capital markets expertise, investor protection mandate, and global practices, in which securities regulators exercise primacy over investment-linked tokens, notwithstanding ancillary functions. The EU's framework stipulates that once a crypto-asset qualifies as a "financial instrument", MiCA loses regulatory authority over it.[75] In turn, the asset remains subject to the existing EU financial services framework applicable to that financial instrument.[76] The ESMA's guidelines establish a hierarchical approach to hybrid tokens, whereby the presence of financial-instrument characteristics takes precedence in classification[77], ensuring that the principle of "same risks, same rules" governs the regulatory outcome.

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[73] OHRI, *supra* note 2.
[74] *Id.*
[75] MiCA Regulations, Art. 2(4)(a).
[76] European Securities & Markets Authority, *Guidelines on the Conditions and Criteria for the Qualification of Crypto-Assets as Financial Instruments*, ESMA75453128700-1323, ¶¶3(6–9) (Dec. 17, 2024) https://www.esma.europa.eu/sites/default/files/2024-12/ESMA75453128700-1323_Final_Report_Guidelines_on_the_conditions_and_criteria_for_the_qualification_of_CAs_as_FIs.pdf.
[77] European Securities and Markets Authority, *Final Report: Guidelines on the Conditions and Criteria for the Qualification of Crypto-assets as Financial Instruments*, ESMA75-453128700-1323 (Dec. 17, 2024), https://www.esma.europa.eu/sites/default/files/2024-12/ESMA75453128700-1323_Final_Report_Guidelines_on_the_conditions_and_criteria_for_the_qualification_of_CAs_as_FIs.pdf.

While under the current law, SEBI cannot unilaterally override co-equal regulators such as the RBI or IRDAI, Parliament could enact enabling legislation, drawing on precedents such as the Finance Act, 2015, which consolidated commodities regulation within SEBI's jurisdiction.[78] Such a statutory clarification would preserve sectoral regulators' autonomy while ensuring that fundraising-linked hybrids are consistently supervised under a disclosure-based regime, thereby minimising regulatory arbitrage and enhancing investor protection.

5.3. Issuance and Disclosure Requirements

The ICO issuance process under this model follows the structure of IPO rules, but is tailored for blockchain. Every security token ICO must register with SEBI and furnish a "token offer document" meeting prescribed disclosure standards. This instrument would be the digital equivalent of an IPO prospectus, vastly more detailed than the typical ICO whitepaper.[79] Marketing of the ICO must also comply with SEBI advertising guidelines and ban unsubstantiated claims; celebrity endorsements or misleading projections would be subject to penalties.

This rigorous offering regime avoids the "Wild West" of many ICOs, where only a cursory whitepaper is provided.[80] India currently has "no safety net for investors in ICOs" because they lack the ICDR-style safeguards used in IPOs.[81] To close that gap, our proposal adapts the

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[78] *Finance Minister Arun Jaitley Formalizes Merger of Forward Markets Commission (FMC) with SEBI,* PRESS RELEASE - MINISTRY OF FINANCE (Sept. 28, 2015), https://www.pib.gov.in/newsite/printrelease.aspx?relid=128260.

[79] Rachit Prakash Mathur, *Lessons from Europe: Why India needs Regulatory Sandboxes for the ICO*, IRCCL (NOV. 10, 2024) https://www.irccl.in/post/lessons-from-europe-why-india-needs-regulatory-sandboxes-for-the-ico#:~:text=The%20only%20disclosure%20requirement%20for,market%20and%20the%20market%20valuation.

[80] *Id.*

[81] Ritvij Ratn Tiwari, *The Wild West of ICOs: The Murky Waters of Securities Regulation of Crypto Assets*, LSPR (Mar. 30, 2023) https://lawschoolpolicyreview.com/2023/03/30/the-wild-west-of-icos-the-murky-waters-of-securities-regulation-of-crypto-assets/#:~:text=,actions%20to%20address%20the%20issue.

ICDR norms by requiring issuer eligibility criteria, lock-in periods for promoters, and continuous disclosure by token issuers. In all cases, involving SEBI "at all stages of an ICO" is mandatory to ensure compliance and to protect investors.

5.4. Investor Protections and Enforcement

At the core of the model is investor protection. All standard securities-law safeguards apply to token ICOs. Issuers must provide full disclosure, and all anti-fraud provisions of the SEBI Act apply. The SC has affirmed SEBI's mandate to protect investors, including in cross-border contexts.[82] Consistent with that mandate, this framework would give SEBI broad enforcement powers: disgorgement, fines and trading bans against issuers or promoters of unregistered ICOs or those that mislead investors. As in the US, tokenised securities must comply with substantive rules on fairness and conflicts of interest.[83] Importantly, the model retains SEC-style core protections: market transparency, surveillance, and custody rules.[84] Any new trading venue for tokens (including off-exchange digital platforms) would be required to implement these measures, thereby reinforcing core protections even in a blockchain environment.

Investor remedies must be institutionalised: grievances from ICO investors could be explicitly recognised under the Consumer Protection Act, 2019 (as suggested by SEBI)[85], in a manner consistent with SEBI's recommendations on investor redress in emerging digital markets. Additionally, the Investor Protection and Education Fund

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[82] SEBI v. Pan Asia Advisors Ltd., (2015) 14 SCC 71.
[83] Peter Ryan & Charles DeSimone, *Modern Markets, Enduring Protections: Protecting Investors in Tokenized Securities*, SIFMA (Sept. 3, 2025) https://www.sifma.org/resources/news/blog/modern-markets-enduring-protections-protecting-investors-in-tokenized-securities/#:~:text=%2A%20Anti,as%20AML%20%2F%20KYC%20rules.
[84] *Id.*
[85] OHRI, *supra* note 2.

(**"IPEF"**), established by SEBI[86], could be expanded to cover losses arising from token-related frauds. The IPEF is primarily funded by unclaimed amounts and penalties collected by SEBI, and it is used to compensate eligible and identifiable investors for losses arising from violations of securities laws.[87] For ICOs, the Fund's scope could be extended *ex ante* by requiring issuers to contribute a portion of proceeds or maintain insurance coverage, thereby creating an accessible and proactive compensation mechanism. However, a limitation lies in the cross-border nature of ICOs: remedies under Indian law may be ineffective against foreign issuers, necessitating bilateral or multilateral cooperation mechanisms to ensure enforceability of investor protections beyond India's jurisdiction.

5.5. Custody, Anti-Money Laundering and Cybersecurity

To guard against fraud and illicit use, all ICO participants and service providers must undergo client identification procedures in accordance with PMLA guidelines.[88] In practice, this means token issuers can only sell to investors who have completed SEBI-mandated KYC/AML checks, and token sale proceeds must be routed through regulated intermediaries.

These requirements echo international standards such as the Swiss FINMA guidance, which treats ICOs as payment transactions that trigger AML laws unless the token is purely utility-focused. In India, AML regulation traditionally applies to banks and SEBI intermediaries.[89] Under the proposed model, any crypto exchange or

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[86] Securities and Exchange Board of India, 1992, §11(5) No. 15, Acts of Parliament, 1992 (India).
[87] Kriti, *SEBI enhances scope of Utilisation of Investor Protection and Education Fund*, SCC ONLINE BLOGS (Oct. 26, 2023) https://www.scconline.com/blog/post/2023/10/26/sebi-increases-scope-of-utilization-of-investor-protection-and-education-fund-legal-news.
[88] The Prevention of Money Laundering Act, 2003, §11A, No. 15, Acts of Parliament, 2003 (India).
[89] NISHITH DESAI, *supra* note 73.

platform that hosts token trading would be specifically licensed by SEBI (much as securities exchanges are), thereby falling under KYC controls and successfully addressing concerns about "anonymous" token issuance.

5.6. Cross-Border and Secondary Market Considerations

The regulation of ICOs needs to be robust, such that subsequent secondary trading is sufficiently consistent. Under the Thai framework, no specific regulatory restrictions are imposed "on the trading of… tokens after the initial offering," on secondary trading, transfers, and decentralised circulation, and any "life cycle" controls beyond fraud enforcement are disclaimed.[90] Additionally, if a token issuer later converts to a traditional IPO or bond issue, token holders would have the statutory right to 'exit', that is, conversion or redemption, much as minority shareholders do today.

A key requirement of the proposed framework is dual approval by SEBI and compliance with applicable foreign exchange laws. In practice, it would imply that an India-issued token offered abroad would still need an Indian prospectus supplement if Indian investors are involved, and that foreign investors in an Indian ICO would need to deal through Indian-registered intermediaries. Coordination with foreign regulators would be encouraged to prevent regulatory arbitrage, that is, issuers deliberately choosing jurisdictions with weaker oversight to avoid stricter Indian requirements[91]. Rather than discouraging offerings, such coordination would signal to global markets that India provides a predictable and harmonised framework

[90] *At a glance: cryptoassets for investment and financing in Thailand*, LEXOLOGY (Nov. 29, 2024) https://www.lexology.com/library/detail.aspx?g=516f5213-a2df-431f-af22-fe5654425e00.
[91] Annelise Riles, *Managing Regulatory Arbitrage: A Conflict of Laws Approach*, 47 CORNELL INT'L L.J. 63, 70 (2014).

for ICOs, reducing compliance fragmentation and enhancing investor confidence in Indian-issued tokens.

5.7. Sandbox and Phased Implementation

Inspired by MiCA and the Swiss framework, the model calls for a phased rollout with regulatory sandboxes, which would allow SEBI to grant experimental no-action relief under strict conditions. Only vetted issuers, investors and intermediaries, for example, registered brokers or institutional participants, could join initial pilots. The trials of blockchain registries, smart-contract auditors and DLT custody systems would generate data for refining the rules. The model would gradually lift waivers and apply the permanent rules to all ICOs.

5.8. Tackling underlying Jurisprudential Gaps

Adopting a progressive framework for the regulation of ICOs would entail a series of unprecedented debates within the securities law paradigm. To illustrate, the key foundational question of whether the tokenised security is truly decentralised is crucial to determining whether the investment has reverted to a non-security. Thus, it becomes crucial to establish a reasonable test of 'decentralisation'.[92] After borrowing from the discussions around *Howey*, it would become intuitive to resort to the American jurisprudence to resolve this crisis. Justice Castel, in *Securities and Exchange Commission v. Telegram*,[93] applied the Bahamas Test to determine that, taking into account Telegram's role, the TON Blockchain was not sufficiently decentralised. The Bahamas test essentially proposes an alteration to one of the prongs of

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[92] Gabriel Shapiro, *Defining Decentralization for Law*, MEDIUM (Apr. 16, 2020) https://lex-node.medium.com/defining-decentralization-for-law-58ca54e18b2a.
[93] Securities & Exchange Commission v. Telegram Grp., Inc., 448 F. Supp. 3d 352 (S.D.N.Y. 2020).

the *Howey* test.[94] Instead of inquiring whether the investment profits rely on the "*efforts of others*", it emphasises whether the project, say tokenised securities, would be capable of existing if the sellers stopped their work or disappeared. If it could exist, it would be deemed sufficiently decentralised, and an argument could be made that the investment has morphed into a non-security. However, alternate answers maybe found in the Hinman factors, the factors listed by US SEC's erstwhile Director of the Division of Corporation Finance William Hinman in his 2018 *When Howey Met Gary (Plastic)* speech to measure when sufficient decentralisation is attained in a blockchain system; [95] or Srinivasan's *minimum Nakamoto coefficient*, which measures decentralisation by identifying the minimum number of entities whose collusion could compromise a blockchain's integrity.[96] As of now, taking into consideration the status quo, it is only possible to foresee such debates arising out of the existing gaps in current jurisprudence. However, without a framework in place, there is no way to predict the correct answer to these future challenges. Thus, legislators in India need to be more open to such tangential discussions on best practices that might lead to the adoption of the framework.

Upon enforcement of the proposed model framework, it would meet the author's initial contentions that ICO has a regulatory model that balances the interests of investors and potential regulatory overreach. In light of the description of the proposed model, the authors assert that, upon enforcement, no substantive issue will arise. While the presence of multiple regulators hints at a potential clash of subject matter, jurisdiction, and interests, the only problems that can arise would be purely procedural.

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[94] M. Todd Henderson and Max Raskin, *A Regulatory Classification of Digital Assets: Toward an Operational Howey Test for Cryptocurrencies, ICOs, and Other Digital Assets*, 2 COLUM. BUS. L. REV. 443, 461 (2019).
[95] HINMAN, *supra* note 20.
[96] Balaji S. Srinivasan, *Quantifying Decentralization*, MEDIUM (Jul. 28, 2017) https://news.earn.com/quantifying-decentralization-e39db233c28e.

6. Conclusion

The jurisdictions that were the first to respond to the emergence of ICOs are not perfect models to replicate credulously. They continue to correct flaws in their enforcement and to reinforce their laws through legislation. Switzerland's taxonomic clarity, initially praised as investor-friendly, has been undermined by the fact that tokens rarely remain in the category assigned to them at issuance.[97] Utility tokens marketed as access rights often acquire profit-sharing features as protocols mature, while asset tokens are restructured to masquerade as utilities. This reflects the need for a more flexible system that focuses on substance over form.

This article has argued that tokenised securities, when regulated at the ICO stage, would justify SEBI's intervention to ensure investor protection. However, the mechanism of regulation remains widely debated worldwide, and the framework proposed here is only an informed synthesis of countries' experiences and prudence. As fintech evolves rapidly, regulation must remain current and facilitative of economically productive practices. Ultimately, regulating tokenised securities tests the adaptability of securities law in the digital age, requiring a shift toward functionalism and safeguards to protect investors without constraining decentralised systems.

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[97] *Overview of different crypto token types in Switzerland*, LEXR BLOG (May 22, 2025) https://www.lexr.com/en-ch/blog/crypto-token-types-switzerland/.

ARTICLE

BEYOND CSR COMPLIANCE: EXAMINING ESG INTEGRATION AND GOVERNANCE GAPS IN INDIAN CORPORATE LAW FOR ADDRESSING CLIMATE VULNERABILITIES

Shrivalli Patra* *&* Astha Samal**

Abstract

In the Companies Act of 2013, India was among the first jurisdictions to statutorily mandate Corporate Social Responsibility to ensure that corporations support social welfare. The reality of CSR spending reveals that the initiative remains largely compliance-driven and limited in scope to specific sectors. In more recent times, Environmental, Social, and Governance represents a shift towards a stakeholder-oriented approach, embedding sustainability into corporate governance, risk management, and investor relations. This study examines the regulatory push led by SEBI through various regulations, such as the Business Responsibility and Sustainability Report (BRSR), the BRSR Core, and the ESG Funding Regulations 2023, as well as emerging frameworks such as the Reserve Bank of India's Draft Climate Risk Framework. However, these remain largely disclosure-oriented and limited to listed entities, with enforcement mechanisms and statutory obligations still underdeveloped. Drawing on global models such as the European Union's ("**EU**") Corporate Sustainability Reporting Directive and the United Kingdom's director duties framework, among others, the paper identifies critical gaps in India's governance architecture, particularly the absence of board-level fiduciary duties for climate risks, weak deterrence against greenwashing, and exclusion of carbon-intensive unlisted sectors. This article argues that meaningful ESG integration in India requires statutory reform, stronger enforcement, and alignment with international standards to transform sustainability from voluntary compliance into substantive corporate accountability.

<u>Keywords:</u> CSR; ESG; Companies Act; EU Corporate Sustainability Reporting Directive; UK Companies Act 2006.

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* Shrivalli Patra, Student, National Law University Odisha.

** Astha Samal, Student, National Law University Odisha.

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1. Introduction

In recent times, India has experienced extreme heat, with a record 77 heatwave days in the 2024 summer; extreme precipitation caused floods, resulting in hundreds of deaths, water shortages, and irregular monsoon patterns on a larger-than-usual scale.[1] The World Bank has highlighted concerns about droughts, groundwater shortages, glacier melt, rising sea levels, agriculture and food security, and energy and water security.[2] While the corporate sector spends substantial funds on environmental initiatives, its role as a major contributor to environmental degradation cannot be ignored.

The Companies Act, 2013, has mandated Corporate Social Responsibility ("**CSR**"), requiring companies that meet the defined criteria to allocate a minimum amount of funds to social welfare activities. Over a decade later, the concept of Environmental, Social, and Governance ("**ESG**") emerged, evaluating a company's

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[1] 'Climate Impacts in India: Experience, Worry, and Attribution to Global Warming' (*Yale Program on Climate Change Communication*) https://climatecommunication.yale.edu/publications/climate-impacts-india/ accessed 13 September 2025.

[2] 'India: Climate Change Impacts' (*World Bank*) https://www.worldbank.org/en/news/feature/2013/06/19/india-climate-change-impacts accessed 13 September 2025.

performance beyond its financial results. The emphasis has now shifted to environmental impact, stakeholder relationships, ethics, and accountability. This article examines whether Indian corporate law has evolved from a CSR-centric framework to an *ESG-oriented* governance model capable of addressing the risks of climate crisis.

In Part I, this article traces the history of CSR to its current status, conceptualising corporate responsibility towards the community in India. In Part II, the article discusses the emergence of ESG in global and Indian contexts. Part III identifies lacunae in Indian Corporate Law and integrates environmental sustainability with corporate governance mandates. Part IV argues for statutory reform and a stronger regulatory push for bolstering environmental vigilance and conservation. Part V concludes.

2. CSR as a precursor

CSR in India has evolved from the ideas of 'corporate citizenship' or 'business responsibility.'[3] Indigenous industries actively participated in the freedom struggle[4] and made valuable contributions to social reform by establishing key social institutions.[5] Corporate citizenship thus regards enterprises as members of the community, like any citizens.[6] This added a layer of social responsibility to the corporations, beyond their economic objectives.[7] While debates on the definition of CSR may continue,[8] it can be understood to primarily be a corporation's contributions towards its stakeholders, such as customers, employees, shareholders, the community at large and even the environment,

[3] Anupama Mohan, '*Corporate Citizenship: Perspectives from India*' (2001) J. of Corporate Citizenship 107.
[4] Medha Kudaisya, *The Promise of Partnership: Indian Business, the State, and the Bombay Plan of 1944* (2014) 88 Business History Review 97 https://doi.org/10.1017/S0007680513001426.
[5] Mohan (n 3).
[6] ibid.
[7] ibid.
[8] Lance Moir, 'What Do We Mean by Corporate Social Responsibility?' (2001) 1 Corporate Governance 16 https://doi.org/10.1108/EUM0000000005486.

outside of a profit motive.[9] Such contributions may include initiatives or support for social causes such as education, environmental welfare, gender equality, and poverty alleviation.[10]

In India, endeavours resembling the contemporary idea of CSR were already in motion in the pre-industrial age. In ancient times, community involvement began as a form of philanthropy or charity rooted in religious beliefs. After the advent of colonisation, certain prosperous families from traditional merchant communities built business dynasties, some of which still stand tall today. 11 Their efforts in the development of society did not stem purely from charitable intentions. Still, they were woven with business considerations to empower a society that is supportive and ready for industrial and business growth.[11] This model of corporate governance, which has existed in India since the era of colonisation, emerged in the 20th century in the West as the 'stakeholder' model.[12]

Through the 1960s and 1970s, what had begun as a form of charity was beginning to assume the role of a 'corporate social responsibility'. During this time, issues concerning the economically marginalised communities, the physical environment, population control, and the freedom struggle gained traction, and businesses increased their community participation to support social causes.[13] A sense of social responsibility was recognised and acknowledged by many leading companies. However, in practice,

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[9] Nayan Mitra and René Schmidpeter, 'The Why, What and How of the CSR Mandate: The India Story' in Nayan Mitra and René Schmidpeter (eds), *Corporate Social Responsibility in India: Cases and Developments After the Legal Mandate* (Springer International Publishing 2017) https://doi.org/10.1007/978-3-319-41781-3_1 accessed 16 August 2026.

[10] Companies Act, 2013, sched. VII.

[11] ibid.

[12] Steve Letza, Xiuping Sun and James Kirkbride, 'Shareholding Versus Stakeholding: A Critical Review of Corporate Governance' (2004) 12 Corporate Governance: An International Review 242 https://doi.org/10.1111/j.1467-8683.2004.00367.x.

[13] Sushil Dixit and Sarita Dixit, 'Evolution of CSR in India: Indian Roots in Emerging Context' (2018) XIV Journal of Advances and Scholarly Researches in Allied Education 1883.

very few translated their words into action with formal policies in place to fulfil any responsibility beyond those mandated by law.[14]

As the corporate sector expanded, monitoring and implementing CSR became more difficult in India.[15] Instances emerged in which companies claimed to have CSR policies without, in effect, having any.[16] The voluntary nature of CSR proved unable to sustain its spirit. Thus, corporate social responsibility was made a legal mandate under Section 135 of the Companies Act, 2013. Section 135 required companies that meet certain financial criteria to make mandatory contributions to CSR activities.[17] The new legal framework not only dictated 'who' was obligated to contribute but also 'what amount' and 'how' through minimum spending limits and specified CSR areas, respectively.[18]

While traditional regulatory regimes targeted change by trying to influence corporate behaviour through reforms in environmental, human rights, or consumer protection law, these efforts remained an outside-looking-in approach to introducing accountability.[19] CSR mandate went beyond, giving social responsibility and filling a critical gap left by the previous legal framework. This followed the new-age socio-economic thinking, which considered a company as "*a social institution having duties and responsibilities towards the community in which it functions.*"[20]

[14] Mohan (n 3).
[15] Onyeka Osuji, Franklin N Ngwu and Dima Jamali, *Corporate Social Responsibility in Developing and Emerging Markets: Institutions, Actors and Sustainable Development* (Cambridge University Press 2020).
[16] 'E.Summary-Karmayog CSR Ratings 2008.Doc' https://docs.google.com/document/d/e/2PACX-1vRjunlIZRKzKZYWLBr0KorzzR2H_fDKTmEv2rnvMUFgyYiIkZsLI9Rhh8v4ZjhIWA/pub accessed 13 September 2025.
[17] Companies Act, 2013.
[18] Akanksha Jumde and Jean du Plessis, 'Legislated Corporate Social Responsibility (CSR) in India: The Law and Practicalities of Its Compliance' (2022) 43 Oxford University Press 170.
[19] 'Socially Responsible Business in India: Has the Elephant Finally Woken up to the Tunes of International Trends?' https://doi.org/10.1350/clwr.2012.41.4.0240 accessed 21 April 2026.
[20] National Textile Workers' Union v PR Ramakrishnan, (1983) 1 SCC 228.

On reflection, the way the CSR mandate has panned out has led corporates to restrict their CSR activities to specific areas. Data from the Ministry of Corporate Affairs reveals that education and healthcare receive more than 51% of the CSR funding.[21] Despite the Indian economy's reliance on sectors that depend on nature, such as forestry, agriculture, and fisheries, for a third of its GDP, environmental welfare is a lower priority in CSR spending. While efforts have been made towards environmental conservation over the years, they generally do not originate from the corporate sector. World Economic Forum data reveal that among investments in forest restoration efforts in India between 2011 and 2017, 94% were the result of government interventions.[22]

Earlier, industrial practitioners, businessmen, and environmental policy-makers sidelined environmental protection and climate risks, believing that their manufactured goods had little impact on the environment. However, it has been highlighted that environmental damage from industrial accidents has increased in India between 2010 and 2020. Oil spills have caused ripple effects across supply chains and damaged marine ecosystems, leading to heavy legal battles and cleanup costs. Manufacturing industries are major contributors to waste, climate change, natural resource depletion, and environmental pollution. Corporate involvement in environmental degradation warrants accountability. When corporations contribute to environmental problems, they must also become part of the solution and contribute their share to environmental sustainability.

While mandating CSR ensured that corporations engaged in upliftment of the community and social welfare, the focus of such

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[21] 'Corporate Data Management' https://www.mcacdm.nic.in/development_wise.php accessed 13 September 2025.

[22] 'A Third of India's Economy Relies on Nature: Here's Why Corporates Need to Invest More in Natural Climate Solutions' (*World Economic Forum*, 5 August 2024) https://www.weforum.org/stories/2024/08/india-economy-natural-climate-solutions/ accessed 13 September 2025.

spending has been limited to specific sector Corporations continue to function on a compliance-driven approach focused on completing short-term projects such as health camps, environmental protection and awareness camps, blood donation camps to fulfil their legal obligations under the CSR framework rather than investing time and energy in cultivating eco-friendly sustainable practices that require long-term projects. The current legal framework on CSR has failed to embed environmental accountability in corporate law and remains inadequate to make a substantial impact in combating climate change. In this backdrop, the spirit of corporate social responsibility calls upon corporations to finally pay attention to the environment.

3. Origin of ESG in the Indian Corporate Law

3.1. ESG Emergence Globally

ESG norms in international markets have finally emerged, increasing awareness that sustainability is not only an ethical issue but also a need for financial stability and investor trust. The EU continues to act as a pioneer for integrating ESG concerns into the legal framework. Examples such as the EU Taxonomy Regulation of 2020 stand out, as it[23] establishes which activities are environmentally sustainable. The EU continued to amend its regulatory framework in 2022 with the Sustainable Finance Disclosure Regulation ("**SFDR**") and the CSRD.[24] These combined regulations advance double materiality (both social and financial impact) in ESG reporting and climate accountability.

In contrast, the United States of America ("**US**") has chosen a more diffuse course of action. They have ESG fund classification rules that were first proposed by the U.S. Securities and Exchange Commission (SEC) in 2021. These rules followed a market-driven

[23] 'Regulation - 2020/852 - EN - Taxonomy Regulation - EUR-Lex' https://eur-lex.europa.eu/eli/reg/2020/852/oj/eng accessed 13 September 2025.
[24] 'Directive - 2022/2464 - EN - CSRD Directive - EUR-Lex' https://eur-lex.europa.eu/eli/dir/2022/2464/oj/eng accessed 13 September 2025.

approach reflecting the preference for disclosure-based securities governance rather than prescriptive sustainability mandates. Later in 2024, a climate risk disclosure framework[25] was introduced that mandated reporting of Scope 1 (direct greenhouse gas emissions from sources a company owns or controls) and Scope 2 (indirect greenhouse gas emissions from the energy the company buys and uses, such as electricity). Yet this approach remains conceptually limited as ESG is primarily used as a financial materiality issue rather than a broader socio-environmental obligation. However, due to ongoing political contestation and multi-state litigation,[26] the implementation of these 2024 climate disclosure rules has been delayed and has involved partial withdrawals rather than outright withdrawals.

Despite the different regulatory structures governing ESG in the EU and the US, both jurisdictions reflect a broader global trend: investor demand for consistent, comparable ESG data. This is reinforced by initiatives like the International Sustainability Standards Board ("**ISSB**") standards and the Task Force on Climate-related Financial Disclosures ("**TCFD**") recommendations. ESG has therefore become part of the mainstream of capital markets as a governance and financial risk concern, rather than just a corporate social responsibility concern.

However, ESG frameworks have produced limited, substantial, and sustainable changes across jurisdictions.[27] Within the current "disclosure"- centric architecture, producing large volumes of standardised data without ensuring the incorporation of metrics and reports has reduced ESG compliance to yet another due

[25] 'SEC.Gov | SEC Adopts Rules to Enhance and Standardize Climate-Related Disclosures for Investors' https://www.sec.gov/newsroom/press-releases/2024-31 accessed 13 September 2025.
[26] 'US Appeals Court Hits Pause on Challenges to SEC Climate Rule | Reuters' https://www.reuters.com/legal/government/us-appeals-court-hits-pause-challenges-sec-climate-rule-2025-09-12/ accessed 13 September 2025.
[27] J Alberto Aragón-Correa, Alfred A Marcus and David Vogel, 'The Effects of Mandatory and Voluntary Regulatory Pressures on Firms' Environmental Strategies: A Review and Recommendations for Future Research' (2020) 14(1) Academy of Management Annals 339.

diligence task. Further, inconsistencies in rating methodologies, lack of uniform enforcement, and selective materiality assessments dilute the comparability and reliability of ESG data.[28] Thus, while ESG generates statistically accurate datasets, its ability to mitigate climate vulnerabilities remains contested.

3.2. India's Regulatory Push

SEBI's BRSR[29] has been central to India's ESG integration. Effective from Financial Year ("**FY**") 2022-23, it requires the top 1000 listed companies to disclose standardised quantitative and qualitative data on ESG performance. Unlike the earlier Business Responsibility Report[30] ("**BRR**"), the BRSR makes disclosures measurable, forward-looking, and comparable to international standards such as the Global Reporting Initiative ("**GRI**"), the Sustainability Accounting Standards Board ("**SASB**"), and the TCFD. Importantly, SEBI has also introduced the BRSR Core,[31] a tailored set of Key Performance Indicators subject to mandatory independent assurance, to make ESG reporting credible, verifiable, and investor-friendly. It is phased in for the top 150 companies from FY 2023-24 and will be expanded to the top 1000 companies by FY 2026-27.

The BRSR framework extends beyond mere disclosure obligations. It incorporates a layered architecture of qualitative assessments,

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28 Hannan Vilchis Zubizarreta and Delfor Tito Aquino, 'Understanding ESG Ratings: A Systematic Literature Review of Methodologies, Divergences, Impact, Standardization, Disclosure Quality, Technology, and Global Financial Implications (2020–2025)' (2026) 3 Real Estate 9 https://doi.org/10.3390/realestate3030009.

29 'Business Responsibility and Sustainability Reporting by Listed entitiesAnnexure1_p.Pdf' https://www.sebi.gov.in/sebi_data/commondocs/may-2021/Business%20responsibility%20and%20sustainability%20reporting%20by%20listed%20entitiesAnnexure1_p.PDF accessed 13 September 2025.

30 'SEBI | Business Responsibility Reports' https://www.sebi.gov.in/legal/circulars/aug-2012/business-responsibility-reports_23245.html accessed 13 September 2025.

31 'SEBI | BRSR Core - Framework for Assurance and ESG Disclosures for Value Chain' https://www.sebi.gov.in/legal/circulars/jul-2023/brsr-core-framework-for-assurance-and-esg-disclosures-for-value-chain_73854.html accessed 13 September 2025.

leadership indicators and assurance mechanisms. It requires companies to articulate their governance structure, ensure stakeholder engagement, and implement risk-mitigating strategies. This further strengthens the regime by mandating independent third-party assurance of key indicators, thereby enhancing credibility and reducing the scope for unverifiable claims. This reflects a shift from the earlier passive reporting to active accountability.

In July 2023, SEBI revamped the ESG fund regulations[32] to prevent greenwashing. In this deceptive marketing practice, companies or organisations create a false or misleading impression of their environmental responsibility and sustainability. Through this framework, mutual funds can now launch multiple ESG-themed schemes across the six defined strategies outlined therein. Following this, one must invest at least 80 per cent of that scheme's assets under management ("**AUM**") in securities consistent with one's chosen ESG strategy. This also strengthens disclosure standards. E.g., fund names must align with chosen strategies, ESG scores of portfolio companies must be disclosed monthly, and independent assurance of portfolio alignment is required. Fund managers must also demonstrate stewardship by reporting on proxy voting and measurable sustainability outcomes.

The regulatory ecosystem now extends beyond capital markets. The Reserve Bank of India's Draft Climate Risk Framework 2024[33] marks the first comprehensive attempt to integrate climate considerations into financial governance. Modelled on the Task

[32] 'Sebi Issues New ESG Debt Framework to Regulate Social, Sustainability, and Linked Bonds - The Economic Times' https://economictimes.indiatimes.com/markets/stocks/news/sebi-issues-new-esg-debt-framework-to-regulate-social-sustainability-and-linked-bonds/articleshow/121653300.cms?from=mdr accessed 13 September 2025.

[33] 'Press Releases | Official Website of Reserve Bank of India' https://www.rbi.org.in/Scripts/bs_viewcontent.aspx?Id=4393 accessed 22 August 2026.

Force on Climate-Related Financial Disclosures ("**TCFD**")[34], it requires regulated entities, such as commercial banks, non-banking financial companies ("**NBFCs**"), and other financial institutions, to disclose governance arrangements, strategic resilience, risk management processes, and climate-related metrics. Beyond disclosures, the draft framework is a multi-dimensional regulatory instrument that introduces risk-assessment tools, such as climate stress testing and scenario analysis.[35] Regulated entities are expected to evaluate the resilience of their portfolios under varying climate transition and physical risk scenarios, including extreme weather events and policy shocks associated with decarbonization. This marks a significant shift from static reporting to dynamic risk modelling. It requires institutions to integrate climate considerations into capital adequacy planning, credit risk assessment, and long-term financial strategy. The implementation is scheduled at the beginning of FY 2025-26, with larger institutions required to disclose earlier.[36] By embedding these climate-related risks into core prudential regulation, the RBI not only addresses green capital but also reinforces the reality that climate shocks pose as much of a threat to an entity as credit, market, or liquidity risks. However, the framework's treatment of these tools remains at a relatively high level of checks, as there is limited methodological standardisation with no detailed operational guidance or enforceable benchmarks for tools, leaving considerable discretion to regulated entities.

India's approach to framing ESG regulations has been focused on governance and risk management mandates, as reflected in the

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[34] 'Task Force on Climate-Related Financial Disclosures | TCFD)' (*Task Force on Climate-Related Financial Disclosures*) https://www.fsb-tcfd.org/ accessed 22 August 2026.

[35] Reserve Bank of India, *Draft Disclosure Framework on Climate-related Financial Risks, 2024* (Draft Circular RBI/2023-24/DOR.SFG.REC/30.01.021/2023-24, 28 February 2024) para 6(h), Annex 1 'Strategy' (Enhanced Disclosure), and Annex 1 'Risk Management' (Enhanced Disclosure).

[36] Business Standard, 'RBI Proposes Road Map for REs to Address Climate-Linked Financial Risks' (28 February 2024) https://www.business-standard.com/industry/news/rbi-proposes-road-map-for-res-to-address-climate-linked-financial-risks-124022801091_1.html accessed 22 August 2026.

above-mentioned frameworks. Unlike the earlier CSR regulations mentioned under the Companies Act, 2013, that focused on spending, this regulator-driven model involves an incremental and deliberate institutionalisation of ESG, typically via circulars and directives on disclosures, and supervisory oversight; as opposed to the statute-driven model in Europe, where regulations are introduced via binding legislative directives, proactive regulators, which might lead to potential overreach.[37] This incremental step in corporate governance in India is integral to long-term strategy and to gaining investor confidence in establishing ESG, rather than mere voluntary philanthropy.

4. Lesson From Other Jurisdictions

While current ESG regulations seek to align with global practices, there is a statutory vacuum in Indian corporate law, as it remains anchored in CSR. Under section 135 of the Companies Act, 2013, climate action is treated as just another form of disbursement, as determined by the directors, rather than a fiduciary duty. This stands in stark contrast to other statute-driven jurisdictions, such as the UK, in its Companies Act (2006, Sec. 172), which links directors' obligations to the environment, and the CSRD (EU), which places an obligation on boards to incorporate sustainability into financial strategy[38]. In India, this is a voluntary disclosure exercise due to the lack of such provisions. Section 166 of the Companies Act, 2013 requires directors to act in good faith and in the interest of stakeholders, including the environment, but the

[37] Dhammika Dharmapala Vikramaditya Khanna Oxford Business Law Blog, 'Dhammika Dharmapala on Mandated Corporate Social Responsibility and India's Companies Act of 2013 | University of Chicago Law School' (28 November 2016) https://www.law.uchicago.edu/news/dhammika-dharmapala-mandated-corporate-social-responsibility-and-indias-companies-act-2013 accessed 22 August 2026.

[38] Heida Oskarsdottir, Throstur Olaf Sigurjonsson and Runolfur Smari Steinthorsson, 'The European Union's Corporate Sustainability Reporting Directive: Impact on Corporate Boards' [2025] International Journal of Law and Management https://doi.org/10.1108/IJLMA-03-2025-0106 accessed 13 September 2025.

language is broad and aspirational. The Indian courts[39] have interpreted directors' duties under this section primarily through the lens of shareholder and corporate interest.[40] Environmental considerations have rarely been the determinative basis of liability. Even during judicial scrutiny of a director's duties, the focus has largely been on fraud, mismanagement, or oppression rather than on failures to anticipate or mitigate environmental risks. This reflects a structural limitation wherein the absence of explicit statutory benchmarks for climate governance renders enforcement contingent on discretionary judicial interpretation. Consequently, directors are neither required to undertake climate risk assessments nor held liable for inaction on sustainability concerns.

To address this gap, legislative clarification that explicitly incorporates climate risk oversight within fiduciary duties, coupled with mandatory board-level responsibilities such as sustainability committees, periodic climate risk reporting, and the integration of environmental metrics into corporate strategy, can be implemented under Section 166 to establish an enforceable governance obligation.

Even though the current framework (SEBI's BRSR) has mainstreamed ESG disclosures, the Indian regime remains compliance-light. Weak strategies or high emissions attract no sanction as long as they are disclosed. Unlike EU requirements, Indian law does not mandate external assurance for most sustainability reporting. This risks ESG reporting becoming 'performative' rather than an operational reorientation. Even where ESG regulations exist, enforcement is minimal.[41] Such a lack

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39 *Rajeev Saumitra v Neetu Singh and Ors* 198 CompCas 359 (Del) para 67(a).
40 'Company's Interest vs Duty to Protect the Environment – A Director's Balancing Act – IndiaCorpLaw' https://indiacorplaw.in/2023/09/05/companys-interest-vs-duty-to-protect-the-environment-a-directors-balancing-act/ accessed 21 April 2026.
41 PTI, 'Parliamentary Panel Pitches for ESG Oversight Body to Combat Greenwashing Activities' *The Hindu* (5 August 2025) https://www.thehindu.com/news/national/parliamentary-panel-pitches-for-esg-oversight-body-to-combat-greenwashing-activities/article69896854.ece accessed 23 August 2026.

of a stringent penalty regime creates negligible deterrence relative to the scale of assets under management and the potential gains from mislabelled ESG investments. India also lacks a climate litigation liability framework,[42] unlike in the Netherlands,[43] Australia,[44] or the U.S.,[45] where shareholder lawsuits and public-interest litigation hold companies accountable for failing to mitigate climate risks. This disparity arises because the existing Indian environmental laws, such as the Environment Protection Act and the Air/Water Acts, were crafted before the era of climate accountability and offer limited tools for corporate-level climate governance. They involve monetary penalties and directions for corrective disclosures rather than stringent financial sanctions or market access restrictions.

These ESG requirements are, in effect, limited to the largest listed companies in India. The unlisted sector, being the largest and housing some of the most carbon-intensive sectors: thermo-power, mining, and heavy industries, is left out of all disclosure models. This creates a sort of two-tier governance environment, with big emitters putting themselves above the board, reducing market discipline and weakening India's commitment to climate action.

Such contrasts with global approaches demonstrate India is lagging. The EU has established the Corporate Sustainability Due Diligence Directive ("**CSDDD**"), mandating that companies develop transition plans aligned with the Paris Agreement.[46] The

[42] 'World's Youth for Climate Justice' (*World's Youth for Climate Justice*) https://www.wy4cj.org/legal-blog/is-ridhima-pandey-v-union-of-india-going-to-change-the-future-of-climate-change-litigation-in-india-an-assessment-of-the-indian-supreme-courts-recent-order accessed 13 September 2025.

[43] *Milieudefensie v Royal Dutch Shell plc* ECLI:NL:RBDHA:2021:5339, District Court of The Hague, 26 May 2021.

[44] 'Australian Greenwashing on Trial: Clyde & Co' (10 April 2024) https://www.clydeco.com:443/insights/2024/04/australian-securities-and-investments-commission-v accessed 23 August 2026.

[45] *Commonwealth of Massachusetts v Exxon Mobil Corporation*, Civil Action No 1984-cv-03333 (Mass Super Ct, filed 24 October 2019).

[46] Observer Researcher Foundation, 'Beyond ESG Promises: EU's Corporate Sustainability Due Diligence Directive' (*orfonline.org*) https://www.orfonline.org/expert-speak/beyond-esg-promises-eu-s-corporate-sustainability-due-diligence-directive accessed 13 September 2025.

UK has mandated TCFD disclosures.[47] The US has mandated climate risk disclosure rules through SEC regulations, although they are currently under litigation.[48] In contrast, India's ESG regime is driven largely by regulatory circulars, listing obligations, and supervisory instructions issued by bodies such as SEBI and the RBI, rather than being embedded in any binding primary legislation.

India is therefore in a structural paradox where it has made lofty international commitments on climate governance that are not embedded in its corporate law. Unless there are legislative guarantees that address the interplay among fiduciary obligations, boards, and climate resilience, ESG will be limited to disclosure and reporting. India needs to address this gap by instituting climate governance in the company law and enhancing enforcement mechanisms. Thus, broadening the scope to unlisted companies and shifting from mere transparency to accountability. It is only at this point that ESG can transform into a reporting practice and become a real engine of strategic change, system-level financial health and authentic corporate responsibility.

5. Way Forward

For a long time now, Indian corporate law has paid lip service to environmental sustainability. An examination of the statutory and regulatory framework reveals weak compliance requirements and very little enforceability.[49] India's ESG regime has reached a critical juncture where disclosure-based compliance, though progressive, must evolve into a deeper governance-oriented accountability

[47] 'TCFD-Aligned Disclosure Guidance for Public Sector Annual Reports' (*GOV.UK*, 17 July 2025) https://www.gov.uk/government/publications/tcfd-aligned-disclosure-application-guidance accessed 13 September 2025.
[48] 'The SEC Eliminated Climate Rules. Other Governments Are Doing the Opposite. | Institute for Business in Global Society' (*Harvard Business School*, 1 July 2025) https://www.hbs.edu/bigs/federal-climate-rules accessed 14 September 2025.
[49] 'Environment & Climate Change Laws and Regulations Report 2026 India' (*ICLG*, 27 March 2026) https://iclg.com/practice-areas/environment-and-climate-change-laws-and-regulations/india/ accessed 23 August 2026.

framework. To achieve this, the Companies Act, 2013 needs to be amended to explicitly integrate climate governance into directors' fiduciary duties, much like the UK's Companies Act, 2006 and the EU's CSRD. Embedding sustainability in statutory duties would shift ESG from a mere reporting exercise to a core element of corporate strategy and risk management. Alongside this, SEBI's role must be strengthened to move beyond facilitating disclosures towards enforcing them through credible sanctions against greenwashing and misleading sustainability claims. Mandatory external assurance of ESG disclosures should become standard practice to enhance their reliability for investors and stakeholders.

Another crucial reform is the introduction of mandatory transition planning and carbon disclosures, requiring companies to align their strategies with India's Paris Agreement commitments and Nationally Determined Contributions ("**NDC**"). Boards should be tasked with publishing detailed climate transition plans that cover Scope 1–3 emissions, resilience measures, and sector-specific decarbonisation pathways. Linking executive compensation to ESG performance can further embed accountability, incentivising management to meet climate and sustainability targets in a substantive way rather than treating them as symbolic commitments. An approach similar to the one taken in the EU Shareholders' Rights Directive may be explored, subject to compatibility with India's existing corporate governance frameworks, whereby a component of the remuneration policy is linked to ESG performance.[50] By tying sustainable practices to executive pay, management's interests would align with ESG objectives, ensuring that companies allocate resources, design policies, and make operational decisions that advance these goals, moving beyond the tick-box approach. Expanding ESG mandates beyond the top 1000 listed companies is equally necessary, as many

[50] Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement (Text with EEA relevance) 2017 (OJ L).

of India's most carbon-intensive sectors remain outside the disclosure framework. Tailored sector-specific regulations for industries such as mining, power, and heavy manufacturing would prevent the emergence of a two-tier governance regime and ensure a more comprehensive climate response.

To complement these legal reforms, regulatory institutions must also focus on capacity building by equipping boards, auditors, regulators, and investors with the tools to understand and evaluate ESG metrics. Finally, aligning domestic regulations with global frameworks such as the ISSB standards, the TCFD recommendations, and the EU taxonomy will ensure Indian corporations remain competitive in attracting sustainable finance and integrating into global capital markets.

6. Conclusion

Climate change continues to destroy ecosystems and destabilise lives across continents.[51] The need of the hour is to move beyond short-term compliance-oriented environmental preservation measures towards long-term corporate governance and regulatory mechanisms that enable firms to withstand immediate market pressures and invest in climate objectives whose benefits are realised over the long term.[52] By embedding climate responsibilities into law, strengthening enforcement mechanisms, expanding coverage to unlisted and high-emission sectors, and ensuring judicial and institutional recognition of ESG duties, India can transform ESG from a box-ticking exercise into a genuine engine of corporate responsibility, resilience, and long-term value creation.

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[51] Bibek Bhattacharya, 'The Upside down World: How Climate Change Has Made Extreme Weather the Global Norm' (*mint*, 22 August 2026) https://www.livemint.com/newsletters/climate-change-and-you/climate-change-assam-floods-heat-europe-wildifires-11787224390686.html accessed 23 August 2026.

[52] Finnegan and Meckling, *Fighting the Future: Short-Term Investors and Business Opposition to Climate Policy* (Politics and International Relations, 21 July 2025) https://doi.org/10.33774/apsa-2025-flxcq accessed 23 August 2026.

ARTICLE

REIMAGINING CONJUGAL RESTITUTION: SECTION 9 OF THE HINDU MARRIAGE ACT IN INDIA'S PRIVACY ERA

Aditi Singh*

Abstract

The remedy of restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955, is one of the most enduring and contested remnants of colonial family law in India. Although traditionally justified as a means of preserving marriage and encouraging reconciliation, the remedy raises deeper questions about privacy, autonomy, dignity, and equality within marriage. This paper examines the constitutional validity of Section 9 through a doctrinal and feminist constitutional lens. It traces the remedy's origins and its treatment in *T. Sareetha v. T. Venkata Subbaiah*, *Harvinder Kaur v. Harmander Singh Choudhry*, and *Saroj Rani v. Sudarshan Kumar Chadha,* before assessing the provision against the contemporary constitutional framework of privacy and proportionality. The paper argues that Saroj Rani's emphasis on preserving marriage rests on a conception of marital equality that does not adequately account for unequal power within intimate relationships. Applying the proportionality framework in *K.S. Puttaswamy v. Union of India*, the argument is that Section 9 imposes a disproportionate burden on decisional autonomy and bodily integrity, particularly where one spouse seeks to withdraw from the relationship. The paper concludes that while the State may facilitate reconciliation, it cannot compel intimacy. Section 9 should therefore be reconsidered, alongside stronger voluntary mediation mechanisms and a meaningful no-fault framework for marriages that have irretrievably broken down.

Keywords: Restitution; Conjugal Rights; Privacy; Substantive Equality; Proportionality; Family Law.

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* Aditi Singh, Student, National University of Study and Research in Law.

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1. Introduction

Marriage today represents a relationship built on trust, choice, and companionship. Yet, within Indian family law, one provision continues to permit the State to intrude into this private space. This remedy, known as restitution of conjugal rights (RCR), authorises a court to order one spouse who has "withdrawn from the society of the other" to return to cohabitation, surviving as a legacy of colonial legal tradition. Here, "*society*" denotes the state of marital cohabitation rather than mere social interaction.[1] Although a petition for restitution arises between private parties, the remedy itself is created by statute and enforced by judicial decree. The question assumes particular significance in the post-*Puttaswamy* era, where privacy, dignity, and autonomy have been recognised as

[1] Leela Sharma v Keshav Sharma (1980) HLR 171.

integral to constitutional liberty, raising the issue of whether such State intervention in intimate cohabitation can be constitutionally justified.

Section 9 of the Hindu Marriage Act, 1955, along with its equivalents across personal laws under Section 22 of the Special Marriage Act, 1954; Section 36 of the Parsi Marriage and Divorce Act, 1936; and Sections 32 and 33 of the Indian Divorce Act, 1869,[2] embody this remedy. While acknowledging the distinct statutory nuances among these provisions, this paper primarily focuses on Section 9, the central battleground of Indian constitutional jurisprudence on the subject, to evaluate the validity of state-compelled cohabitation. Black's Law Dictionary defines " conjugal rights "to mean: "The rights and privileges arising from the marriage relationship, including the mutual rights of companionship, support and sexual relations."[3] Originally, RCR was meant to promote reconciliation between estranged spouses and to preserve the institution of marriage.[4] The idea was that separation stemmed from misunderstanding and could be healed through judicial intervention.[5] However, this assumption now appears deeply outdated. In a society where marriage is understood as a partnership between equals, the idea of compelling one partner to return to the other raises serious constitutional concerns.

The traditional justification for Section 9 is the preservation of marital harmony; however, given the evolving status of women, it is pertinent to reassess the validity of matrimonial laws based on traditional notions of women's roles.[6] Family law, once viewed as

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[2] Indian Divorce Act, §§ 32–33, 1869.
[3] Black's Law Dictionary s.v. "conjugal rights" (9th ed. 2009).
[4] B.R. AMBEDKAR, WRITINGS AND SPEECHES vol 14, 671 (Ministry of Social Justice and Empowerment, Government of India 1995), https://archive.org/details/Dr.BabasahebAmbedkarWritingsAndSpeechespdfsAllVolumes/Volume_14_01/page/n671/mode/1up?q=restitution (last visited 5 November 2025).
[5] J. DUNCAN M. DERRETT, INTRODUCTION TO MODERN HINDU LAW 197 (OUP 1963).
[6] Archana Parashar, Gender Inequality and Religious Personal Laws in India, 22 BROWN JOURNAL OF WORLD AFFAIRS 197 (2016).

an extension of social morality, is increasingly understood through the lens of constitutional morality, which requires that institutions and the exercise of State power remain consistent with the values and spirit of the Constitution rather than prevailing social norms.[7] In the present context, this requires that the preservation of marriage be assessed against constitutional commitments to individual liberty, dignity, and equality, rather than treated as an overriding social value.

Therefore, RCR must now be measured against evolving constitutional principles. On its most basic level, this paper poses a simple question: can a law of cohabitation survive in a constitutional order where privacy and autonomy are entrenched as basic rights? To respond to this, the paper examines the historical justification of RCR, its judicial development and its evaluation through constitutional and feminist perspectives. This paper advances a primary constitutional claim: that coercive restitution under Section 9 fails the proportionality standard under Articles 14, 15, and 21 and warrants judicial invalidation. Secondarily, it addresses the policy implications for Parliament, outlining how the procedural and reconciliatory functions of Section 9 must be replaced through statutory irretrievable breakdown and voluntary mediation.

The paper does recognise the importance of marriage as a social institution and the State's interest in facilitating reconciliation. However, it questions whether the preservation of marriage, when pursued through coercive legal means, can remain constitutionally legitimate. In a constitutional democracy that values dignity and choice, marriage cannot be sustained through compulsion. True marital harmony can exist only where both individuals retain their freedom to consent, or to walk away.

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[7] *State (NCT of Delhi) v Union of India* (2018) 8 SCC 501.

This paper adopts a doctrinal and constitutional approach to analyse the validity of restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955. It examines the statutory framework, judicial precedents, and the evolution of privacy, autonomy, dignity, and equality in Indian constitutional history. The analysis adopts a substantive-equality feminist perspective, shifting the discussion beyond the formal gender-neutral to how seemingly gender-neutral legal rules can be applied within unequal social and marital power dynamics. In this respect, the paper refers to feminist critiques of Indian family law, such as those of Flavia Agnes, as well as official reform materials on the gendered functioning of matrimonial remedies. The paper also turns to comparative legal resources and institutional facts on mediation. It draws on reports and data from the Bangalore Mediation Centre, NALSA, and the Mediation and Conciliation Project Committee to examine how less restrictive mechanisms can help reconcile marriages. The paper, however, does not make an original empirical study of the extent to which Section 9 is used or has impacted men and women. Its observations regarding the provision's practical operation are therefore based on reported decisions, institutional and reform materials, and existing scholarship, rather than independent empirical findings.

2. Historical Context and Purpose of Restitution of Conjugal Rights

2.1. Colonial and Historical Roots

The idea of restitution of conjugal rights is derived from medieval English ecclesiastical law, which treated marriage as a spiritual duty and desertion as a sin, thereby authorising decrees compelling the spouse to return. In England, marriage was considered a property transaction whereby the wife was merely chattel in the owner's possession.[8] Sir J. Hannen even noted that not once had he known a restitution petition to be genuine, that these were merely a convenient device either to enforce a money demand or to obtain a divorce.[9]

The provision was introduced to India by colonial courts in 1867,[10] when the Privy Council treated cohabitation obligations as enforceable via a decree analogous to specific performance. The ruling brought English law into Indian law, whereby a wife could be legally required to return by her husband if she had withdrawn without cause. Importantly, the Dharmashastra or Muslim law had never known such an idea; the borrowing was completely alien to Indian traditions.[11]

A turning point occurred in the case of *Rukhmabai*.[12] In the 1880s, her child marriage and subsequent refusal to live together led her husband to sue for restitution. The Bombay High Court initially ruled in her favour, holding that a woman who was wedded in "helpless infancy" couldn't be forced to live with a man without her consent. Following a retrial, however, the court ordered Rukhmabai to resume cohabitation with her husband or face imprisonment. Rukhmabai refused to comply and expressed her willingness to face imprisonment. Still, the matter was ultimately settled before any sentence was served, after her husband accepted monetary compensation and relinquished the decree.[13] The case subsequently became a symbol of resistance against patriarchal control. It contributed significantly to public debates on child marriage and women's autonomy.

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8 Raj Kumari Agarwala, *Restitution of Conjugal Rights under Hindu Law: A Plea for the Abolition of the Remedy*, 12 J. Indian L. Inst. 257 (1970).
9 *Marshall v Marshall* (1879) 5 PD 19.
10 *Moonshee Buzloor Ruheem v Shusoonissa Begum* (1867) 11 MIA 551.
11 Paras Diwan, Law of Marriage and Divorce (5th ed. 2008).
12 *Dadaji Bhikaji v Rukhmabai* (1885) ILR 9 Bom 529.
13 Sudhir Chandra, *Enslaved Daughters: Colonialism, Law and Women's Rights* (2nd ed. 2008)
https://doi.org/10.1093/acprof:oso/9780195695731.003.0003.

2.2. *Post-Independence Codification and Enforcement*

With Independence came a mission to unify personal laws into the Hindu Code Bills, with the aim of modernising and rationalising Hindu family law. The Hindu Marriage Act, 1955, codified the laws governing marriage, divorce, and restitution. Section 9 stated that where either of the parties had, without reasonable cause, withdrawn from the society of the other, the aggrieved party may apply for restitution. Additionally, this remedy is available under various personal laws in India, including Section 22 of the Special Marriage Act, 1954; Section 36 of the Parsi Marriage and Divorce Act, 1936; and Sections 17, 32, and 33 of the Indian Divorce Act, 1869.[14]

The provision was controversial. Initially, modernisers like Dr B.R. Ambedkar and others in Parliament debates had conceived of a secular, egalitarian code based on consent and dignity. During the parliamentary debates, several legislators objected to the inclusion of the restitution clause, arguing that it contradicted the spirit of a modern constitutional order. M.R. Khardekar, one of the prominent members of the drafting committee, condemned the provision in striking terms, observing that "to say the least, this particular clause is uncouth, barbarous and vulgar. That the government should be abettors in the form of legalised rape is something very shocking."[15] Despite the strong criticism, restitution of conjugal rights remained on the statute books, a colonial relic justified as a "reconciliatory" provision.[16] Proponents argued that since the law offered no physical means to compel intercourse, it was a harmless encouragement of unity.

However, practice revealed a different reality. In an analysis of reported Indian cases between 1954 and 1969, Raj Kumari Agarwala found that restitution petitions were often pursued for

[14] Indian Divorce Act, §§ 32–33, 1869.
[15] PARLIAMENTARY DEBATES ON THE SPECIAL MARRIAGE BILL, Dec. 10, 1954.
[16] AMBEDKAR, *supra* note 7, at 671.

purposes other than genuine reconciliation. The petition was used to resist the wife's maintenance claim or to lay the groundwork for divorce proceedings, in several cases, particularly those involving husbands.[17] The historical record thus revealed an early tension between the remedy's stated objective of reconciliation and the strategic functions it could perform within matrimonial litigation.

Later socio-legal research provides some, albeit geographically limited, evidence of the gendered use of the remedy in Family Court practice. Sylvia Vatuk's examination of case files from the Madras Family Court, where the overwhelming majority of suits were filed by Hindus under the Hindu Marriage Act, found a predominance of male petitioners among restitution proceedings.[18] Read alongside earlier Family Court studies by Flavia Agnes, this suggests a marked gender asymmetry in the use of the remedy. Agnes' record found that men filed approximately 90% of RCR petitions in Kolkata[19] and 75% in Karnataka and Maharashtra.[20] These studies do not establish a nationwide or contemporary pattern, but they provide empirical support for examining how a formally gender-neutral remedy may operate within unequal marital conditions." The enforcement mechanism under Order 21, Rules 32 and 33 of the Code of Civil Procedure, 1908,[21] exposes this coercive character, by which the courts can enforce the decree of restitution by attaching property or imposing fines. Even though physical force is not permitted, the decree remains a very effective instrument of coercion. Failure to comply for a year becomes grounds for divorce under Section 13(1A)(ii) of the Hindu Marriage Act.[22] Additionally, the coercive nature of the remedy was

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[17] Agarwala, *supra* note 11, at 262.
[18] Sylvia Vatuk, *To Restore the Comforts and Bliss of Married Life': Restitution of Conjugal Rights in Indian Law and Practice*, in FAMILY STUDIES 113, 129–30 (Anuja Agrawal ed., Oxford Univ. Press 2024).
[19] Flavia Agnes, *A Study of Family Courts in West Bengal* 31 (WEST BENGAL WOMEN'S COMM'N 2004).
[20] Flavia Agnes, *Hindu Conjugality: Transition from Sacrament to Contractual Obligations*, in *Redefining Family Law in India* 236, 243 (Archana Parashar & Amita Dhanda eds., Routledge 2008).
[21] Code of Civil Procedure, Order 21 rr. 32–33, 1908.
[22] Hindu Marriage Act, § 13(1A)(ii), No. 25, 1955.

deepened by the Marriage Laws (Amendment) Act, 1976, which introduced an explanation placing the onus of proving "reasonable excuse" on the spouse withdrawing.[23] In the context of unequal marital power, this burden may be particularly significant where a spouse leaves the marital home because of abuse, coercive control, or other circumstances that may be difficult to establish through formal evidence.

These features reveal the tension within the remedy itself. While Section 9 is formally designed to encourage reconciliation, its procedural consequences may also create incentives to use restitution strategically, particularly in disputes involving maintenance or subsequent matrimonial relief. The question of whether this structure can genuinely promote reconciliation, rather than merely compel litigation over cohabitation, therefore remains central to the constitutional and policy debates surrounding the provision.

3. Judicial Interpretation and Constitutional Debate

The contradictions inherent in the remedy of restitution of conjugal rights were vividly revealed in the courts. While the law sought to transform RCR into a conciliatory provision aimed at preserving marriage, its colonial foundation and coercive character could not escape judicial scrutiny. Indian courts have oscillated between two visions of marriage, in which it has been at times seen as a social institution worthy of protection by the state, and at times considered as a union of autonomous individuals.

This chapter follows the judicial journey of Section 9 of the Hindu Marriage Act from its initial constitutional test and conflicting judgments by two high courts to the subsequent affirmation of its

[23] Marriage Laws (Amendment) Act, 1976.

constitutionality by the Supreme Court in 1984, and even analyses the latest ongoing petition questioning it.

3.1. Progressive Revolution: T. Sareetha v. T. Venkata Subbaiah (Andhra Pradesh High Court 1983)

Judicial engagements with restitution of conjugal rights trace their origin to the case of *T. Sareetha v. T. Venkata Subbaiah.*[24] In which Sareetha, the young actress, approached the court with the case in response to her husband's petition filed under Section 9 of the Hindu Marriage Act. The ruling of Justice P.A. Choudary made the apparently routine procedural objection into a constitutional reckoning.

The Andhra Pradesh High Court recognised that even symbolic proclamations carry the threat of enforced proximity. Therefore, this Colonial fiction of enforced affection is deeply linked to coercion, particularly in the Indian socio-economic contexts where gender difference is stark.

Justice Choudary began by identifying the issue as concerning the fundamental rights to life and personal liberty under Article 21. Referring to *Kharak Singh v. State of U.P.*[25] and *Govind v. State of M.P.*[31] he argued that the right to life encompasses more than "mere animal existence" and includes privacy, dignity, and the autonomy to make intimate personal choices. In doing so, the judgment moved beyond a narrow understanding of cohabitation and directly engaged with the idea of sexual autonomy within marriage, recognising that decisions concerning bodily intimacy lie at the core of personal liberty.

He argued that a decree for the restoration of conjugal rights, while being civil in nature, extended state intervention within a woman's home and body. As the court noted, an act of forced sex is no less

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[24] *T Sareetha v T Venkata Subbaiah* AIR 1983 AP 356 [hereinafter "**Sareetha**"].
[25] *Kharak Singh v State of Uttar Pradesh* AIR 1963 SC 1295.

consequential than consensual sex in producing pregnancy, and in a matter so intimately concerning her body, the wife, consistent with her human dignity, should not be excluded from that choice.[26]

This reasoning, however, was vulnerable on an important doctrinal point. Justice Choudary's analysis closely connected a decree for restitution with the possibility of compelled sexual relations, even though Section 9 does not, in law, authorise physical force or compel sexual intercourse. Enforcement is limited to the civil consequences provided under the Code of Civil Procedure. This distinction became central to the subsequent criticism of *Sareetha* in *Harvinder Kaur* and *Saroj Rani*.

Yet the force of the constitutional objection need not depend on equating compelled cohabitation with compelled sexual intercourse. The more fundamental question is whether the State may, through a statutory remedy and a judicial decree, require an unwilling spouse to resume marital cohabitation and impose legal consequences for continued refusal. Property attachment may be less intrusive than physical compulsion, but the absence of physical force does not necessarily exhaust the inquiry into autonomy. A legal obligation to return to an intimate marital relationship, backed by judicial sanctions and capable of producing further matrimonial consequences, independently implicates decisional autonomy and personal liberty. On this narrower ground, *Sareetha* remains significant even if its treatment of the relationship between cohabitation and sexual intimacy is not accepted in full. Justice Choudary also traced restitution to English ecclesiastical law as an uncivilised remedy of feudal times" that even Britain had abandoned, and questioned why India should still have a law which had "outlived its moral purpose".[27]

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[26] *Sareetha*, A.I.R. 1983 A.P. at 356, ¶ 19.
[27] *Id.* at 356, ¶¶ 20–21.

Most importantly, the judgment redefines matrimonial relationships as issues of personal autonomy, not of social order. Justice Choudary held that compelling a person to cohabit or to be sexually available against their will violated Articles 14, 19, and 21. He declared Section 9 unconstitutional and nullified the husband's petition. The judgment acknowledged that consent in marriage cannot be presumed and that the Constitution protects individual autonomy from state enforcement of intimacy. However, *Sareetha* was later rejected, its insistence that marital status does not extinguish individual autonomy anticipated concerns that would become more central to later Indian jurisprudence on privacy, dignity and decisional autonomy, particularly in later cases such as *Navtej Singh Johar v Union of India*[28] and *K.S. Puttaswamy v Union of India*,[29] positioning *Sareetha* as an early doctrinal precursor to India's privacy jurisprudence. Its significance, therefore, lies less in treating cohabitation and compelled sexual intercourse as legally identical, and more in identifying the constitutional difficulty created when the State itself intervenes to regulate an unwilling person's intimate domestic choices.

3.2. Institutional Preservation: Harvinder Kaur v. Harmander Singh Choudhary (Delhi High Court, 1984)

The Delhi High Court's one-judge bench decision in *Harvinder Kaur v. Harmander Singh Choudhry*[30] was a direct response to the previous case; when faced with the same issue- assessing the constitutionality of RCR- the judgment took an opposite route. The decision was a clear judicial reaffirmation of the traditional concept of marriage as a social institution worthy of protection against constitutional encroachment.

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[28] *Navtej Singh Johar v Union of India* (2018) 10 SCC 1 [hereinafter "Navtej Singh Johar"].

[29] *K.S. Puttaswamy v Union of India* (2017) 10 SCC 1 [hereinafter "Puttaswamy"].

[30] *Harvinder Kaur v Harmander Singh Choudhry* AIR 1984 Del 66 [hereinafter "Harvinder Kaur"].

The judgment held that restitution of conjugal rights did not invade privacy because the decree directed only the resumption of cohabitation; it could not, and did not, direct intercourse.[31] The judgment also expressed a broader concern: that constitutional law in the home would destroy the institution of marriage and that Articles 14 and 21 have no place in married life.[32] On this reasoning, privacy was not a protector of personal liberty but an excuse for courts not to meddle in the home.

The limitation of this approach, however, is that the absence of physical force does not exhaust the question of State compulsion. *Harvinder Kaur* treated the distinction between cohabitation and sexual intercourse as largely dispositive, without separately examining whether a judicially enforceable obligation to resume marital cohabitation could itself implicate personal liberty and decisional autonomy.

Justice Rohatgi also believed that Section 9 was gender-neutral and had achieved a legal state goal by maintaining the institution of family as the centre of society. Quoting precedent in English law and earlier Indian decisions, he noted that sexual intercourse is not the *summum bonum* of marriage, and cohabitation entailed a moral, emotional, and religious union over bodies. Justice Rohatgi consequently criticised *Sareetha* for reducing marriage to its sexual dimension and emphasised its social, emotional, and institutional character. The underlying premise was that constitutional scrutiny should not be permitted to destabilise the legal structure of marriage itself."

[31] *Id.* at 12.
[32] *Id.* at 34.

3.3. Supreme Court's decision: Saroj Rani v. Sudarshan Kumar Chadha (1984)

When the Supreme Court heard *Saroj Rani v. Sudarshan Kumar Chadha*[33], two conflicting views of the High Courts were in tension. The role of the Supreme Court was to rule on whether the State had the right to preserve marriage through law.

The wife, Saroj Rani, already had a decree for restitution. A year later, she applied for a divorce because the decree had not been enforced. The Court used this case to scrutinise the constitutionality of Section 9 in its own right.

Justice Sabyasachi Mukharji, speaking for the bench, upheld Section 9 and the Delhi High Court's reasoning in *Harvinder Kaur*. The court, in its ruling, defined restitution as a reasonable social provision intended to preserve the marriage.[34] The Court emphasised that the decree could not be physically enforced: the only permissible consequence of disobedience was property attachment under the CPC or, after a year, an application for divorce. Since the law did not authorise physical coercion, it was, in the view of the Court, not inconsistent with Articles 14 and 21.[35]

In doing so, the Court directly rejected the central premise of *Sareetha* that a decree for restitution could be treated as equivalent to compelled sexual relations. For the Court, the distinction between physical compulsion and the civil consequences attached to non-compliance was constitutionally decisive. The Court held that Section 9 served a legitimate goal by allowing couples to settle their differences and live together on a basis of mutual understanding.

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33 *Saroj Rani v Sudarshan Kumar Chadha* AIR 1984 SC 1562 ¶¶ 10–11 [hereinafter "Saroj Rani"].
34 *Id.* at 11–12.
35 *Id.*

This reasoning was faithful to the early 1980s, when the State's interest in upholding marriage was ipso facto presumed to be per se legitimate. However, the distinction drawn by the Court does not by itself resolve the broader question of whether legally compelling an unwilling spouse to resume marital cohabitation, while attaching civil consequences to continued refusal, independently implicates decisional autonomy and personal liberty. Thus, while *Saroj Rani* successfully identified a weakness in *Sareetha*'s equation of cohabitation with compelled sexual intercourse, it did not fully engage with the narrower autonomy-based objection to Section 9**.**

From today's perspective, the limitations of this reasoning are clear. *Saroj Rani* understood privacy as narrow, i.e., as mere absence of state interference, rather than as the freedom to make intimate, internal choices. More significantly, the Court failed to engage with the post-Emergency constitutional elevation of Article 21 as a source of personal liberty, continuing instead the approach adopted in *Harvinder Kaur*, despite the need for a more rigorous protection of individual liberty against state intrusion. The Court overlooked the power imbalances and gendered realities that make such "social provisions" coercive in practice.

Later constitutional developments, especially *Puttaswamy* and *Joseph Shine v. Union of India*[36]*,* transform this understanding, recognising privacy, autonomy, and dignity as the essence of liberty. Against this jurisprudential evolution, *Saroj Rani's* assumptions now appear fragile, reflecting an era that prioritised marital unity over individual consent. The decision now reads less as constitutional interpretation and more as a reflection of its time, anchored in patriarchal ideals of family unity that the modern rights framework can no longer sustain.

[36] *Joseph Shine v Union of India* (2019) 3 SCC 39 [hereinafter "Joseph Shine"].

Yet the ruling became a binding precedent, freezing constitutional scrutiny of Section 9 for decades, leaving only technical matters like reasonable excuse or enforcement to be decided. The deeper constitutional challenge lay dormant until one generation of lawyers picked it up again in the era of privacy.

3.4. Reopening the Debate

In 2019, a public-interest petition was filed before the Supreme Court by a group of students of the Gujarat National Law University, challenging the constitutional validity of the restitution of conjugal rights under Indian personal laws. Their petition seeks to declare Sections 9 of the Hindu Marriage Act, 1955, and 22 of the Special Marriage Act, 1954, and Order 21, Rules 32–33, of the Code of Civil Procedure as unconstitutional under Articles 14, 15, and 21.[37]

The petitioners contend that restitution of conjugal rights, by legally compelling cohabitation, violates decisional autonomy, bodily integrity, and the right to privacy. They further argue that restitution of conjugal rights discriminates against women, in effect, if not in form. While the law appears gender-neutral, its operation reinforces patriarchal hierarchies: women, more often economically and socially dependent, are those compelled to return. Relying on the effects-based reasoning subsequently developed in *Navtej Singh Johar* and *Joseph Shine*, the petition argues that the constitutional validity of a facially neutral provision must also be assessed in light of its actual operation within unequal social and familial power structures.

Depending heavily on *Puttaswamy*, the petition states that bodily integrity, decisional autonomy, and mental sanctity constitute the right to privacy. It states that a directive forcing a person to cohabit

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[37] SC Observer, *Ojaswa Pathak v Union of India: Challenge to Restitution of Conjugal Rights*, SC OBSERVER (2019),https://www.scobserver.in/cases/ojaswa-pathak-union-of-india-challenge-to-restitution-of-conjugal-rights-case-background/ (last visited Nov. 3, 2025).

unwillingly offends this triad of autonomy. Cohabitation, the petition notes, is an intimate personal choice protected by Article 21; coercion turns marriage into a relationship of subordination and not consent.

The petition also points to misuse. It questions the remedy's continuing relevance and raises concerns about its use in response to maintenance claims and complaints of cruelty. The petitioners thus argue that the remedy no longer expresses a legitimate state interest but instead sustains structural inequality.

In response, the Government has rationalised Section 9 as protecting a legitimate state interest in upholding marriage, on the grounds that the provision is procedural, mild, and consonant with constitutional norms. A three-judge bench admitted the petition on 30th July 2019, and it remains pending despite the profound transformation in privacy and autonomy jurisprudence, leaving a significant constitutional question unresolved. Whatever the outcome, *Ojaswa Pathak* has restored to life a dormant debate. It challenges the idea that preserving marriage can justify limiting autonomy and invites the Court to synchronise family law with the lineage of *Puttaswamy*.

4. Constitutional Analysis and the Privacy Era

4.1. The Constitutional turn: From State Non-Interference to Individual Autonomy

The constitutional landscape of privacy and personal liberty in India has profoundly transformed since *Saroj Rani*, which assumed that the home was a private space exempt from constitutional scrutiny; however, this approach no longer seems apt in the present-day privacy-centric jurisprudence.

In *Puttaswamy*, the Supreme Court declared privacy to be intrinsic to life and liberty under Article 21. The Court recognised that "privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation."[38] The judgment said privacy is not just the right to be left alone but the right to make autonomous choices - choices that define identity and existence.

Building on this foundation, *Navtej Singh Johar* located sexual and decisional autonomy within the concept of dignity. The Court held that autonomy is individualistic and that the ability to make choices about one's body and intimacy is integral to identity. Similarly, in *Joseph Shine*, the Court rejected the notion that the family is a constitutional blind spot. It clarified that familial structures cannot be regarded as private spaces where constitutional rights are violated and that to grant immunity within marriage would "obstruct the unfolding vision of the Constitution.

Together, these rulings redefined privacy not as a shield for social institutions but as a sphere of self-determination and dignity for the individual. They replaced the old idea of privacy as non-interference with a positive guarantee of personal autonomy, the right to make intimate choices free from coercion, even within the family. In this light, any law that compels cohabitation or forced proximity under the guise of reconciliation must be tested against this evolved understanding of liberty and dignity.

4.2. The Retentionist Position

Before examining Section 9 under the proportionality framework, it is necessary to consider the strongest case for its retention. The constitutional analysis cannot rest solely on the harms associated with compelled cohabitation without also considering the distinct functions the provision presently performs within the broader matrimonial framework.

In practice, restitution of conjugal rights is often regarded not as an end in itself, but rather as "a stepping-stone to other

[38] *Puttaswamy*, (2017) 10 S.C.C. at 323.

remedies."[39] This suggests that the case for retaining Section 9 cannot be assessed solely by its stated objective of preserving marriage. Within the existing matrimonial framework, the provision may also perform distinct adjudicatory and procedural functions.

A proceeding under Section 9 provides a judicially supervised mechanism for examining the circumstances surrounding separation. While voluntary mediation may facilitate reconciliation, it does not necessarily serve an adjudicatory function or produce a binding determination on whether continued separation is justified.

Section 9 also serves a distinct procedural function through its relationship with Section 13(1A)(ii). Where a decree for restitution remains unsatisfied for one year or more, either spouse may seek divorce on that basis.3 Thus, a proceeding initially directed towards reconciliation may, where reconciliation fails, provide a comparatively less fault-dependent pathway to dissolution. Unlike a petition based directly on grounds such as cruelty or desertion, this route does not require the parties to establish a separate matrimonial offence at the stage of the divorce proceedings. In a system where matrimonial dissolution continues largely to depend upon fault-based and contested grounds, this function cannot be entirely overlooked.

4.3. Testing Section 9 under the Proportionality Framework

The recognition of privacy and autonomy as fundamental rights in *Puttaswamy* transformed the method of constitutional review in India. The nine-judge bench held that any restriction on the right to privacy must satisfy a structured proportionality test. Subsequent judgments have elaborated this framework into four elements: (a) the existence of a legitimate state aim, (b) a rational connection between the measure and that aim, (c) the necessity of adopting the

[39] Gopika Solanki, *Adjudication in Religious Family Laws: Cultural Accommodation, Legal Pluralism, and Gender Equality in India* 114 (Cambridge Univ. Press 2011).

least restrictive means, and (d) a balance between the benefits to the public interest and the harm to individual rights.

This framework is now the controlling standard for assessing intrusions on personal liberty under Article 21, and by extension, for evaluating the constitutionality of Section 9 of the Hindu Marriage Act, 1955 (HMA), which authorises the restitution of conjugal rights. The proportionality test is particularly appropriate in this context because Section 9 involves a direct state intervention into the intimate sphere of marriage. The law allows one spouse to compel the other to resume cohabitation through judicial decree. While the decree cannot enforce physical intimacy, it nevertheless mandates the restoration of shared living and marital companionship.

4.3.1. Legitimate Aim

The first question under proportionality is whether Section 9 serves a legitimate aim in a constitutional democracy. The courts in the cases of *Harvinder Kaur* and *Saroj Rani* upheld the provision on the ground that it pursued a valid social objective, the preservation of marriage and the prevention of family breakdown.

On its face, that is a legitimate objective. The family is an important social institution, and reconciliation is often treated as a desirable social goal. However, the means adopted under Section 9 must still satisfy the remaining proportionality requirement, which the analysis now turns to.

4.3.2. Suitability or Rational Connection

The second limb of the proportionality test requires a rational connection between the measure and its stated objective. Even if reconciliation is assumed to be a legitimate aim, Section 9 must demonstrably contribute to that end. The evidence, however, shows a different picture.

The High Level Committee on the Status of Women in India[40] found that Section 9 of the Hindu Marriage Act, though intended to preserve marriage, is "being misused" and observed that suits for restitution are routinely filed to defeat wives' maintenance or cruelty claims, and noted that RCR is "against human rights," as "no one should be forced to live with another." The Committee therefore recommended deleting Section 9 and its counterparts across personal laws. The Law Commission of India (2018)[41] endorsed this finding and noted that RCR should not be permitted to undermine women's economic independence.

These findings reveal a clear mismatch between the law's stated purpose and its actual operation. Moreover, Reconciliation, by its nature, depends upon a voluntary willingness to resume the marital relationship; compliance with a judicial decree, particularly where backed by legal or economic consequences, is not necessarily equivalent to the restoration of that relationship. The fact that spouses may return to cohabitation under such pressure, therefore, does not, by itself, demonstrate that the objective of reconciliation has been achieved.

The Andhra Pradesh High Court in *Sareetha* exposed this contradiction decades earlier. Justice P.A. Choudary observed that, in our social reality, RCR operates "as an engine of oppression" against the wife. The forced proximity that it authorises neither restores affection nor achieves reconciliation. A decree that legally enforces cohabitation cannot nurture the voluntary intimacy that defines marriage.

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[40] High Level Committee on the Status of Women in India, *Report of the High Level Committee on the Status of Women in India* 199-200 (Ministry of Women and Child Development, Government of India 2015), https://www.vmml-cwds.ac.in/sites/default/files/2024-04/Report_of_the_High_level_Committee_on_the_Status_of_Women_in_India.pdf (last visited Nov. 5, 2025).

[41] Law Commission of India, *Consultation Paper on Reform of Family Law* (August 2018) https://www.scobserver.in/wp-content/uploads/2021/09/Writ_Petition_by_Ojaswa_Pathak_Restitution_of_Conjugal_Rights.pdf (last visited Nov. 6, 2025).

The enforcement mechanism under Section 9 further exposes its irrationality. Though the decree cannot be physically executed, the Code of Civil Procedure allows indirect coercion through attachment of property under Order 21, Rules 32–33. These measures rely on material deprivation rather than persuasion and rarely result in genuine reconciliation. Thus, while Section 9 formally seeks to facilitate reconciliation, its coercive mechanism may secure compliance without securing the voluntary restoration of the marital relationship that the provision is intended to promote.

4.3.3. Necessity: Are There Less Intrusive Alternatives?

The necessity limb asks whether the State could achieve the same objective through measures that are less restrictive of individual rights. In the context of Section 9, the relevant inquiry is not whether reconciliation is desirable, but whether coercive restitution is necessary to achieve it.

The answer lies in India's expanding mediation framework, which offers precisely such an alternative. The Mediation Act, 2023[42], marks a legislative shift towards consent-based dispute resolution by formally recognising and regulating pre-litigation mediation. Mediation is voluntary, confidential, and non-adversarial; it promotes reconciliation through dialogue rather than decree. It respects personal autonomy while addressing the social objective of preserving marriage. Crucially, it operates without infringing bodily integrity or privacy.

This framework is complemented by Section 9 of the Family Courts Act, 1984,[43] which imposes a statutory duty on Family Courts to seek settlement at the very threshold of matrimonial proceedings. The court must actively assist and persuade the parties towards reconciliation and may adjourn proceedings where there is

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42 Mediation Act, No. 32 of 2023.
43 Family Courts Act, No. 66 of 1984, § 9.

a reasonable possibility of settlement. Thus, even within formal adjudication, the law already mandates conciliation through facilitative, not coercive, means.

The empirical record also points to mediation as a far more effective and humane tool. According to the Vidhi Centre for Legal Policy Report (2016),[44] the Bangalore Mediation Centre recorded a 61 per cent settlement rate for matrimonial cases between 2011 and 2015, with divorce cases reaching over 80 per cent in multiple years. The National Legal Services Authority (NALSA)[45] and the Mediation and Conciliation Project Committee (MCPC)[46] reported a 68 per cent national settlement rate for mediated disputes in 2019–2020. In 2025,[47] a nationwide mediation drive settled approximately 100,000 cases, with matrimonial disputes forming the largest category. These outcomes show that voluntary, dialogue-based processes achieve reconciliation more effectively than forced cohabitation.

However, as discussed previously, Section 9 presently serves functions beyond reconciliation. In particular, an RCR proceeding provides a judicial mechanism for determining whether withdrawal from the society of a spouse was supported by a reasonable excuse and, upon the passing and subsequent non-compliance with a decree, supplies the statutory basis for divorce under Section 13(1A)(ii). Voluntary mediation does not presently perform these adjudicative and procedural functions.

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[44] Vidhi Centre for Legal Policy, *Strengthening Mediation in India: An Interim Report on Court-Annexed Mediation* (2016) https://vidhilegalpolicy.in/wp-content/uploads/2019/05/26122016_StrengtheningMediationinIndia_FinalReport.pdf (last visited Nov. 4, 2025).

[45] National Legal Services Authority (NALSA). Settlement Through Mediation Reports (2019–2020). https://nalsa.gov.in/settlement-through-mediation-report/ (last visited Nov. 8, 2025).

[46] Mediation and Conciliation Project Committee (MCPC), *Official Website* https://mcpc.nic.in (last visited Nov. 8, 2025).

[47] *SC Panel–NALSA Mediation Drive: 1 Lakh Cases Resolved, Matrimonial Disputes Make Up Biggest Chunk*, THE PRINT (Oct. 22, 2025), https://theprint.in/judiciary/sc-panel-nalsa-mediation-drive-1-lakh-cases-resolved-matrimonial-disputes-make-up-biggest-chunk/2769028/ (last visited Nov. 5, 2025).

That distinction, however, does not by itself establish that the coercive remedy of restitution is constitutionally necessary. The functions presently performed through Section 9 may, where considered necessary, be secured through alternative statutory mechanisms that do not require a decree compelling the resumption of marital cohabitation. The precise form such alternatives should take is a matter of legislative design and is considered separately in the recommendations section. Taken together, these developments make it difficult to sustain the claim that coercive restitution is necessary. Where the State already provides structured, effective, and rights-respecting avenues for reconciliation, the continued use of a decree that compels cohabitation under threat of legal sanction becomes excessive. Although, as discussed previously, Section 9 may also perform distinct evidentiary and procedural functions, those functions do not by themselves establish the necessity of coercive restitution in its present form. Section 9 is therefore not the least restrictive means; it is a significantly more intrusive mechanism operating alongside less restrictive and more effective alternatives.

4.3.4. Balancing: Disproportionate Harm to Fundamental Rights

The final limb of proportionality, balancing, requires weighing the importance of the State's objective against the severity of its impact on fundamental rights.

The burden imposed by Section 9 falls substantially on decisional and bodily autonomy, which *Puttaswamy* affirmed fell under the umbrella of privacy. A law that allows the State to enforce marital cohabitation intrudes precisely into these protected domains.

This intrusion undermines both sexual autonomy and dignity. In *Joseph Shine* and *Navtej Singh Johar,* the Supreme Court affirmed that personal and decisional autonomy lies at the heart of dignity and liberty, rejecting any notion of subordination within marriage.

Restitution of conjugal rights, by compelling cohabitation, directly violates this principle. The harm may also operate through economic coercion. A remedy historically premised on the restoration of a spouse's companionship can, within unequal marital and economic structures, reinforce patriarchal patterns of control. [48]

In *Sareetha*, Justice Choudary warned that nothing is more degrading to dignity than subjecting a person, through law, to compelled sexual relations. This concern acquires far greater constitutional urgency when read alongside the Bharatiya Nyaya Sanhita, 2023, which, despite comprehensive reform of criminal law, retains the marital rape exception under Section 63[49], a provision currently pending constitutional review before the Supreme Court of India in *All India Democratic Women's Association v. Union of India*[50]. The State thus simultaneously compels cohabitation through civil law while withholding criminal protection against non-consensual sexual acts within marriage. This creates a situation in which the harm flowing from Section 9 is not merely speculative but structurally foreseeable: the law effectively places individuals, particularly women, in spaces where bodily autonomy is not meaningfully protected.

Recent civil jurisprudence reinforces this position. In *Nimisha v. State of Kerala*,[51] the Kerala High Court recognised that non-consensual sexual conduct within marriage constitutes cruelty and violates bodily autonomy, even if shielded from criminal liability. The Court affirmed that a spouse has a fundamental choice not to suffer within marriage. This reasoning strengthens the constitutional concern about using a decree of restitution to require

[48] FLAVIA AGNES, LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHTS IN INDIA (Oxford Univ. Press 1999).
[49] Bharatiya Nyaya Sanhita, No. 45 of 2023, § 63, Exception 2.
[50] *All India Democratic Women's Ass'n v Union of India*, Writ Petition (C) No. 326 of 2024.
[51] *Nimisha v. State of Kerala* 2017 SCC OnLine Ker 3484.

a spouse to resume cohabitation when the spouse asserts that doing so would compromise bodily autonomy or dignity.

The harm is intensified by its gendered operation. Articles 14 and 15(1) forbid state action that is arbitrary or discriminatory, yet, as observed, despite appearing gender-neutral on paper, the provision functions within unequal power structures and is used predominantly by husbands to compel wives' return, reinforcing patriarchal control rather than mutual reconciliation. As held in Anuj Garg v. Hotel Association of India (2008)[52], laws rooted in moral paternalism or gender roles are unconstitutional. This effect cannot be justified under Article 15(3), which permits protective measures for women but not provisions that, in operation, expose them to coercion and legal disadvantage. In practice, restitution decrees expose women to social pressure and legal disadvantage, turning the private sphere into one of state-sanctioned subordination.

Against these harms, the benefits associated with Section 9 are limited. The question at the balancing stage is whether their retention justifies the degree of intrusion on autonomy, dignity, privacy, and equality that a coercive decree of restitution entails. For the reasons developed above, that constitutional cost remains disproportionate to the benefits secured by the present form of Section 9. As the court in *Saroj Rani* asserted that it gives spouses "*an opportunity to resolve their differences*", but decades of observation show that reconciliation rarely results from compulsion.

When fundamental rights like dignity, privacy, and equality are at stake, minor social objectives cannot outweigh grave constitutional harm. Section 9 fails the balancing test: it intrudes into the most private sphere of human life while yielding no legitimate or measurable public good.

[52] *Anuj Garg v Hotel Association of India* AIR 2008 SC 663.

Finally, restitution of conjugal rights is weighed down by its own contradictions: it seeks to preserve marital relationships through legal coercion, even as the constitutional order increasingly recognises marriage as a relationship founded on autonomy, dignity, and consent. Viewed under the four-limb test affirmed in *Puttaswamy*, Section 9 does not withstand constitutional scrutiny. It represents an outdated and disproportionate intrusion into personal life. It is a remedy that seeks to preserve the shell of marriage at the cost of its substance.

5. Conclusion and Recommendations

Restitution of conjugal rights was meant to be a symbol of reconciliation, but has become an instrument of compulsion. From its colonial birth in English ecclesiastical law to its codification in the Hindu Marriage Act, 1955, Section 9 has reflected the eternal tension between social order and personal freedom. What was meant as a moral safeguard against desertion has become, in practice, a coercive tool that goes against the very constitutional values the modern Indian State claims to uphold.

This paper traced that evolution, from the colonial transplant to judicial interpretation to contemporary constitutional scrutiny. It found that Section 9 fails to reconcile its historical purpose with India's privacy-centric jurisprudence. The *Sareetha* judgment in 1983 had already exposed the incompatibility between coercive restitution and the right to privacy decades before the Supreme Court recognised autonomy and dignity in *Puttaswamy*. Despite remaining in force, the statute fails to meet the proportionality standard. There is no adequate connection between restitution and reconciliation, and less intrusive alternatives, such as mediation, have proven more effective. Most importantly, the harm it causes to bodily integrity, decisional autonomy and gender equality outweighs any social benefit.

The pending case of *Ojaswa Pathak* gives the Supreme Court another chance to revisit the constitutionality of Section 9 in the privacy era. The outcome of this case may finally decide whether marriage in India is governed by constitutional morality or social morality. The constitutional question, however, does not exhaust the debate. If Section 9 is to be reconsidered or repealed, the question of how its functions should be addressed within the broader framework of matrimonial law also requires attention. This brings the inquiry from constitutional validity to legislative reform, an issue that has long been considered by the Law Commission of India and other reform bodies.

5.1. The Case for Legislative Reform

India's own reform bodies have long acknowledged the shortcomings of Section 9. The Law Commission of India's 71st Report (1978)[53] was one of the first to suggest irretrievable breakdown of marriage as a ground for divorce, saying that forcing spouses to stay in a marriage without emotional content is futile and unjust. Commission noted that coerced reconciliation serves neither the institution of marriage nor the individuals within it.

More than three decades later, the 217th Report (2009)[54] reiterated this view, citing the Supreme Court's decision in *Naveen Kohli v. Neelu Kohli*[55], where the Court lamented the "extreme cruelty" of keeping parties legally bound to a marriage that had ceased to exist in fact. The 217th Report recommended amending the Hindu Marriage Act and the Special Marriage Act to include irretrievable breakdown as a statutory ground for divorce. It said the law must reflect social reality: "Nothing is gained by trying to keep the parties tied for ever to a marriage that in fact has ceased to exist."[56]

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[53] Law Commission of India, *Report No 71: Irretrievable Breakdown of Marriage* (1978).
[54] Law Commission of India, *Report No 217: Irretrievable Breakdown of Marriage – Another Ground for Divorce* (2009) 12.
[55] *Naveen Kohli v. Neelu Kohli* (2006) 4 SCC 558.
[56] Law Commission of India, *supra* note 60, at 12.

Importantly, the Commission emphasised that divorce reform must be accompanied by safeguards, especially ensuring maintenance and financial protection for the economically weaker spouse and dependent children.

This position was also reiterated in the Law Commission's 2018 Consultation Paper on Reform of Family Law[57] reflecting a consistent institutional understanding across decades that coercive matrimonial remedies, such as restitution, are untenable.

Despite these recommendations, legislative reform has not moved. Parliament has not implemented the irretrievable breakdown principle, and Section 9's coercive framework remains intact. The persistence of restitution as a statutory remedy despite four decades of criticism from the Law Commission shows the gap between judicial awareness and legislative will.

Comparative developments also show that the abandonment of restitution of conjugal rights has generally formed part of a broader restructuring of matrimonial law rather than an isolated repeal. In England and Wales, Section 20 of the Matrimonial Proceedings and Property Act 1970[58] abolished the remedy, alongside the transition to a framework centred on the irretrievable breakdown of the marriage and independent financial remedies. Ireland followed through on the Family Law Act 1988 after the Irish Law Reform Commission had recommended abolishing restitution and related matrimonial remedies. South Africa's Divorce Act 70 of 1979 similarly abolished restitution, introduced irretrievable breakdown as a basis for divorce, and retained provisions for maintenance and the financial consequences of dissolution. Australia's Family Law Act 1975 likewise abolished restitution and adopted irretrievable breakdown, established through a period of separation, as the sole

[57] Law Commission of India*, supra note* 54.
[58] Matrimonial Proceedings and Property Act 1970, c. 45, § 20 (U.K.).

ground for divorce, while providing separate frameworks for spousal maintenance and property adjustment.

The comparative experience shows that RCR was generally not repealed without alternatives. Other jurisdictions addressed their roles on several levels, including functions related to reconciliation, marital breakdown, and financial protection, by drawing on other legal systems. But these models cannot be directly applied in India. India's unique social setting and socio-economic disparities in marriage call for a reform that includes the abolition of the system of coercive restitution, along with sufficient financial and institutional protection for the vulnerable spouses.

5.2. Recommendations

In light of this, the following reform directions are suggested:

a) Repeal Section 9 of the Hindu Marriage Act, 1955 and the corresponding provisions in the Special Marriage Act, 1954 and the Code of Civil Procedure. The repeal should extend to the legal consequences and enforcement mechanisms specifically attached to a decree for restitution. The State's interest in preserving marriage can no longer justify forced intrusion into marital privacy.

b) Replace restitution with voluntary reconciliation mechanisms, and structured pre-litigation mediation and counselling under the Mediation Act, 2023, as the standard response to marital disputes. This may be operationalised by expressly including matrimonial disputes within the pre-litigation mediation framework through appropriate notification or amendment, ensuring a clear legislative alternative to coercive restitution.

c) Introduce "irretrievable breakdown of marriage" as a statutory, no-fault ground for divorce as recommended by the Law Commission in its 71st and 217th Reports. This could replace the procedural function currently performed by Section 9, read with Section 13(1A)(ii). At present, where a decree for restitution remains unsatisfied for one year, either spouse may seek divorce without having to establish a fresh matrimonial fault. A statutory ground based on objective and sustained marital breakdown or separation could perform this function directly, allowing either spouse to seek dissolution where the marriage has effectively ceased to exist, without first obtaining a decree compelling the parties to resume cohabitation. Appropriate safeguards would be necessary to prevent a financially stronger spouse from using separation to evade existing obligations.

d) Strengthen post-dissolution safeguards, including maintenance, property division and custody rights to protect the economically weaker spouse and dependent children so that autonomy doesn't become abandonment.

e) Promote gender-sensitive legal literacy and counselling services so that reconciliation, if possible, is achieved through informed consent, not social coercion. This must be complemented by mandatory gender-sensitive training for Family Court judges, so that restitution claims are not treated as routine procedural tools but are examined in light of their constitutional implications.

Ultimately, a remedy that permits the State to compel marital cohabitation cannot be reconciled with a constitutional order founded on dignity, autonomy, privacy and equality. Reform may require carefully designed alternatives to address the functions Section 9 presently performs, but those practical considerations cannot justify the continued infringement of fundamental rights. Marriage may remain a social institution worthy of support; it cannot, however, become a space in which personal autonomy is surrendered to legal compulsion.

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ARTICLE

FURNISHED WITHIN THE STATE: PHYSICAL PRESENCE, THE VIRTUAL SERVICE PERMANENT ESTABLISHMENT AND THE LIMITS OF TREATY INTERPRETATION

Smeet Sanghvi*

Abstract

The service permanent establishment was drafted for a world in which people crossed borders to work. Article 5 of both Model Conventions deems a taxable presence to arise where an enterprise furnishes services within the source State through employees or other personnel who remain there for a stipulated period. Every operative term in that formula presupposes bodies in a place. Services no longer require them. This article asks what becomes of the doctrine once the presupposition fails. It argues that the answer given by the Indian courts in Clifford Chance is textually correct and institutionally sound, and that it disposes of only half the question. Part 2 reconstructs the clause's architecture and shows that the physical anchor is not incidental to it but constitutive of it. Part 3 reads the Indian authorities as three separate lines: a territorial line running from E-Funds to Clifford Chance, a quantitative line concerned with the arithmetic of the threshold, and a substantive line culminating in Hyatt, which aggregates recurrent short visits into continuity. Part 4 places India in comparative perspective and identifies a pattern that has attracted little notice. Every administrative attempt to assert a virtual service permanent establishment has either been withdrawn, as in Saudi Arabia in 2023, or confined to a domestic nexus rule that the treaty displaces, as with India's own significant economic presence provision. Part 5 concludes that reform must be textual and identifies the only credible vehicle in the draft Protocol on cross-border services now before the U. N. intergovernmental negotiating committee, which abandons the temporal threshold and the physical nexus together. Finally, the costs of the current disequilibrium and the reforms are discussed.

Keywords: Service PE; Permanent Establishment; Model Tax

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* Smeet Sanghvi, CA Finalist *&* B.Com LL.B (Hons.), Graduate, Gujarat National Law University, Gandhinagar. An earlier version of this manuscript was presented at the 5th GCBPP Competition organised at GNLU Gandhinagar.

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1. Introduction

Article 7 of every modern double taxation convention[1] denies the source State any claim upon the business profits of a foreign enterprise unless that enterprise has a permanent establishment situated there.[2] Everything, therefore, turns upon Article 5. For most of the last century, that article did tolerable work because the enterprises it governed left visible traces. A factory, a branch, a warehouse, a construction site. Value was made where things were, and the treaty could locate it by looking.

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[1] *See* examples from India, Mauritius, UAE, Russia, etc.
[2] OECD, MODEL TAX CONVENTION ON INCOME AND ON CAPITAL: CONDENSED VERSION 2017, art. 7(1) (OECD Publishing 2017) [*hereinafter* **OECD MODEL 2017**]. *See also* U.N. DEP'T OF ECON. & SOC. AFFAIRS, UNITED NATIONS MODEL DOUBLE TAXATION CONVENTION BETWEEN DEVELOPED AND DEVELOPING COUNTRIES, art. 7(1), U.N. Doc. ST/ESA/PAD/SER.E/213 (2021) [*hereinafter* **U.N. MODEL 2021**].

Services broke the correspondence. An advisory firm may earn substantially in a market it never builds in. The service permanent establishment clause was the treaty's response and is a deeming provision rather than a definition. It dispenses with premises and substitutes people. Where an enterprise furnishes services in the other State through employees or other personnel, and those activities continue beyond a stipulated number of days, a permanent establishment is deemed to exist, whether or not anything resembling a fixed place can be found.[3] The physical element was displaced from the building to the body. It was not abandoned.

Digitalisation has now severed that last link. A Singapore law firm advises an Indian client over video for eleven months without a lawyer boarding an aircraft. A United Arab Emirates engineering team supervises an Indian installation by remote desktop. The economic engagement is continuous, substantial and directed at the Indian market. The treaty asks only whether anybody was in India, and the answer is no.

The Indian revenue authorities pressed the argument that the answer ought not to matter. They contended that an enterprise that continuously furnishes services in India creates a virtual service permanent establishment, and that digitalisation has rendered the physical limb of Article 5 obsolete. The Delhi Bench of the Income Tax Appellate Tribunal rejected the contention in March 2024.[4] The Delhi High Court affirmed the rejection in December 2025, holding that the word within carries a territorial connotation and that, in the absence of personnel physically performing services in India, there can be no furnishing of services within India.[5] A

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[3] U.N. MODEL 2021, *supra* note 2, art. 5(3)(b).
[4] *Clifford Chance Pte Ltd. v. Asst. Comm'r of Income Tax*, ITA Nos. 2681 & 3377/Del/2023, [2024] 160 taxmann.com 424 (ITAT Del. Mar. 14, 2024) (India).
[5] *Comm'r of Income Tax (Int'l Taxation)-1 v. Clifford Chance Pte Ltd.*, ITA No. 353/2025, 2025:DHC:10838-DB (Del. H.C. Dec. 2025) (India), reported at [2025] 181 taxmann.com 254 (Del.).

concept absent from the negotiated text, the Court added, cannot be supplied by judicial fiction.[6]

That holding is correct. It is also a referral. A court which declines to legislate returns the question to those who may. The question this article addresses is what those negotiators should now do, and the answer it defends is neither the abolition of the physical anchor nor its preservation. It is the replacement of presence as a proxy for engagement by measures of engagement itself.

The stakes are not abstract for India. Services exports reached 387.5 billion United States dollars in the financial year 2024-25, a 13.6 per cent rise over the preceding year and a historic high.[7] A material proportion of that value crossed the border without anybody accompanying it. India is simultaneously a large market for imported professional, technical and platform services delivered on the same terms. It therefore stands on both sides of the question, and its answer cannot be a simple preference for source taxation.

2. The Architecture of the Service Permanent Establishment

2.1. The fixed-place baseline

Article 5(1) of both Models defines a permanent establishment as a fixed place of business through which an enterprise carries on its business, wholly or partly. Three requirements are embedded in that sentence, and they operate cumulatively. There must be a place of business, that place must be fixed in the sense of possessing geographical and temporal stability, and the business of the

[6] *Id.*

[7] Press Info. Bureau, Gov't of India, Ministry of Commerce & Indus., *India's Total Exports Grow by 6.01% to Reach Record $824.9 Billion in 2024-25*, Release ID 2126119 (May 2, 2025), https://www.pib.gov.in/PressReleasePage.aspx?PRID=2126119 (citing Reserve Bank of India data).

enterprise must be carried on through it.

The Supreme Court of India settled the Indian content of the first two requirements in *Formula One World Championship Ltd v Commissioner of Income Tax*.[8] A place is at the disposal of an enterprise when the enterprise has the right to use and control it, and mere access granted for a project does not suffice.[9] Adopting Philip Baker's formulation, the Court required stability, productivity and dependence, so that the location must be fixed, business must actually be conducted there, and the enterprise must carry on its operations through it.[10] The disposal test is not a test of title. It is a test of functional control, which is why a third-party-owned motor racing circuit could satisfy it.

2.2. The Deeming Technique and its Territorial Premise

The service clause abandons the first two requirements and retains the third in altered form. It asks not where the enterprise is but where its people are, and for how long. The United Nations Model provides the template. Article 5(3)(b) deems a permanent establishment to arise from the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for that purpose, but only if activities of that nature continue within a Contracting State for a period or periods aggregating more than 183 days in any twelve months.[11]

The OECD Model contains no such article. It offers an alternative provision in the Commentary for States that wish to tax services on a net basis without a fixed place of business. That provision likewise requires that the services be performed in the source State

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[8] Formula One World Championship Ltd. v. Comm'r of Income Tax, [2017] 394 I.T.R. 80 (S.C.) (India) (Sikri & Bhushan, JJ.) (decided Apr. 24, 2017).
[9] *Id.*
[10] *Id.* (adopting the formulation in PHILIP BAKER, DOUBLE TAXATION CONVENTIONS (3d ed., Sweet & Maxwell 2001)).
[11] U.N. MODEL 2021, *supra* note 2, art. 5(3)(b).

by an individual present there.[12] The accompanying Commentary is explicit about the limit. All member States agree that a State should not have source taxation rights on income derived from the provision of services performed by a non-resident outside that State.[13] The territorial premise is therefore not a drafting accident inherited from the age of factories. It is a considered allocation, defended on the ground that taxing a non-resident on gross receipts from activity conducted wholly abroad both overtaxes low-margin suppliers and invites administrative overreach.

Indian treaty practice varies the threshold but not the premise. The India-Singapore Agreement sets a 90-day limit in any fiscal year, reduced to 30 days when the services are performed for a related enterprise.[14] The India-United Kingdom Convention adopts the same pair of figures for any twelve months and excludes services taxable as royalties or fees for technical services.[15] The India-United Arab Emirates Agreement requires more than nine months within any twelve months for the same or a connected project.[16] The India-United States Convention places the service clause at Article 5(2)(l).[17] The numbers differ. The verb does not. In each instrument, the services must be furnished within the source State.

2.3. What the reform instruments left untouched

It is worth recording what the last decade of multilateral reform did not do. Action 7 of the Base Erosion and Profit Shifting project

[12] OECD MODEL 2017, *supra* note 2, cmt. on art. 5 (alternative provision for the taxation of services).
[13] *Id.*, *quoted in* Michael S. Kirsch, *Tax Treaties and the Taxation of Services in the Absence of Physical Presence*, 41 BROOK. J. INT'L L. 1143 (2016).
[14] Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, India-Sing., art. 5(6), Jan. 24, 1994, as amended by Protocol, June 29, 2005.
[15] Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains, India-U.K., art. 5(2)(k), Jan. 25, 1993, 1993 S.I. No. 1801.
[16] Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital, India-U.A.E., art. 5(2)(i), Apr. 29, 1992.
[17] Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, India-U.S., art. 5(2)(l), Sept. 12, 1989.

addressed the artificial avoidance of permanent establishment status, and the Multilateral Instrument implemented its conclusions through provisions on commissionaire arrangements, the specific activity exemptions, an anti-fragmentation rule and the splitting up of contracts.[18] None of them touches the service clause. Action 1 canvassed a significant economic presence nexus as one of three options for the digitalised economy and adopted none of them.[19] The 2017 update to the OECD Model left the physical premise of the service provision undisturbed.

The 2025 update went further than any of its predecessors and still stopped short. Approved by the Committee on Fiscal Affairs on 13 October 2025 and by the OECD Council on 18 November 2025, it deleted paragraphs 18 and 19 of the Commentary on Article 5. It inserted a new sequence at paragraphs 44.1 to 44.21 governing home office arrangements.[20] A home or similar location will generally not constitute a place of business where the individual works there for less than 50 per cent of total working time for the enterprise in any twelve months, and a commercial reason for the individual's presence in the other State is required.[21] Convenience, talent retention, and savings in office costs are expressly excluded as commercial reasons.[22] The significance of the change is easily overstated. It concerns an employee who is physically present in the source State and asks whether the room in which they work functionally belongs to their employer. It says nothing whatever

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[18] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, arts. 12-15, Nov. 24, 2016. *See also* OECD, PREVENTING THE ARTIFICIAL AVOIDANCE OF PERMANENT ESTABLISHMENT STATUS, ACTION 7: 2015 FINAL REPORT (OECD Publishing 2015).

[19] OECD, ADDRESSING THE TAX CHALLENGES OF THE DIGITAL ECONOMY, ACTION 1: 2015 FINAL REPORT ch. 7 (OECD Publishing 2015). *See also* OECD, TAX CHALLENGES ARISING FROM DIGITALISATION: INTERIM REPORT 2018 (OECD Publishing 2018).

[20] OECD, THE 2025 UPDATE TO THE OECD MODEL TAX CONVENTION (OECD Publishing, Nov. 19, 2025) (approved by the Committee on Fiscal Affairs on Oct. 13, 2025 and by the OECD Council on Nov. 18, 2025).

[21] *Id.*, cmt. on art. 5, paras. 44.1-44.21.

[22] *Id.*

about an enterprise whose personnel never arrive.

3. Three lines in the Indian authorities

Indian jurisprudence on the service permanent establishment is often presented as a sequence of decisions. It is better understood as three lines of reasoning which answer different questions and which have not yet been reconciled with one another.

3.1. The territorial line

The first line asks where the services were furnished, and it treats that question as dispositive. Its foundation is *Assistant Director of Income Tax v E-Funds IT Solution Inc*, decided by the Supreme Court on 24 October 2017.[23] Two United States companies contracted with United States customers and subcontracted the performance to a wholly owned Indian subsidiary, seconding two employees to India in the process. The Revenue asserted a service permanent establishment under Article 5(2)(l) of the India-United States Convention. The Court held that services must be furnished within India and that no customer, resident or otherwise, received any service in India from the assessee.[24] The assessing officer, the Commissioner and the Tribunal had adopted what the Court called a fundamentally erroneous approach in treating contracting with a wholly owned subsidiary and outsourcing business to it as themselves creating a permanent establishment.[25]

E-Funds is a decision about the service's direction, not merely its location. Personnel were in India. Clients were not. The clause was not satisfied because furnishing describes a relation between a supplier and a recipient, and that relation was consummated in the United States.

[23] *Asst. Dir. of Income Tax-I v. E-Funds IT Solution Inc.*, (2018) 13 S.C.C. 294, [2017] 399 I.T.R. 34 (S.C.) (India) (Nariman & Kaul, JJ.) (decided Oct. 24, 2017).
[24] *Id.*
[25] *Id.* at para. 12.

Clifford Chance completes the line by testing the converse. A Singapore law firm advised Indian clients. For the assessment year 2020-21, its lawyers spent 120 days in India, of which 36 were vacation days, 35 were devoted to business development, and 5 were days on which more than one lawyer was present. Forty-four days remained. For the assessment year 2021-22, no lawyer came at all, with the work performed entirely from Singapore during the pandemic.[26] The Revenue argued that the second year disclosed a permanent establishment for virtual services. The Tribunal disagreed, holding that the actual performance of services in India is essential and that the treaty contains no provision for a virtual service permanent establishment.[27] It relied upon the OECD Commentary to the effect that the services must be performed in a State through an individual present in that State.[28]

The Delhi High Court affirmed. Article 5(6) contemplates the rendition of services by employees within India and demands a fixed nexus, a physical footprint within India.[29] The term "within" has a territorial connotation, and in the absence of personnel physically performing services in India, there can be no furnishing of services within India.[30] Most importantly for this article's argument, the Court declined the invitation to modernise by construction. Any provision or language which is not explicitly included in a tax treaty cannot be artificially read in by way of judicial fiction.[31]

The reasoning is orthodox and right. A double taxation convention is a bargain between two sovereigns, and the allocation of taxing rights within it is the consideration each gave. A court which

[26] *Clifford Chance Pte Ltd.*, *supra* note 4 (assessment years 2020-21 and 2021-22, receipts of Rs. 15,55,45,693 and Rs. 7,97,64,414 respectively).
[27] *Id.*
[28] *Id.* (referring to the Commentary on Article 5 to the effect that services should be performed in a State by a foreign enterprise through an individual present in that State).
[29] *Clifford Chance Pte Ltd. (Del. H.C.)*, *supra* note 5.
[30] *Id.*
[31] *Id.*

enlarges one State's share by interpretation does not update the bargain. It rewrites it unilaterally, without the reciprocal concession that the other State would have extracted at the table.

3.2. The quantitative line

The second line assumes that presence is required and asks how it is to be counted. Its questions are arithmetical, and its answers have been remarkably consistent.

Vacation days do not count because no service is furnished on them, and days devoted to business development do not count either because soliciting work is not performing it. When several employees are in India on the same day, that day counts once, not once for each of them. The Mumbai Bench reached those conclusions under the India-United Kingdom Convention in *Linklaters LLP*, where 42 qualifying days fell well below the ninety-day threshold.[32] The Delhi Bench and the Delhi High Court reached them again in *Clifford Chance*. The principle underlying all three is that the threshold measures the duration of a taxable presence and not the aggregate of man-days expended.

The Bangalore Bench stated the point most cleanly in *Electrical Material Centre Co. Ltd. v. Deputy Director of Income Tax*.[33] Four engineers of a Saudi Arabian enterprise accumulated more than 360 man-days in India, but their collective presence spanned only 90 solar days. Only solar days count, the Tribunal held, and not man-days, so the threshold was not crossed.[34] The Tribunal added that no question of a virtual permanent establishment arose because nothing had been rendered via electronic mail, the internet, or

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[32] *Linklaters LLP v. Dep'y Dir. of Income Tax*, [2019] 106 taxmann.com 195 (ITAT Mum.) (India).
[33] *Electrical Material Center Co. Ltd. v. Dep'y Dir. of Income Tax*, TS-451-ITAT-2017(Bang.) (ITAT Bang. Sept. 28, 2017) (India) (assessment year 2010-11, India-Saudi Arabia Agreement).
[34] *Id.*

video conference.[35]

The arithmetic is defensible in principle and burdensome in practice. It converts the threshold into an evidentiary contest over travel records, timesheets, engagement letters and calendars, conducted years after the events and by an authority with every incentive to characterise an ambiguous day as a service day. The line is administrable only for enterprises that anticipate it and document accordingly, which is to say, for the largest and best-advised.

3.3. The substantive line

The third line asks whether the enterprise was, in substance, carrying on business in India, and it treats the day count as evidence rather than as the question at issue. Its most consequential expression is the judgment of the Supreme Court in *Hyatt International Southwest Asia Ltd v Additional Director of Income Tax*, delivered on 24 July 2025.[36]

A United Arab Emirates resident had entered into strategic oversight services agreements with the owners of Indian hotels for a term of twenty years. Under them, it appointed key personnel, set human resources and procurement policy, controlled pricing and marketing, operated bank accounts and assigned staff. Its executives visited India frequently, though no individual exceeded the nine-month threshold in the service clause of the India-United Arab Emirates Agreement.[37]

The Court held that the enterprise had a fixed place of permanent establishment within the meaning of Article 5(1), the pervasive and enforceable control it exercised over the hotels having placed the premises functionally at its disposal, notwithstanding that the

[35] *Id.*
[36] *Hyatt Int'l Sw. Asia Ltd. v. Addl. Dir. of Income Tax*, 2025 INSC 891 (India) (Pardiwala & Mahadevan, JJ.) (decided July 24, 2025).
[37] *Id.* at paras. 3-8. *See also* India-U.A.E. Agreement, *supra* note 16, art. 5(2)(i).

buildings belonged to others.[38] It raised the question of continuity through the service clause. Under Article 5(2)(i), it said, the relevant consideration is the continuity of business presence in aggregate and not the length of stay of each employee, so that once continuity in the business operations is established, the intermittent presence or return of a particular employee becomes immaterial.[39] It distinguished *E-Funds* on the ground that the Indian subsidiary had supplied back-office support at arm 's-length remuneration and had taken no part in core business functions. In contrast, the hotel was the site of the appellant's own primary operations.[40] On attribution, it endorsed the holding of a Larger Bench of the Delhi High Court that profits may be attributed to an Indian permanent establishment even where the enterprise as a whole is loss-making, since liability follows business presence rather than global profitability.[41]

Hyatt is frequently read as a substance-over-form decision, and in one sense, it is. Read against *Clifford Chance*, however, it discloses something more precise. The Supreme Court did not dispense with the requirement of physical presence. It refused to fragment it. What it aggregated was a series of real visits by real people to real premises, and the aggregation was permissible because each component was already within the territorial premise of Article 5. Substance operated upon presence. It did not substitute for it.

3.4. The dissonant authority

One decision sits outside all three lines. In *ABB FZ-LLC v Deputy Commissioner of Income Tax,* the Bangalore Bench considered a United Arab Emirates regional headquarters which supplied services to an Indian group company under a headquarters services agreement, its employees having been in India for 25 days.[42] The

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[38] *Hyatt Int'l Sw. Asia Ltd.*, *supra* note 36, at paras. 22, 24.
[39] *Id.* at para. 21.
[40] *Id.* at para. 20.
[41] *Id.* at para. 23.
[42] *ABB FZ-LLC v. Dep'y Comm'r of Income Tax*, ITA(TP) No. 1103/Bang/2013,

Tribunal held that a permanent service establishment existed. It reasoned that in the present age of technology, where services, information, consultancy, and management can be provided through virtual modes such as electronic mail, the internet, video conferencing, remote monitoring, and remote desktop access, physical presence is not the operative criterion.[43] What the treaty requires, the Tribunal said, is not the employees' stay for more than nine months but the rendering of services for that period.[44]

ABB FZ-LLC is the only Indian authority which squarely endorses a virtual service permanent establishment, and it has not worn well. The Delhi Bench and the Delhi High Court have since taken contrary views on materially identical treaty language, and the High Court's reasoning on the word "within" is inconsistent with that view. The decision is also internally awkward because the Tribunal ultimately characterised the receipts as royalty under Article 12(3) of the same Agreement, which made the permanent establishment finding largely academic to the result.[45] It should now be regarded as confined to its facts.

3.5. Secondment as the residual battleground

The territorial line has narrowed the practical dispute. Where the foreign enterprise sends nobody, there is no permanent service establishment. Where it sends people on secondment, everything turns on which employees remain. The Supreme Court distinguished *Director of Income Tax v Morgan Stanley and Co Inc*, holding that stewardship activity undertaken to protect the assessee's own interest as a customer creates no permanent service establishment. At the same time, deputation does where the assessee remains responsible for the work and the employees retain

[2017] 83 taxmann.com 86 (ITAT Bang.) (India) (assessment years 2009-10 and 2010-11).
43 *Id.*
44 *Id.*
45 *Id.* (characterizing the receipts as royalty under Article 12(3) of the India-U.A.E. Agreement).

their lien or their place on its payroll.[46] The Delhi Bench applied that distinction to eight employees seconded by a United Kingdom parent to its Indian subsidiary in *JC Bamford Excavators Ltd*, finding a service permanent establishment under Article 5(2)(k) while holding that royalties for separately licensed intellectual property were not effectively connected with it, the deputed personnel having had no role in the grant of those rights.[47] The Delhi High Court reached a similar conclusion in *Centrica India Offshore*, directing attention to the substance of the employment relationship rather than its form.[48]

Morgan Stanley also provides the limiting principle of attribution, which is too often forgotten. Where the associated enterprise, which constitutes the permanent establishment, is remunerated on an arm's length basis, taking account of all risk-taking functions, nothing further falls to be attributed.[49] A finding of a permanent establishment is therefore not a finding of additional tax. It is a finding that an attribution exercise must be performed, and that exercise may well yield nothing.

4. The Virtual Service Permanent Establishment in Comparative Perspective

The Indian debate is usually presented as a contest between a conservative judiciary and an innovative administration, with foreign practice cited for the proposition that other States have already moved. The comparative record does not support that framing. It discloses a pattern which cuts the other way.

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[46] *Dir. of Income Tax (Int'l Taxation) v. Morgan Stanley & Co. Inc.*, (2007) 292 I.T.R. 416 (S.C.) (India) (decided July 9, 2007).

[47] *J.C. Bamford Excavators Ltd. v. Dep'y Dir. of Income Tax*, [2014] 43 taxmann.com 283 (ITAT Del.) (India) (decided Apr. 8, 2014). *See also* India-U.K. Convention, *supra* note 15, art. 5(2)(k).

[48] *Centrica India Offshore (P.) Ltd. v. Comm'r of Income Tax*, [2014] 44 taxmann.com 300 (Del. H.C.) (India).

[49] *Morgan Stanley & Co. Inc.*, *supra* note 46.

4.1. Assertion and retreat

Saudi Arabia is the clearest case, and it is routinely reported inaccurately. An internal circular of 2015 had treated a non-resident as having a permanent establishment for services wherever it contracted with a Saudi customer, and the contract ran for six months or longer, irrespective of whether any employee set foot in the Kingdom.[50] That was a genuine virtual service permanent establishment, and it generated a decade of assessments. It no longer represents the law. By a circular of 17 May 2023 on the taxation of permanent establishments in the context of double taxation agreements, the Zakat, Tax and Customs Authority replaced it with a three-part test requiring the furnishing of services, the physical presence of employees within the Kingdom, and presence exceeding 183 days in any twelve months.[51] The administration, which had gone furthest, reversed itself, and it did so by reference to the treaty text.

Israel occupies the remaining ground. Circular 4/2016 of 11 April 2016 asserts a permanent establishment arising from a significant digital presence, identifying factors such as a website adapted to Israeli customers, popularity among Israeli users, local involvement in customer recruitment and data collection, ongoing relations with Israeli customers, significant local marketing and support, and the assumption of business risk in Israel.[52] It is an administrative instrument asserting a treaty result, and it remains subject to precisely the objection raised by the Delhi High Court. A single revenue authority's assertion does not supply a concept absent

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[50] *ZATCA Clarifies Position on Services Permanent Establishments Under Double Tax Treaties*, DLA PIPER GULF TAX INSIGHTS (June 2023), https://www.dlapiper.com/en/insights/publications/gulf-tax-insights/gulf-tax-insights---june-2023/zatca-clarifies-position-on-services-permanent-establishments-under-double-tax-treaties.

[51] Zakat, Tax & Customs Auth. (Saudi Arabia), Circular on the Taxation of Permanent Establishments in the Context of Double Taxation Agreements (May 17, 2023). *See also Saudi Arabia Clarifies Interpretation of Service-PE Provisions in Its Tax Treaties*, EY GLOBAL TAX ALERT (2023).

[52] Israel Tax Auth., Circular No. 4/2016, Internet Activity of Foreign Companies in Israel (Apr. 11, 2016).

from the negotiated text.

4.2. The domestic nexus which the treaty displaces

A second group of jurisdictions is frequently enlisted in support of virtual nexus. It belongs on the other side of the ledger, because what they have enacted operates only where no treaty intervenes.

India is itself the leading example. Explanation 2A to section 9(1)(i) of the Income-tax Act 1961, substituted by the Finance Act 2020, provides that the significant economic presence of a non-resident in India constitutes a business connection, and that transactions or activities constitute such a presence whether or not the non-resident has a residence or place of business in India or renders services in India.[53] The thresholds were notified with effect from 1 April 2022, namely, aggregate payments exceeding two crore rupees or systematic and continuous solicitation of business from or interaction with more than three lakh users in India.[54] The provision is drafted precisely to reach the enterprise which never arrives. It is also, for most taxpayers, inert, because section 90(2) entitles a non-resident to the more beneficial of the Act and the applicable agreement, and every applicable agreement conditions the taxation of business profits upon a permanent establishment as that agreement defines it.[55] Significant economic presence, therefore, bites only where there is no treaty, which is a much smaller category than the rule's drafting suggests.

The same structural point undermines the equalisation levy as a solution. Introduced in 2016 at six per cent on consideration for online advertising services and extended in 2020 at two per cent to e-commerce supplies or services, it was deliberately placed outside the Income-tax Act to fall outside the treaties altogether. Both

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[53] Income-tax Act, No. 43 of 1961, sec. 9(1)(i), expl. 2A (India), as substituted by the Finance Act, No. 12 of 2020, sec. 4 (India).
[54] Income-tax Rules, 1962, r. 11UD (India), inserted by Cent. Bd. of Direct Taxes Notification No. 41/2021, G.S.R. 314(E) (May 3, 2021), effective Apr. 1, 2022.
[55] Income-tax Act, No. 43 of 1961, sec. 90(2) (India).

limbs have since been withdrawn, the two per cent levy with effect from 1 August 2024 and the six per cent levy with effect from 1 April 2025.[56] India has thus dismantled the only instrument by which it actually collected tax from non-resident digital suppliers. At the same time, the treaty position, which prevented it from doing so through the Act, remains exactly as it was.

Taiwan is commonly cited as having adopted a virtual permanent establishment, but it has not done so. Its rules subject cross-border electronic services supplied by foreign enterprises to profit-seeking enterprise income tax under domestic source rules. Where the supplier is resident in a jurisdiction with a comprehensive agreement, it may apply for exemption from tax on its business profits under that agreement on the basis that it has no permanent establishment in Taiwan, and recover tax already withheld.[57] The domestic rule yields to the treaty in the ordinary way. It is a collection mechanism, not a nexus innovation.

4.3. Where the threshold is met

Where personnel are in fact present, foreign courts have applied the service clause without difficulty or need to stretch it. In *AB LLC and BD Holdings LLC v Commissioner of the South African Revenue Service*, a United States advisory firm rotated seventeen employees through a client's boardroom in Johannesburg between February 2007 and May 2008, exceeding 183 days during 2007.[58] The Tax Court found a permanent establishment under Article 5(2)(k) of the South Africa-United States treaty and, in addition, that the boardroom itself constituted a fixed place of business.[59] It also held that a success fee received in 2009 remained attributable to the

56 Finance Act, No. 28 of 2016, ch. VIII (India) (introducing the levy on online advertisement services). Finance Act, No. 12 of 2020 (India) (extending the levy to e-commerce supply or services). The two per cent levy ceased to apply with effect from Aug. 1, 2024 and the six per cent levy with effect from Apr. 1, 2025.
57 Taiwan Income Tax Act, art. 25 and art. 124. *See also Applying Tax Treaties to Reduce the Tax Burden on Foreign E-Commerce*, STELLEX LAW FIRM (Feb. 11, 2026).
58 *AB LLC and BD Holdings LLC v. Comm'r for the S. Afr. Revenue Serv.*, Case No. 13276, [2015] ZATC 2, 77 S.A.T.C. 349 (Tax Ct. May 15, 2015) (S. Afr.).
59 *Id.* at paras. 40, 42.

period during which the permanent establishment had existed.[60] In Canada, the Federal Court of Appeal in *Wolf v Canada* applied the services provision of the Canada-United States Convention and dismissed the appeal on evidentiary grounds, the taxpayer having failed to establish when the revenues said to displace the Canadian proportion had been earned.[61]

Neither decision required a virtual nexus because, in each, the enterprise had done the very thing the clause describes. Taken with the Saudi retreat, the pattern is consistent. The physical premise of the service clause has not been eroded by judicial or administrative practice anywhere. It has been confirmed by it.

4.4. India's treaty position and its own courts

One further feature of the Indian position deserves emphasis, because it is the source of much of the confusion. India is not an OECD member and has recorded positions on the Commentary on Article 5. Among them is the view that physical presence or performance of services is not necessary in the source State to constitute a permanent establishment, and that taxing rights may exist in a State even where services are furnished from outside it.[62] That is India's position as a negotiator. It is not the law of any Indian treaty, because a position in a commentary is not an operative provision of an agreement, and the Delhi High Court has now held as much in substance. The Indian revenue has been asserting, at the assessment stage, what the Indian negotiator has not yet secured at the table. The courts have declined to close the gap for it, and they were right to decline.

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[60] *Id.* at para. 43.

[61] *Wolf v. Canada*, 2019 FCA 283 (Can.) (decided Nov. 15, 2019). *See also* Convention with Respect to Taxes on Income and on Capital, Can.-U.S., art. V(9), Sept. 26, 1980.

[62] OECD, MODEL TAX CONVENTION ON INCOME AND ON CAPITAL 2017 (FULL VERSION), Positions of Non-OECD Economies on Article 5 and Its Commentary (OECD Publishing 2019). *See also* Mayur B. Nayak, Tarunkumar G. Singhal & Anil D. Doshi, *India's Stand on OECD Model Commentary Update 2008*, BOMBAY CHARTERED ACCOUNTANT J. (Nov. 2008).

5. Why the reform must be textual

If interpretation cannot carry the reform and unilateral domestic rules are displaced by the treaties they were meant to circumvent, only two routes remain. The first is bilateral renegotiation, treaty by treaty, which is slow and yields a patchwork that gives rise to double taxation in the interim. The second is a multilateral instrument. Until recently, there was no plausible candidate.

There is now one, and it has attracted surprisingly little attention in the Indian literature. The Intergovernmental Negotiating Committee established under General Assembly resolutions 78/230 and 79/235 is drafting a United Nations Framework Convention on International Tax Cooperation together with two early protocols, the first of which concerns the taxation of income derived from the provision of cross-border services.[63] The Co-Leads released draft texts in July 2026, and negotiations continued in New York in August 2026, with the final text to be submitted to the General Assembly in 2027.[64]

The draft services protocol does what no existing instrument does. It allocates taxing rights over three categories of service income, namely fees for services, automated digital services and insurance premiums. It dispenses with the temporal threshold altogether, permitting net basis taxation where an enterprise carries on business in the other State through employees or agents without any minimum period. Above all, it does not require physical presence. Nexus is instead drawn from a menu that includes the place of performance, the consumer's residence, and the deductibility of the payment, with automated digital services

[63] G.A. Res. 78/230 (Dec. 22, 2023). G.A. Res. 79/235 (Dec. 24, 2024). *See also* U.N. DEP'T OF ECON. & SOC. AFFAIRS, Intergovernmental Negotiations for a U.N. Framework Convention on International Tax Cooperation, https://financing.desa.un.org/unfcitc.

[64] Co-Leads' Draft Protocol I to the U.N. Framework Convention on International Tax Cooperation, U.N. Doc. CRP.33 (July 2026). *See also UN Releases Draft Global Tax Cooperation Convention and Two Early Protocols*, EY GLOBAL TAX ALERT (July 2026).

sourced based on the end-user's location and user data.[65] An enterprise without a physical presence may elect to be taxed on a net basis, with profits determined by a reasonable allocation.[66]

Substantial questions are left open. The maximum gross rates are blank. The relationship with the existing bilateral network is unresolved. There is no mechanism yet to prevent overlapping claims by several source jurisdictions over the same receipt, which is the obvious hazard of a nexus rule keyed to consumer location.[67] Those gaps are serious. There are also gaps in a text, and a text can be amended before adoption. There are no gaps in a doctrine which no amount of judicial ingenuity can fill.

The United Nations Model already contains the components from which a narrower solution could be assembled. Article 12A permits source taxation of fees for technical services at a negotiated rate without any requirement of presence, and Article 12B does the same for income from automated digital services, with an election for net basis taxation of qualified profits.[68] Both are available to any pair of States willing to adopt them bilaterally, and both would have resolved *Clifford Chance* without any need to argue about the meaning of within. That they were not adopted in the India-Singapore Agreement is a product of negotiation. It is not a defect in the doctrine of permanent establishment.

6. The costs of the present disequilibrium

The gap between an expansive domestic nexus and an unchanged treaty nexus is not a theoretical untidiness. It imposes four

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65 Frederik Heitmüller, *The UN Tax Convention Draft Protocol on Cross-Border Services: Clear Direction but Crucial Details Left Open*, INT'L CTR. FOR TAX & DEV. (Aug. 10, 2026), https://ictd.ac/general/the-un-tax-convention-draft-protocol-on-cross-border-services-clear-direction-but-crucial-details-left-open/.
66 *Id.*
67 *Id.*
68 U.N. MODEL 2021, *supra* note 2, arts. 12A, 12B. On the latter, see Andrés Báez Moreno, *Because Not Always B Comes After A: Critical Reflections on the New Article 12B of the UN Model Tax Convention on Automated Digital Services* (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3923508.

identifiable costs.

The first is double taxation and its attendant litigation. Where a source State asserts a claim on an economic presence theory and the residence State recognises no permanent establishment, relief depends upon the mutual agreement procedure. That procedure is slow, discretionary in most treaties and unsupported by mandatory arbitration in the great majority of India's agreements. The taxpayer carries the cost of the disagreement in the interval.

The second is the conversion of a substantive rule into an evidentiary one. The day-counting jurisprudence requires an enterprise to prove, years later, what each visiting employee did on each day in India. *Clifford Chance* turned upon the characterisation of 76 of 120 days. An enterprise which did not classify its calendars contemporaneously will lose that argument regardless of the economic reality, and an enterprise which did will incur the cost of a compliance apparatus disproportionate to the tax at issue.

The third is competitive distortion, and it operates in both directions. Where a foreign supplier serves an Indian market remotely and pays no Indian tax, the domestic supplier of the same service competes from a position of disadvantage. Where a source State asserts an aggressive nexus without treaty warrant, its own exporters face the mirror image abroad. India, as both a large exporter and a large importer of services, is exposed on both counts, and an aggressive unilateral position is therefore against its own interest in a way that is not true of a purely importing jurisdiction.

The fourth is the risk of double non-taxation. Where the source State is barred by its treaty and the residence State either grants an exemption or lacks information, the receipt is entirely excluded. The withdrawal of the equalisation levy has widened that gap in India rather than narrowed it, since the levy was collecting where the Act could not.

7. Recommendations

7.1. For treaty negotiators

India should stop pursuing through interpretation what it has not obtained through negotiation. Two concrete steps follow. The first is to seek the inclusion of Article 12A of the United Nations Model in agreements with its principal services trading partners, at a negotiated and modest gross rate. That article directly addresses remote technical, managerial, and consultancy services; it is already drafted and includes established commentary. The second is to engage substantively in drafting the United Nations services protocol rather than waiting for its adoption, with particular attention to the two defects identified above: the absence of a rule preventing overlapping source claims and a binding dispute resolution mechanism. A protocol which creates a nexus without creating arbitration will multiply the disputes it was meant to resolve.

7.2. For the administration

Two reforms would remove most of the present friction at modest cost. The Central Board of Direct Taxes should issue a circular codifying the day counting principles which the Tribunals and the Delhi High Court have now settled, namely that vacation days and business development days are excluded, that a day on which several employees are present counts once, and that solar days rather than man-days are the unit. The principles are judicially established. Their codification would end their litigation. Second, the advance ruling machinery should be directed to standard fact patterns, in particular secondment arrangements and offshore delivery to Indian clients, so that the position is settled before the engagement is priced rather than after it is assessed.

7.3. For enterprises

The compliance implications of the present law are narrow and practical. Because the threshold is measured in solar days of service performance, the controlling document is the contemporaneous record. An enterprise engaged with India should classify each day of each visit at the time as client-facing service, business development, internal, or personal. It should retain the deliverable sign-offs and client acceptances that corroborate that classification. Secondment agreements should expressly state where payroll, supervision, and disciplinary authority reside, because *Morgan Stanley* and JC Bamford make those determinative factors. Finally, a permanent establishment finding should be priced accordingly. Where the Indian associated enterprise is remunerated at arm's length for all functions performed, and risks assumed, *Morgan Stanley* holds that nothing further falls to be attributed, and a defensible transfer pricing position is therefore the most valuable protection available.

7.4. For the courts

Nothing in this article asks the courts to do more than they have done. The refusal in *Clifford Chance* to read a virtual service permanent establishment into a treaty which does not contain one is the correct discipline, and it should be maintained even as the pressure to depart from it increases. One clarification would nevertheless assist. *Hyatt* aggregates recurrent presence into continuity, and *Clifford Chance* excludes days on which no service was performed. The two are reconcilable because *Hyatt* aggregates days which already qualify, while *Clifford Chance* determines which days qualify. Saying so expressly would prevent *Hyatt* from being deployed, as it already is being deployed in assessment proceedings, as authority for aggregating days that *Clifford Chance* excludes.

8. Conclusion

The service permanent establishment is a proxy. Days of presence were adopted because they were observable and because, in the economy for which the clause was drafted, they correlated tolerably well with the thing that actually matters, which is sustained economic engagement with a market.

A State may ask its courts to read the proxy as though it said something else, which is what the Indian Revenue asked and did not obtain. Or it may renegotiate the proxy. The Delhi High Court was right that the first course is not open, and the reason is not formalism. A treaty allocates taxing rights between two sovereigns, and a court which enlarges one share by construction confers a benefit for which no reciprocal concession was ever given.

Saudi Arabia asserted a virtual service permanent establishment and abandoned it. India enacted a significant economic presence rule, only to find it displaced by section 90(2) in every case that mattered. Taiwan's electronic services regime yields to the treaty on application. The physical anchor has proved considerably more durable than the commentary predicted, not because it is well designed, but because nothing has yet replaced it in binding texts.

The text that could bind is now being drafted in New York. Whether the United Nations services protocol survives its open questions, particularly the overlapping claims problem and the absence of mandatory arbitration, will determine whether the next decade of service taxation is governed by a negotiated rule or by a proliferation of unilateral assertions and the disputes they generate. The choice is not between certainty and fairness. It is between a rule arrived at by agreement and a contest arrived at by attrition.

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ARTICLE

TRIAL IN ABSENTIA: THE BALANCING DILEMMA

Shaurya Mahajan & Revathi Satish*

Abstract

This paper critically examines the introduction of trial in absentia under Section 356 of the Bharatiya Nagarik Suraksha Sanhita, a significant departure from the Criminal Procedure Code that permits courts to proceed against accused persons in their absence, subject to prescribed safeguards. It situates this legislative shift within Herbert Packer's Crime Control and Due Process models, examining the tension between preventing absconding accused from frustrating the administration of justice and preserving the right to a fair trial. It traces the Supreme Court's recommendation for a trial-in-absentia mechanism in *Hussain v. Union of India* and examines the procedural and constitutional dilemmas it raises. Drawing from international and Indian jurisprudence, it argues that while trial in absentia is a conceptually efficacious remedy, its current state compromises due process and requires enhanced safeguards. The paper concludes with a call to balance the rights of the accused and the victim and to align domestic procedural innovation with comparative international standards.

Keywords: Trial in absentia; Due Process; Fair Trial; Retrial; BNSS; BSA; BNS.

* Authors are Fourth-Year B.A. LL.B (Hons.) candidates at the Jindal Global Law School, O. P. Jindal Global University. They can be reached at shauryam182@gmail.com and 23jgls-revathi@jgu.edu.in respectively.

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1. Introduction

The introduction of the *Bharatiya Nagarik Suraksha Sanhita* (BNSS) replaces the half-century-old *Criminal Procedure Code* (CrPC) as the procedural criminal law of the land. This change comes as part of the Parliament's effort to decolonise the criminal legal system and sever ties with its colonial underpinnings.[1] While the need for a shift remains essential, it is perhaps most imminent in the criminal law arena, where procedural law occupies a special position, as it bridges the gap between what the law says and what the law does. Maneka Guruswamy eloquently captures this special status while referring to procedural criminal law as the "*Accused's Constitution*".[2]

[1] Ministry of Law and Justice, *India's Progressive Path in the Administration of Criminal Justice System*, Press Information Bureau (Apr. 21, 2024), https://www.pib.gov.in/PressReleasePage.aspx?PRID=2018392.
[2] Menaka Guruswamy, *Menaka Guruswamy Writes on Centre's Proposed Criminal Code: The Custody Question*, The Indian Express (Aug. 19, 2023), https://indianexpress.com/article/opinion/columns/criminal-code-bills-bharatiya-nyaya-sanhita-criminal-laws-mcoca-ipc-crpc-8920188/.

With this special importance in mind, the Parliament introduced several key changes to the procedural framework. The most ground-breaking among them is the introduction of trial in absentia under Section 356 of the BNSS for *grave offences*.[3] This addition was not born of legislative initiative; rather, it stemmed from the Supreme Court's (SC) recommendation in *Hussain v Union of India*.[4] This discussion is supported by observations of the Jharkhand and Calcutta High Courts, which noted the need to amend the CrPC provision as a legislative remedy to address trial delays.[5] However, despite the Court's endorsement, the introduction of this provision marks a significant departure from settled jurisprudence. It raises pertinent fair-trial questions that warrant closer examination. It is also worth noting that the constitutional validity of the provision has been challenged in the *Mannargudi Bar Association* case[6], which is currently pending before the Supreme Court.[7]

While the statutory introduction under section 356 BNSS has sparked discussion regarding its impact in the Indian context, it is worth noting that the debate on trial in absentia has been long-running in international law and thus provides relevant insights for our discussion. Indeed, the SC noted section 339B of the Bangladesh Criminal Procedure Code as a possible measure to remedy delays in trials caused by accused persons absconding during trial proceedings.

The issues under consideration in this paper also remain of contemporary significance, as the government has begun operationalising the new mechanism. Recently, proceedings were

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[3] Bharatiya Nagarik Suraksha Sanhita, 2023, § 356, No. 46, Acts of Parliament, 2023 (India).
[4] Hussain v. Union of India, (2017) 5 SCC 702.
[5] Hari Singh v. State of Jharkhand, (2018) SCC OnLine Jhar 2534; Kader Khan v. State of West Bengal, (2022) SCC OnLine Cal 1038.
[6] Mannargudi Bar Association v. Union of India & Ors, W.P.(C) No. 625/2024.
[7] Debby Jain, *Bar Association Approaches Supreme Court Challenging Validity of 4 BNSS Provisions*, LiveLaw (Oct. 18, 2024), https://www.livelaw.in/top-stories/supreme-court-bar-association-plea-challenging-bnss-provisions-handcuffing-cognizance-attachment-272884?fromIpLogin=73168.96403563913.

initiated towards conducting in absentia trials against six Pakistani nationals accused in the 26/11 Mumbai attacks, including Hafiz Saeed and Zaki-ur-Rehman Lakhvi.[8] This illustrates the perfect kind of cases for which the provision was included in the BNSS and provides useful guidance in situating our understanding in this paper.

This paper aims to analyse the newly introduced provision of trial in absentia under Section 356 BNSS from the perspectives of the accused and the victim, and to assess whether the need for a fair trial has been balanced against the equally important need for justice. The issue of trial in absentia is a dilemma – a question of 'to be or not to be'. It presents the competing positive and negative implications as manifestations of Herbert Packer's 'Crime Control' and 'Due Process' models.[9] The Crime Control model prioritises swift and efficient identification, prosecution, and punishment of offenders in the interests of public safety and timely justice. The Due Process model, by contrast, views the criminal justice system as an obstacle course that requires scrutiny at every stage to prevent wrongful convictions and protect the accused's rights through formal and fair procedures. The paper uses these models as a lens to analyse trial in absentia, wherein the Crime Control model supports proceeding despite the accused's absence to prevent evasion of justice. In contrast, the Due Process model highlights the accused's inability to defend themselves meaningfully.

Through a close reading of Section 356 of the BNSS, the paper highlights several key issues arising from the current provision. It

[8] Mateen Hafeez, *Ball Set Rolling for Trial in Absentia Against Six 26/11 Pakistani Accused*, The Times of India (Aug. 18, 2026), https://timesofindia.indiatimes.com/city/mumbai/ball-set-rolling-for-trial-in-absentia-against-six-26/11-pakistani-accused/articleshow/133302907.cms; Rajeev Singh, *26/11 Case: Mumbai Police Seek Interpol Route to Try Pakistani Terrorist Hafiz Saeed, 5 Others*, The Times of India (Aug. 21, 2026), https://timesofindia.indiatimes.com/india/26/11-case-mumbai-police-seek-interpol-route-to-try-pakistani-terrorist-hafiz-saeed-5-others/articleshow/133426972.cms.

[9] Herbert Packer, *Two Models of the Criminal Process*, 113 U.PA.L.REV 1 (1964).

also discusses the debate on trial in absentia under international law and draws on insights, placing them within the broader rights-centric framework. While *prima facie* the provision appears to contain several procedural safeguards, a deeper examination reveals that these safeguards are incomplete and in need of strengthening. The paper argues that while the addition of trial in absentia is a conceptually balanced measure, there remains a need to integrate a right of retrial and to strengthen safeguards to prevent excessive state action.

2. Trial in Absentia – A New Addition?

Trial in Absentia refers to the commencement or continuation of a criminal trial *in absentia* or "*in the absence*" of the accused.[10] This is an exception to the regular trial requirement of the accused's presence[11] and is based on the accused's forfeiture of his right[12] by evading the legal process.[13] While the CrPC allowed for a partial trial in absentia by recording evidence in the accused's absence, BNSS, for the first time, has introduced a complete trial-in-absentia provision.[14] Interestingly, while BNSS marks the first time such a measure has been codified and statutorily provided, the Gujarat High Court in 2016 issued a circular directing all subordinate courts to continue trials and pass verdicts even in the absence of the accused.[15]

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[10] Legal Information Institute, https://www.law.cornell.edu/wex/in_absentia (last visited Jul. 4, 2024).

[11] Fawzia Cassim, *The Accused's Right to be Present: A Key to Meaningful Participation in the Criminal Process*, 38 Comp. Int. Law J. South. Afr. 285 (2005).

[12] Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214 (1977).

[13] Priyank Ladoia, Tanmay Sharma and Pranav Tomar, *Trial-In-Absentia: Implications under New Law*, Azb and Partners (2025), https://www.azbpartners.com/wp-content/uploads/2024/07/Part-V-Trial-In-Absentia-Implications-Under-New-Law.pdf.

[14] Sanjana Hooda, *Conducting Trials "In Absentia"*, The Criminal Law Blog (Jul. 25, 2019), https://criminallawstudiesnluj.wordpress.com/2019/07/25/conducting-trials-in-absentia/#_ftn1.

[15] Saeed Khan, *Continue Trial Even If Accused Is Absent: Gujarat HC to Lower Courts,* The Times of India (Jul. 11, 2016),

The CrPC under Section 299 allowed the Court to examine prosecution witnesses and record their statements as evidence in the accused's absence.[16] This was limited in application to cases where the accused had absconded, and there was no immediate prospect of arrest. Additionally, Section 317 CrPC permitted the court to proceed with trial in absentia in case the personal attendance of the accused was not required,[17] or if the accused "*persistently disturbed*" the court's proceedings.[18] These provisions have been retained without any substantive changes under the BNSS framework, as Sections 335 and 355, respectively.[19] However, these CrPC provisions are only partial measures as they do not permit the judgment to be delivered in absentia and are only aimed at recording the prosecution's evidence. They do not provide for a complete trial in absentia.[20] The new trial-in-absentia provision under Section 356 BNSS requires the satisfaction of three essential conditions to conduct a trial in the absence of the accused.[21] It provides that (i) the accused must be a proclaimed offender under law; (ii) must have absconded to evade trial; (iii) there must be no immediate prospect of arrest.[22] The first condition must be read in consonance with Section 84(4) BNSS, which limits the classification of 'proclaimed offender' to offences punishable with ten years or more of imprisonment, life imprisonment or capital punishment.[23] In addition to these requirements, the section provides multiple procedural safeguards to ensure that the accused is communicated with. The Court must

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https://timesofindia.indiatimes.com/city/ahmedabad/continue-trial-even-if-accused-is-absent-gujarat-hc-to-lower-courts/articleshow/53160786.cms.

[16] Code of Criminal Procedure, 1973, § 299, No. 2, Acts of Parliament, 1974 (India).

[17] Code of Criminal Procedure, 1973, § 317, No. 2, Acts of Parliament, 1974 (India).

[18] K.N. CHANDRASEKHARAN PILLAI, R. V. Kelkar's Criminal Procedure 275 (7th Ed. 2021).

[19] Bharatiya Nagarik Suraksha Sanhita, 2023, § 355, No. 46, Acts of Parliament, 2023 (India).

[20] Ladoia, *supra* note 13.

[21] BNSS, *supra* note 3.

[22] Westen, *supra* note 12.

[23] Bharatiya Nagarik Suraksha Sanhita, 2023, § 84(4), No. 46, Acts of Parliament, 2023 (India).

make reasonable attempts to inform the accused about the trial against him by issuing at least two warrants, publishing a court summons in a national/local daily newspaper, informing their friends and relatives, and affixing trial information on a conspicuous part of the accused's residence.[24] The section further provides that the accused's act of actively absconding would be deemed "*as a waiver of the right of such person to be present*" and requires the court to note the reasons in writing.[25] Only once the Court has satisfied the essential requirements and exhausted the procedural safeguards can it proceed with the trial.

These requirements have been noted and affirmed recently by the Allahabad HC in its decision in *Ravi Alias Ravindra Singh v State of UP*.[26] Importantly, the court held that the action of a proclaimed offender evading trial *"shall be deemed to operate as a waiver of the right of such person to be present and tried in person."*[27] The court further directed all concerned courts, public prosecutors and police authorities to proceed in accordance with the new provision and take necessary action within 60 days of the order to conclude in-absentia proceedings.[28]

3. Understanding the Necessity

The need for a trial in absentia provision stems from the need for a strong crime-control mechanism that prevents perpetrators from exploiting the system by absconding and bringing the trial to a halt. This need can be contextualised by referring to Packer's twin models of criminal processes, which provide competing normative lenses for analysing the provision vis-à-vis its need.[29] The objective of holding perpetrators accountable and using the law as a

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[24] Bharatiya Nagarik Suraksha Sanhita, 2023, § 356(2), No. 46, Acts of Parliament, 2023 (India).
[25] Bharatiya Nagarik Suraksha Sanhita, 2023, § 356(1), No. 46, Acts of Parliament, 2023 (India).
[26] Ravi Alias Ravindra Singh v. State of U.P, 2026 SCC Online ALL 4491, 37.
[27] *Id.* at 52.
[28] *Id.* at 54.
[29] Packer*, supra* note 9.

deterrent closely aligns with Packer's Crime Control Model.[30] This model emphasises the importance of an efficient system, whose primary function is to suppress and control crime, ensuring societal safety and public order.[31] Trial in absentia serves the core objectives of the model – holding offenders accountable and reducing crime.[32] The tilt of the provision towards Crime Control, as opposed to the competing Due Process Model, evidences its focus on deterrence and efficiency in substance, thus highlighting the need for procedural safeguards to ensure an overall balanced approach.

The provision allows trials to be concluded in cases where the accused has absconded and cannot be apprehended.[33] It remedies the deadlock created by the accused's unavailability to be present at trial. It ensures the victim's right to justice and to a speedy trial, as guaranteed under Article 21 of the Constitution.[34] This balance is further ensured by providing for trial in absentia only in cases of *grave offences*.[35]

This categorisation is key to ensuring the delicate balance between the state and the victim on one side and the accused on the other.[36] First, it ensures access to justice and closure for victims of serious offences and prevents them from having to continue living with

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[30] *Id.* at 1.
[31] Shanell Sanchez, *The Crime Control and Due Process Models*, Open Oregon Educational Resources (2019), https://openoregon.pressbooks.pub/ccj230/chapter/1-8-due-process-and-crime-control-model/.
[32] Ministry of Human Resources and Development, *Criminal Justice Administration: Models of Criminal Procedure*, Inter-University Centre Of The University Grants Commission (2024), https://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/S000020LA/P000841/M010096/ET/1513752430etext.pdf.
[33] G.S Bajpai, *Trial in Absentia Can Help the Cause of Justice*, THE TRIBUNE (Aug. 18, 2021), https://www.tribuneindia.com/news/comment/trial-in-absentia-can-help-the-cause-of-justice-298606/#:~:text=GS%20Bajpai&text=Trial%20in%20absentia%20(TIA)%20evokes,himself%20in%20an%20open%20court.
[34] SN Sharma, *Fundamental Right to Speedy Trial: Judicial Experimentation*, 38 J.I.L.I. 236 (1996); INDIA CONST. art. 21.
[35] BNSS, *supra* note 25.
[36] Akshath Indusekhar, *The Absentia Dilemma: The Introduction of Trial In-Absentia in Indian Legislation*, Oxford Human Rights Hub (Jan. 16, 2024), https://ohrh.law.ox.ac.uk/the-absentia-dilemma-the-introduction-of-trial-in-absentia-in-indian-legislation/.

the trauma. Secondly, the provision serves as a deterrent against future crimes and against the accused exploiting their right. This approach recognises that less heinous crimes impose a differential burden than grave and heinous offences.[37] Indefinitely delaying trial would be contrary to the ends of justice, deny closure to the victim and defeat the spirit of the law.[38]

The introduction of Section 356 BNSS marks a step towards the Crime Control Model and emphasises efficiency and accountability. It eliminates the loophole that allowed the accused to halt proceedings by absconding from court. Under the new system, once reasonable attempts have been made to summon the accused, the court may proceed with the trial regardless of the accused's presence. This serves as a powerful deterrent to potential perpetrators who plan to escape liability by absconding and ensures justice and closure for the victim. However, the step towards Crime Control raises concerns about the accused's rights and calls for a balance between it and the Due Process model.

4. Key Concerns

The incorporation of trial in absentia raises several key constitutional concerns, as a matter of conceptual understanding of the provision. These concerns are rooted in Packer's Due Process Model,[39] which emphasises procedural fairness and fair trial rights. In the Indian constitutional context, these requirements are enshrined under Articles 14 and 21 of the Constitution.[40] This model, in contrast to the Crime Control Model highlighted above, provides a normative lens for conceiving challenges to the provision and offers fertile ground for formulating revisions to

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[37] Mangal Singh v. Kishan Singh, AIR 2009 SC 1535.
[38] Utkarsh Anand, *No Speedy Trial, No Justice: SC Warns against Eroding System's Credibility*, The Hindustan Times (Feb. 18, 2025), https://www.hindustantimes.com/india-news/no-speedy-trial-no-justice-sc-warns-against-eroding-system-s-credibility-101739818163362.html.
[39] Herbert Packer*, supra* note 9.
[40] INDIA CONST. art. 14 and 21.

ensure a balance between expediency and individual rights. These concerns must be addressed by positing a balanced, effective, and narrowly constructed provision for trial in absentia.

4.1. Right to be Present at Trial and Question of Waiver

The constitutional implications raised by the introduction of trial in absentia stem from whether the accused's right to be present at trial is a fundamental right. This distinction is important because the SC in *Basheshar Nath v Central Income Tax Commissioner* held that individuals cannot waive fundamental rights.[41] Subsequently, the SC in *Jayendra Vishnu Thakur v State of Maharashtra* narrowed this definition and held that the right to be present at trial does not constitute a fundamental right,[42] thereby making it possible to be waived by absconding.[43]

Alternatively, even if the right to be present at trial is accepted as a fundamental right, the provision is not affected by the prohibition on the waiver of fundamental rights imposed by *Basheshar Nath*. This is because while the wording of Section 356 mentions the phrase *"waiver of right",*[44] the provision's true nature is that of a reasonable restriction. The SC in *Chintaman Rao v State of Madhya Pradesh* has held that reasonable restrictions are restrictions that balance individual liberties with societal needs and are not arbitrary or excessive.[45] As has been rightly argued, the provision aims to reach a delicate balance between the rights of the victim and the accused and is thus structurally similar to reasonable restrictions.[46] This aim is in line with the requirement of 'procedure established

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[41] Basheshar Nath v. Central Income Tax Commissioner, AIR 1959 SC 149; Nathaniel L. Nathanson, *Waiver of Constitutional Rights in Indian and American Constitutional Law*, 4 J.I.L.I 157 (1962).
[42] Jayendra Vishnu Thakur v. State of Maharashtra, (2009) 7 SCC 104.
[43] James G. Starkey, *Trial in Absentia*, 53 S.J.L.R. 721,724 (1979).
[44] BNSS, *supra* note 25.
[45] Chintaman Rao v. State of Madhya Pradesh, AIR 1951 SC 118.
[46] Avantika Jain and Arnav Sinha, *Reconciling Rights: An Analysis of Section 356 of BNSS*, The Crime & Justice Blog (Apr. 11, 2025), https://crimeandjustice.blog/2025/04/11/reconciling-rights-an-analysis-of-section-356-of-bnss/.

by law' under Article 21 as well as the theoretical understanding emanating from Packer's 'Due Process' model, and thus overcomes the protective ambit of Article 21. This distinction is relevant to conceptualising the provision as a reasonable restriction because it circumvents the issue of waiver by providing for the forfeiture of rights[47] arising from violations of reasonable restrictions.[48]

This is challenged by understanding the right to be present at trial not as a single right but as a bundle of ancillary rights that form an essential part of a fair trial.[49] These ancillary rights have been explained by the SC in *Natasha Singh v CBI,* and include presenting a defence, receiving legal assistance, cross-examining and adducing evidence in favour of the accused.[50] The accused's absence directly engages the natural justice principle of *audi alteram partem,* as it deprives the accused of the opportunity to personally hear, respond to, and participate in the proceedings.[51]

4.2. Right to Effective Legal Representation for the Accused

However, this analysis overlooks a critical procedural safeguard under Section 356 of the BNSS. Section 356(3) provides that the court shall appoint an advocate to represent the absent accused and their interests before the court.[52] The presence of a legal practitioner for the accused ensures the opportunity to present a defence and to cross-examine the prosecution's evidence. This becomes even more important considering the mandate imposed by Section 356(7), which restricts the right of appeal which is available in ordinary cases.

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[47] Peter Westen, *supra* note 12.
[48] Bhumika Indulia, *Trial in Absentia: A Necessary Evil?*, SCC TIMES (Feb. 7, 2023), https://www.scconline.com/blog/post/2023/02/07/trial-in-absentia-a-necessary-evil/amp/.
[49] Criminal Justice Administration*, supra* note 32.
[50] Natasha Singh v. CBI, (2013) 5 SCC 741.
[51] Maneka Gandhi v. Union of India, (1978) 1 SCC 248.
[52] Bharatiya Nagarik Suraksha Sanhita, 2023, § 356(3), No. 46, Acts of Parliament, 2023 (India).

However, the mere presence of a lawyer does not ensure 'effective' legal representation.[53] *Zahira Habibullah Sheikh v State of Gujarat* has emphasised the importance of 'effective' legal representation and its nexus with fair trial.[54] *Anokhilal v State of Madhya Pradesh* held that effective legal representation is an essential requirement of due process.[55] 'Effective' legal representation can be ensured only by allowing the accused to be represented by counsel of his choosing.[56] Article 22(1) of the Constitution guarantees this right to engage a lawyer "*of his choice*".[57] While Section 356 provides for the Court's appointment of a legal practitioner for the accused, it fails to establish any guidelines to ensure effective representation. It disturbs the delicate balance required for trial in absentia.[58] This imbalance must be corrected by providing safeguards to ensure access to effective representation.[59] However, it is important to note that the lack of effective legal representation is not unique to trial in absentia; it is a deeper structural problem in the criminal justice system. Nonetheless, its significance becomes particularly pronounced in the context of in absentia trials where the accused's physical absence limits their ability to personally instruct counsel, clarify key factual circumstances and participate in preparing their defence. The argument, therefore, highlights the unique challenges

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53 Abhinav Sekhri, *Dancing in the Dark: The Right to Effective Legal Assistance in India*, 4(3) Comp. Const. L. & Admin. L.Q. 10 (2019).
54 Zahira Habibullah Sheikh v. State of Gujarat, AIR 2006 SC 1367.
55 Anokhilal v. State of Madhya Pradesh, (2019) 18 SCR 1196.
56 Yash Mittal, *Legal Aid Must Be Effective; Prosecutors Must Ensure Fair Trial: Supreme Court Issues Guidelines To Legal Aid Lawyers, Prosecutors*, LIVELAW.IN (Dec. 2, 2024), https://www.livelaw.in/supreme-court/legal-aid-must-be-effective-prosecutors-must-ensure-fair-trial-supreme-court-issues-guidelines-to-legal-aid-lawyers-prosecutors-277034.
57 INDIA CONST. art. 22, cl. 1.
58 Divyansha Goswami, *Re-Imagining Kafka's Courtroom: Unpacking the Procedural Challenges of Trial-In-Absentia Under the New Criminal Procedure*, LiveLaw (Oct. 8, 2024), https://www.livelaw.in/articles/re-imagining-kafkas-courtroom-unpacking-procedural-challenges-trial-in-absentia-new-criminal-procedure-271902.
59 Anupama Arigala, *Trial in Absentia – A Necessary Evil?*, SCC Times (Feb. 7, 2023), https://www.scconline.com/blog/post/2023/02/07/trial-in-absentia-a-necessary-evil/; Commonwealth Human Rights Initiative, *Hope Behind Bars? Status Report on Legal Aid for Persons in Custody*, Commonwealth Human Rights Initiative (Sept. 18, 2018), https://www.humanrightsinitiative.org/publication/hope-behind-bars-status-report-on-legal-aid-for-persons-in-custody.html.

presented by the inclusion of trial in absentia within a criminal legal system that lacks an effective legal representation framework.

4.3. Absence of Provision for the Accused's Statement under Section 351 BNSS

Another significant concern for the accused is the recording of the accused's statement under Section 351 BNSS (Section 313 CrPC).[60] This statement allows the accused an opportunity to explain the evidence presented against him by the prosecution. This provides the accused a chance to convince the court that the charges against him are invalid and assuage the court by justifying the testimony and evidence presented against him.[61] Importantly, this statement is not recorded under oath, and its contents cannot be used against the accused at a later stage.[62] The trial in absentia scheme envisaged under Section 356 makes no special provision for this statement and thereby deprives the accused of a vital tool to prove his innocence. Combined with the lack of access to effective legal representation, this lack tips the scales against due process and renders the section vulnerable to constitutional and due-process infirmities.

5. Problems with the Bare Text

The wording of Section 356 raises several issues that require closer examination and legislative intervention. While the Court can remedy some of these issues through interpretive tools, legislative enactment is the more efficacious approach to ensure uniformity.

First, Section 356(1) provides that the trial cannot be initiated unless a minimum period of 90 days has elapsed since framing the

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[60] Bharatiya Nagarik Suraksha Sanhita, 2023, § 351, No. 46, Acts of Parliament, 2023 (India).
[61] Surepalli Prashanth, *Scope and Significance of Examination of Accused U/S.313 Cr.P.C*, 2 Indian J. Integr. Res. Law 396 (2022).
[62] Pushkraj Deshpande & Yohaan Abraham, *Overview of Criminal Investigations and Trials under BNSS, BNS, BSA - Part II*, Bar & Bench (Jun. 28, 2024), https://www.barandbench.com/view-point/overview-criminal-investigations-and-trials-bnss-bns-bsa-part-ii.

charges.[63] Section 251(2) BNSS (which reiterates the position under CrPC) requires the accused's presence for the framing of charges.[64] A harmonious construction of these two provisions implies that Section 356 only applies to people who abscond after the framing of charges and during the pendency of the trial.[65] This restricts the provision's application and defeats the legislature's intention. The resulting defeat of the provision's objective would then raise a question about the need for such a toothless position itself.

This issue came up for consideration before the Allahabad HC in *Ravinder Singh* where the court considered the situation of an accused absconding at the stage of framing of charge and after noting several relevant provisions under the BNSS holds that the court *"shall appoint amicus curiae/advocate to collect the record of the case on behalf of the proclaimed offender to defend the absconded accused in his absence at every stage of the court proceedings."*[66] However, the court did not provide any detailed reasoning or interpretation to support this conclusion, and thus, the door on this question remains open.

Importantly, it remains possible to delineate a reasoning to include the framing of charge within the ambit of the provision through the judiciary adopting a textual interpretation, especially in light of the heading of section 356 BNSS, including the words *"inquiry, trial or judgment."*[67] The word "inquiry" has been defined under section 2(1)(k) as being every proceeding before a Magistrate or court other than a trial. It is settled law that a trial begins after the framing of a charge,[68] and therefore, framing of a charge is covered under "inquiry" as defined under section 2(1)(k). Nevertheless, such a

[63] BNSS, *supra* note 25.
[64] Bharatiya Nagarik Suraksha Sanhita, 2023, § 251(2), No. 46, Acts of Parliament, 2023 (India).
[65] Project 39A, *Criminal Law Bills 2023 Decoded #11: Proclaimed Offenders and Trials in Absentia*, The P39A Criminal Law Blog (Nov. 6, 2023), https://p39ablog.com/2023/11/criminal-law-bills-2023-decoded-11-proclaimed-offenders-and-trials-in-absentia/.
[66] Ravi Alias, *supra* note 26, at 10.
[67] Bharatiya Nagarik Suraksha Sanhita, 2023, § 356, No. 46, Acts of Parliament, 2023 (India).
[68] Hardeep Singh v. State of Punjab, AIR 2014 SC 1400, 13.

reading opens the door to judicial ambiguity and divergence and runs contrary to the spirit behind the overhaul of the criminal legal system.

Secondly, the current framework provides that the provision shall apply only to cases of grave offences punishable by 10 or more years' imprisonment.[69] However, Clause 8 allows the state to expand the provision's scope through the notification mechanism.[70] Such unrestricted power to add offences is open to potential misuse and arbitrary state action.[71] The potential for misuse and arbitrary action under the provision casts a long shadow and raises questions that must be addressed when assessing its constitutional validity.

However, this issue is not hypothetical or merely potential misuse; rather, it involves real actions by states. States like Maharashtra,[72] Tamil Nadu,[73] and Mizoram[74] have invoked section 356(8) to enlarge the scope of the provision to cover all instances under section 84(1) of the BNSS.[75] This is pertinent, as Section 84(4) provides for the understanding of a proclaimed offender and applies only to *grave* offences punishable with imprisonment of 10 years or more.[76] On the other hand, Section 84(1) is applicable in case of any person who is absconding and against whom a warrant

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69 BNSS, *supra* note 25.

70 Bharatiya Nagarik Suraksha Sanhita, 2023, § 356(8), No. 46 , Acts of Parliament, 2023 (India).

71 Pushkraj Deshpande, *supra* note 62.

72 Government of Maharashtra, Home Department, *Notification No. BNSS-0425/CR-.47/Spl-9*, Government of Maharashtra (Aug. 14, 2025).

73 Ram Sundaram, *TN Govt Empowers Cops, Courts to Act Against Absconders Under BNSS Section 356*, Times of India (Oct. 12, 2025), https://timesofindia.indiatimes.com/city/chennai/tn-govt-empowers-cops-courts-to-act-against-absconders-under-bnss-section-356/articleshow/124490029.cms?utm.

74 Government of Mizoram, Home Department, *Notification No. C-32012/9/2025-HM-Part (1)*, Government of Mizoram (Jul. 21, 2025), https://home.mizoram.gov.in/uploads/qms/09fa04984bba8c33b5ed14a5cbcde18e/in-pursuance-of-section-1875-of-the-bharatiya-nagarik-suraksha-sanhita-2023.pdf.

75 Bharatiya Nagarik Suraksha Sanhita, 2023, § 84(1), No. 46, Acts of Parliament, 2023 (India).

76 Bharatiya Nagarik Suraksha Sanhita, 2023, § 84(4), No. 46, Acts of Parliament, 2023 (India).

has been issued.[77] This extends the application of the in-absentia mechanism under Section 356 BNSS to virtually all offences, runs counter to the spirit of the provision, which reserves its application only for *grave* offences, and thus undermines the doctrinal foundations of the provision. Additionally, it creates a situation in which an offence chargeable under the same central substantive criminal statute would be treated substantially differently across states. The unfettered discretion available to the government to expand the provision's scope undermines the very rationale for its need and therefore presents a compelling problem.

Thirdly, the provision provides many procedural safeguards to ensure that the commencement of the trial is communicated to the accused and to ascertain that he is intentionally absent from the trial.[78] There is a lack of clarity on whether these safeguard provisions will be read as part of the proclamation procedure outlined in Section 84 or as additional measures required to trigger Section 356.[79]

Fourthly, the standard proclamation format under Form 5 of Schedule 2 does not address the commencement of the trial and cannot be taken to satisfy the procedural safeguards.[80] The lack of a specified uniform format can lead to divergent actions by different states and raise inconsistencies regarding procedural aspects of the proclamation notice, especially as to whether a separate notice is required to intimate the initiation of the trial. This non-inclusion also detracts from the comprehensive overhaul and procedural simplification that underpin the introduction of the new criminal laws.

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77 Bharatiya Nagarik Suraksha Sanhita, 2023, § 84(1), No. 46, Acts of Parliament, 2023 (India).
78 BNSS, *supra* note 24.
79 Bharatiya Nagarik Suraksha Sanhita, 2023, § 84, No. 46, Acts of Parliament, 2023 (India).
80 Bharatiya Nagarik Suraksha Sanhita, 2023, sched. II, Form 5, No. 46, Acts of Parliament, 2023 (India).

Fifthly, the provision fails to distinguish between intentional and unintentional absences on the part of the accused.[81] Both of these cases must be dealt with separately to ensure the proper dispensation of justice.[82] Common administrative hurdles in issuing and delivering summons to the accused accentuate this issue.[83] The BNSS does not change the mechanism for issuing summonses, warrants, and proclamations and, given the current deficient state, opens the door to a situation in which a person can not only be declared a proclaimed offender but also tried and convicted – all without his knowledge.

Lastly, there is a lack of clarity regarding the probative value of evidence recorded in absentia in cases of appeal. This uncertainty becomes significant when an appellate court remands the matter to the trial court on substantive questions of fact. It remains an open question whether the evidence recorded in the absence of the accused can continue to be relied upon, or whether it must be recorded afresh in the presence of the accused. This is especially the case when there is non-compliance with procedural safeguards. The lack of clarity increases the possibility of procedural irregularity and, in turn, the likelihood that cases will be remanded to trial courts, resulting in an indefinite extension of trials and defeating the very purpose of the provision's introduction.

These problems dilute the legislature's intention, opening the door to executive excesses. Resolving these issues is central to giving effect to the provision's intention and balancing it against the accused's due process rights. Ensuring this balance is central to the provision's constitutional validity.

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[81] Sandeep Devashish Das, Kanak Malik & Tanishq Juneja, *Absent but Accountable: India's New Procedure for Trials in Absentia*, The Legal 500 (2025), https://www.legal500.com/guides/hot-topic/absent-but-accountable-indias-new-procedure-for-trials-in-absentia/.
[82] Jayendra Thakur, *supra* note 42.
[83] Pushkraj Deshpande, *supra* note 62.

6. International Insights

International law recognises the right of the accused to be present at trial as an essential human right.[84] Article 14(3)(d) of the ICCPR expressly recognises the accused's presence as a mandatory requirement for a fair trial.[85] This principle has been enunciated and upheld by various ad hoc international criminal tribunals, such as the International Criminal Tribunal for Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR").[86] The Rome Statute maintains this position in establishing the International Criminal Court ("ICC").[87] The right to be present at trial finds an essential nexus with the guarantee of due process and fair trial.[88] While there are exceptions, such as in cases of confirmation of charges or of the accused's disruption of the trial, trials in absentia are generally not permissible under international criminal law. They are strictly forbidden when the accused cannot be found or has fled the court's enforcement.[89]

However, such an understanding overlooks practical realities by overemphasising the accused's rights and underemphasising the victim's right to justice. Such an attitude erodes trust in the international criminal framework and calls into question its effectiveness as a tool for justice. Indeed, the Nuremberg Tribunal, which forms the foundation of the modern international criminal order,[90] allowed trials in absentia in limited cases where the accused

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[84] International Bar Association, *Report on the "Experts' Roundtable on Trials in Absentia in International Criminal Justice*, International Bar Association (Sept. 2016), https://www.ibanet.org/document?id=Experts-roundtable-trials-in-absentia.
[85] International Covenant on Civil and Political Rights art. 14(3)(d), Dec. 16, 1966, 999 U.N.T.S. 171.
[86] Statute of the International Criminal Tribunal for the Former Yugoslavia art. 21(4)(d), May 25, 1993, 32 I.L.M. 1192; Statute of the International Criminal Tribunal for Rwanda art. 20(4)(d), Nov. 8, 1994, 33 I.L.M. 1598.
[87] Rome Statute of the International Criminal Court art. 63(1), July 17, 1998, 2187 U.N.T.S. 90.
[88] Shanell Sanchez, *supra* note 31.
[89] Shouvik Kumar Guha, *The Concept of Trials in Absentia in International Criminal Law and the Special Tribunal for Lebanon: An Overview*, 1 CULJ 11 (2012).
[90] Dennis J. Hutchinson, *Tribunals of War: A History Lesson in Mass Crimes*, Chicago Tribune, Nov. 18, 2001, at C21.

"has not been found" or "in the interest of justice".[91] This is echoed by the UNHRC's interpretation in *Mbenge v Zaire*, which upheld the right under Article 14(3)(d) as qualified rather than absolute.[92] The UNHRC General Comment No. 13 also qualifies the right in exceptionally justified cases.[93] Despite the qualification of the right,[94] the ICTY, ICTR, and ICC provide only for a partial trial in absentia, in the form of procedural rules governing the confirmation of charges and the issuance of an arrest warrant.[95]

A major shift was noted in the creation of the Special Tribunal for Lebanon (STL), which, under Article 22, provided for an absolute trial in absentia in cases where the accused has expressly waived his right, has not been handed over to the tribunal, or has absconded.[96] The STL provides that for a trial in absentia to proceed, it is essential to ensure that the notice was served to the accused or made public and that a defence counsel represents the accused's interests.[97] While such a provision seems to tip the scales away from due process,[98] Article 22(3) of the STL rebalances them by providing for a right of retrial in cases where the accused was represented by defence counsel not of his choice.[99]

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91 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 12, Aug. 8, 1945, 82 U.N.T.S. 279.
92 Monguya Mbenge v. Zaire, Communication No. 16/1977, U.N. Doc. A/38/40, at 134 (1983).
93 Human Rights Comm., General Comment No. 13: Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Art. 14), ¶ 11, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994).
94 Maurice Meli, *Trials in absentia: Erosion of the rights of the accused? A comparative study*, Faculty Of Laws, University Of Malta (2016), https://www.um.edu.mt/library/oar/handle/123456789/17510.
95 Geert-Jan Alexander Knoops, *An Introduction To The Law Of International Criminal Tribunals*, 327–341 (Brill Nijhoff 2014).
96 Statute of the Special Tribunal for Lebanon art. 22(1), annex, S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007).
97 Statute of the Special Tribunal for Lebanon art. 22(2), annex, S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007).
98 Chris Jenks, *Notice Otherwise Given: Will in Absentia Trials at the Special Tribunal for Lebanon Violate Human Rights?*, 33 Fordham Int'l L.J. 57 (2009).
99 Statute of the Special Tribunal for Lebanon art. 22(3), annex, S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007).

7. Conceptualising A Right Of Retrial

A close reading of the position under international law reveals two useful insights. First, a trial in absentia is valid only in a select class of cases. This is drawn from the limited jurisdiction of the ad hoc tribunals and the ICC when adjudicating the most severe international crimes.[100] This narrow scope is echoed under Section 356 BNSS, which restricts trial in absentia to grave offences. Secondly, the STL balances a complete trial in absentia by affording the accused the right of retrial. This right requires the accused to present himself before the tribunal.[101] However, Section 356 incorporates a complete trial-in-absentia mechanism without a right to seek retrial and fails to balance the rights of the accused and the victim. The lack of retrial rights within the Indian trial-in-absentia scheme disturbs the delicate balance between the demands of fair trial and justice. It undermines the provision's benefits to the criminal justice system by depriving the accused of due process rights. It is imperative to incorporate a right of retrial or a *de novo* trial within the provision to achieve harmony. The example from STL provides useful insight. This example is also echoed in the judgment of the ECtHR in *Sejdovic v Italy,* wherein the court posited the twofold safeguards that must accompany a valid trial in absentia, i.e., valid notification and the right of retrial.[102]

While there is no right to retrial under Section 356, there is a right to appeal, albeit with a 3-year limitation. Notably, retrial is not a new addition to the legal framework and is within the appellate court's powers. Section 427(b)(i) BNSS provides the appellate court with the power to commit the accused for retrial.[103] However,

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[100] Astrid Reisinger Coracini, *The International Criminal Court's Exercise of Jurisdiction over the Crime of Aggression – at Last ... In Reach ... Over Some*, 2 GoJIL 745 (2010).
[101] Mohammad Hadi Zakerhossein, *In Absentia Proceedings*, Max Planck Encyclopedias Of International Law, Oxford Public International Law, (Jul. 2021), https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3314.013.3314/law-mpeipro-e3314.
[102] Sejdovic v. Italy, 42 Eur. H.R. Rep. 17 (2006).
[103] Bharatiya Nagarik Suraksha Sanhita, 2023, § 427(b)(i), No. 46, Acts of Parliament, 2023 (India).

judicial precedents have established that this power should be exercised exceptionally, only in cases where the omission or irregularity has occasioned a failure of justice.[104] As a result, courts order a *de novo* trial only sparingly. Still, it nevertheless remains as a narrow course of action that may be adopted by appellate courts.

The submission advanced here is that the proceeding in case of trial in absentia *ipso facto* satisfies the exceptional threshold requirement and therefore should trigger the relief of retrial. This must be made substantive by expanding the right of appeal to a mandatory retrial. However, the three-year limitation period prescribed by the proviso to Section 356(7) should be retained to ensure that procedural delays are avoided.[105] This secures the accused's right to a fair trial while balancing the victim's right to finality and justice.

A key reason for this submission is the recording of the statement under Section 351 BNSS.[106] While a re-trial in the accused's presence would include such a statement, a trial in absentia would not entail such a right. The absence of a retrial provision under Section 356 creates an imbalance and fails to ensure effective legal representation for the accused. Including a right of re-trial would ensure the accused's access to effective legal representation and the opportunity of real and meaningful participation in the trial through the availability of tools like effective cross-examination and the opportunity to give a statement under Section 351 BNSS, wherein the court allows the accused an opportunity to explain any incriminating circumstances. This would strengthen the accused's protections while preserving the finality achieved by the original in absentia trial, thereby balancing Due Process with Crime Control.[107] The absence of these tools seriously prejudices the

[104] Ajay Kumar Ghoshal v. State of Bihar, 2017 SCC OnLine SC 74.
[105] Bharatiya Nagarik Suraksha Sanhita, 2023, § 356(7), No. 46, Acts of Parliament, 2023 (India).
[106] Bharatiya Nagarik Suraksha Sanhita, 2023, § 351, No. 46, Acts of Parliament, 2023 (India).
[107] Bharatiya Nagarik Suraksha Sanhita, 2023, § 351, No. 46, Acts of Parliament, 2023 (India).

accused, renders the other remedies that may be granted on appeal insufficient, and thus makes a case for the mandatory relief.

A plausible counter to incorporating a mandatory right of retrial under the provision can be traced to the very purpose behind the provision – the need to reduce delay and achieve finality in criminal trials. Conducting a retrial appears to be antithetical to the very purpose of trial in absentia and gives rise to the same problems the provision aims to remedy. However, this *prima facie* approach fails to consider that the right of retrial crystallises only upon the accused presenting himself post-conviction. This indicates that the trial has already been completed and he has been convicted of the offence, satisfying the requirement of finality for the victim. The right of retrial merely provides the accused with an opportunity to obtain effective legal representation, present evidence in his favour, and examine the evidence presented against him. The prosecution's case would remain the same as before, except for the added responsibility of examining and rebutting the evidence presented by the defence. Additionally, the requirement for the accused to present himself ensures that he is not able to unduly benefit from the right by absconding again and further incentivises the accused to present himself and 'have his day in court'.

This incorporation can be brought either through a judicial interpretation of 'appeal' under Section 356(7) of the BNSS or by way of a statutory enactment.[108] While the latter remains more desirable, the former, being posited by the SC, would also remedy the critical flaw in the provision and balance the scales between fair trial and justice. This interpretation would, in turn, rest on long-established principles of due process and fair trial and help advance the true purpose of the provision.

[108] Bharatiya Nagarik Suraksha Sanhita, 2023, § 356(7), No. 46, Acts of Parliament, 2023 (India).

8. A Balanced Way Ahead

The addition of Section 356 to the BNSS is a pivotal step in harmonising the accused's right to a fair trial and due process with the practical and pressing requirements of justice and crime prevention. Packer's conceptualisation of the Crime Control and Due Process models eloquently captures this conflict. The harmonisation of the conflict between them requires balancing the victim's need for justice, the State's responsibility to reduce crime and the accused's right to a fair trial.

The current provision for trial-in-absentia is a step in the right direction towards reaching this delicate balance. However, it misses the mark by failing to ensure the accused has access to effective legal representation. The incorporation of a right of retrial would resolve this concern and balance the scales with due process. The current provision also faces an issue regarding its scope. While Clause 8 allows the government to expand the scope of the provision using the notification mechanism, a conjunctive reading of the provision with Section 251(2) restricts its scope to only individuals who abscond during the trial.

It becomes clear that, while the introduction of trial in absentia is a much-needed step in the right direction, the provision needs refinement. It is important to give teeth to the provision, close the door to potential misuse and create a right of retrial as a balancing measure. Only then would we be able to harmonise the competing interests and achieve a balance between rights and practical necessity.

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ARTICLE

LT. SAMUEL KAMALESAN V. UNION OF INDIA: LIMITS OF RELIGIOUS AUTONOMY IN THE INDIAN ARMED FORCES

Samhita Baruah* *&* Pushkar Bapatla**

Special Leave Petition (Civil) No. 25838/2025
Supreme Court of India
Order dated 25 November 2025
Coram: Chief Justice Surya Kant and Justice Joymalya Bagchi

Abstract

Lieutenant Samuel Kamalesan's dismissal from the Indian Army raises a constitutional conflict between individual conscience, protected under Article 25 of the Indian Constitution, and institutional military necessity, insulated under Article 33. The petitioner, being a Protestant Christian officer, was administratively terminated without pension or gratuity for refusing to enter the sanctum sanctorum of the regimental temple during mandatory religious parades. The Supreme Court's superficial dismissal of the Special Leave Petition, together with the characterisation of the officer as a "misfit" led by "religious ego", exemplifies a doctrine of near-absolute judicial deference to military command determinations on matters of institutional discipline. This commentary undertakes a rigorous legal analysis of the judgment's application of the Essential Religious Practices ('ERP') test, its rejection of proportionality, and its tacit reliance on colonial-era structural legacy. The analysis further interrogates whether Article 33, whilst constitutionally valid, has evolved into a mechanism that prioritises military tradition over fundamental constitutional rights, thereby creating an internal contradiction within India's constitutional framework.

Keywords: Right to Religion; Indian Army; Essential Religious Practices; Article 33.

* Samhita Baruah, Student, Gujarat National Law University, Gandhinagar.
** Pushkar Bapatla, Student, Gujarat National Law University, Gandhinagar.

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1. Introduction

The Indian Constitution establishes juridical imbalance for members of the Armed Forces. Part III, which guarantees fundamental rights to all citizens, is expressly subject to abrogation through Article 33[1], which empowers Parliament to determine the extent to which these rights shall be "restricted or abrogated." In *R. Viswan v. Union of India (1983)*[2], the Supreme Court held that this provision balances "the maintenance of discipline" and the liberties enjoyed by the civilian population of India. This creates what may be termed a "differential citizenship regime", a state of "diminished fundamental rights" where the soldier's status is constitutionally bifurcated from the civilian polity.[3]

Article 25, the guarantor of religious freedom, provides that "subject to public order, morality and health... all persons are equally entitled to freedom of conscience." [4] However, for military personnel, this undergoes a constitutional metamorphosis.[4] In *Prithi Pal Singh Bedi v. Union of India (1982)*,[5] the Court noted that

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[1] *Id.*
[2] R. Viswan v. Union of India, (1983) 3 SCC 401, 405.
[3] Uday S. Mehta, Madhav Khosla, CONSTITUTIONALISM, IN THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 15, 22 (Oxford Press 2016).
[4] INDIA CONST. art. 25, cl. 1.
[5] Lt. Col. Prithi Pal Singh Bedi v. Union of India, (1982) 3 SCC 140, 152.

the "appetite for discipline... can swallow many fundamental rights." Consequently, Article 33 permits restrictions on Article 25 that would be impermissible otherwise, prioritising the "collective faith of the command" over individual sentiment.[6]

The institutional embodiment of this principle resides in the *Sarva Dharma Sthal (SDS)*. It is a multi-faith prayer hall intended to operationalise the constitutional ideal of secularism.[7] Paradoxically, the *Kamalesan* judgment demonstrates that this may function as a "*compulsory ritual-participation framework*" that pressures minorities to conform to majoritarian practices.[8] This raises the question of whether constitutional secularism, when operationalised through Article 33, mandates institutional respect for pluralism or permits, and indeed enforces, compulsory participation in majoritarian religious rituals as a condition of service.[9]

2. Facts and Procedural History

2.1. Commission and Regimental Posting

Lieutenant Samuel Kamalesan was commissioned into the Indian Army on 11 March 2017, joining the 3 Cavalry Regiment, an armoured unit characterised by a "fixed class composition."[10] Under this colonial organisational structure, operational squadrons remain divided by caste and religion: Squadron A (Sikh), Squadron B (Jat), and Squadron C (Rajput).[11] Despite the post-independence shift toward "All-India Class" recruitment in newer regiments, these historical organisational structures still exist, creating a unique

[6] ABHINAV CHANDRACHUD, REPUBLIC OF RELIGION: THE RISE AND FALL OF COLONIAL SECULARISM IN INDIA 112-14 (Viking 2020).
[7] Army Order (AO) 1/2005, ¶ 4 (India).
[8] Ex-Sepoy Kamalesan v. Union of India, W.P. No. 15635 of 2019.
[9] Gautam Bhatia, *The Freedom of Conscience and the Armed Forces*, Indian Const. L. & Phil. (May 22, 2020).
[10] STEPHEN P. COHEN, THE INDIAN ARMY: ITS CONTRIBUTION TO THE DEVELOPMENT OF A NATION 185-88 (Oxford University Press 1971).
[11] Amit Ahuja, Abhinav Chandrachud & Devesh Kapur, *The Indian Army and the Post-colonial state*, in the Oxford Handbook of the Indian Constitution 320 (2016).

leadership environment for officers of minority faiths.[12] Kamalesan, a Protestant Christian, was appointed Troop Leader of Squadron B, a role that required him to command Jat soldiers.[13]

2.2. The "Eat, Pray, and Fight Together" Doctrine

The 3 Cavalry Regiment maintains a Hindu temple (*Mandir*) and a Sikh *Gurdwara* as its primary religious facilities. The unit's operational philosophy is dictated by the "Eat, Pray, and Fight Together" doctrine, which posits that unit cohesion and combat effectiveness are contingent upon officers participating in the religious observances of their subordinates.[14] This doctrine is codified in institutional memory and specific Army Orders, which emphasise that "the officer must be one with the men" to maintain morale.[15] Regular religious parades required officers not only to attend but also to participate in rituals, including entering the *sanctum sanctorum* (*garbhagriha*) for *puja* and *aarti*.[16]

2.3. Conflict of Conscience and Command

Kamalesan's monotheistic theological convictions prohibited participation in what he perceived as idol worship.[17] While he observed regimental etiquette by removing his shoes and wearing religious headgear, he declined to enter the inner sanctum. In June 2017, the Commandant issued an explicit oral direction for Kamalesan to enter the *sanctum sanctorum*. Kamalesan's refusal, grounded in his Article 25 right to "freedom of conscience," was categorised by the command as a breach of Section 41 of the Army Act, which mandates absolute obedience to "lawful commands".[18]

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12 Compare Army Order (AO) 1/2005 (governing *Sarva Dharma Sthals*) with Army Act, 1950, § 41.

13 Samuel Kamalesan v. Union of India, W.P.(C) 7564/2021, ¶ 4.

14 PRADEEP P. BARUA, THE STATE AT WAR IN SOUTH ASIA 245-47 (2005).

15 *Regulations for the Army* ¶ 289 (2010) (India).

16 *Kamalesan*, W.P.(C) 7564/2021, at ¶ 8.

17 *Id.* at ¶ 12 (detailing the petitioner's theological objections).

18 Army Act, 1950, § 41(1), No. 46, Acts of Parliament, 1950 (India) ("Any person subject to this Act who disobeys in such manner as to show a wilful defiance of authority any lawful command...shall, on conviction by court-martial, be liable to suffer death...").

2.4. Informal Sanctions and Coercive Pressure

Following his refusal, Kamalesan alleged a pattern of systematic professional marginalisation, including exclusion from *patti* parades and denial of nominations for career-essential courses and UN missions.[19] These allegations highlight the "informal disciplinary regime" often used to enforce cultural conformity within the ranks before formal legal mechanisms are triggered.[20]

2.5. Termination via Rule 14(2)

On 31 January 2019, a Show Cause Notice was issued under Section 19 of the Army Act, *read with* Rule 14(2) of the Army Rules.[21] The Army invoked the "*inexpediency*" proviso of Rule 14(2), bypassing a formal Court Martial because a public trial regarding religious dissent would "*poison the communal atmosphere*" of the regiment.[22] Despite Kamalesan's written defence emphasising his willingness to lead but his inability to violate his conscience,[23] the Central Government dismissed him from service on 03 March 2021, with the forfeiture of all pensionary benefits.[24]

3. Legal Contentions and Judicial Precedent

"Penalty must not 'shock the conscience'…"

3.1. Conflict between Article 33 and Article 25

The petitioner challenged the dismissal under Articles 14, 21, and 25, arguing that while Article 33 permits restrictions on military personnel, such curtailments must satisfy the proportionality standards.[25] Article 33 permits restrictions on fundamental rights of armed forces personnel only "to the extent" necessary for

19 *Kamalesan*, W.P.(C) 7564/2021, at ¶ 15.
20 Gautam Bhatia, The Freedom of Conscience and the Armed Forces, Indian Const. L. & Phil. (22 May 2020).
21 Army Rules, 1954, r. 14(2) (India).
22 *Ex-Sepoy Kamalesan v. Union of India*, (2020) SCC Online Mad 1205.
23 *Id.* at ¶ 21.
24 Samuel Kamalesan v. Union of India, (Supreme Court, 25 Nov. 2025).
25 V. Venkatesan, *SC Upholds Dismissal of Christian Army Officer for Refusing to Enter Temple Sanctum*, Sup. Ct. Observer (Nov. 27, 2025).

discipline and proper discharge of duties,[26] invoking *Modern Dental College v. State of Madhya Pradesh* (2016)[27] and *Anuradha Bhasin v. Union of India* (2020)[28].

Petitioner's partial compliance by attendance at parades and the outer sanctum constituted "*reasonable accommodation*" preserving cohesion without violating his own monotheistic conscience. But, performing *Puja* or *Aarti* in the inner sanctum elevated the symbolic presence to active worship, breaching Article 25(1).[29] He further argued that the absence of mandatory religious parades in the Navy and Air Force proves that such rituals are not "strictly necessary" for operational effectiveness.

The Delhi High Court applied deference, thereby confining the review to procedural regularity and Wednesbury unreasonableness[30] as per *R. Viswan v. Union of India* (1980)[31] and *Union of India v. L.D. Balam Singh* (2002).[32] In the case of *Lt. Samuel Kamalesan*, Article 33 prevailed as a constitutional override once the Army Act was invoked, treating refusal as a threat to cohesion in mixed-faith units. The Supreme Court's dismissal of the SLP further reinforced the institutional autonomy of the Indian Army.

3.2. The "Essential Religious Practices" Limitation

At the heart of the Union's defence lay the restrictive invocation of the Essential Religious Practice doctrine, first articulated in *Commissioner, Hindu Religious Endowments v. Sri Shirur Mutt* (1954)[33], which confines the protection under Article 25 to practices deemed integral to a religion's theology. An affidavit from a pastor of the

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26 INDIA CONST. Art 33.
27 Modern Dental College & Research Centre v. State of M.P., 2016 7 SCC 353.
28 Anuradha Bhasin v. Union of India, 2020 3 SCC 637.
29 *Samuel Kamalesan v. Union of India,* ¶ 4.
30 Named after the 1947 case *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation*, it sets a high bar, meaning courts won't substitute their judgment but will intervene only for "gross" unreasonableness, though newer concepts like proportionality offer stricter review in some contexts.
31 R. Viswan & Ors. v. Union of India & Ors., (1983) 3 SCC 401.
32 Union of India v. L.D. Balam Singh, (2002) 9 SCC 73.
33 Comm'r, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, 1954 SCR 1005.

Church of North India opined that temple entry without rituals aligns with Christian doctrine, characterising the objection as a matter of personal sentiment.[34] On this basis, the case was distinguished from *Bijoe Emmanuel v. State of Kerala* (1986)[35], where the absence of doctrinal contestation regarding the petitioners' faith was central to the Court's protection of individual conscience.

Within this framework, participation in regimental *Sarv Dharm Sthals* was framed as a symbol of unit cohesion and troop morale, rather than as worship sites, thereby rendering participation an obligatory civic duty.[36] Sanctum entry was further reframed as a leadership obligation by relying on *Union of India v. S.K. Rao* (1999).[37] In the absence of a proper factual inquiry into the nature of the art or the impact of the petitioner's conviction, the court uncritically accepted the Army's version of events, treating it as determinative.

3.3. The Validity of "Lawful Command" (Section 41)

A central dispute was whether the order to enter the *sanctum sanctorum* constituted a "lawful command" under Section 41 of the Army Act. The Army maintained that since religious parades are "military duties" essential to cohesion, the order was lawful. Conversely, the petitioner argued that no command that violates the core of Article 25 can be constitutionally "lawful," questioning whether military orders are insulated from judicial review merely by being issued through proper channels.

Section 41 penalises wilful defiance of "lawful commands" with up to 14 years' imprisonment.[38] Invoking this provision, the Union classified the act of leading or participating in sanctum-related activity as a lawful military duty rooted in regimental customs. It was argued that such participation forms part of military cohesion

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[34]Samuel Kamalesan v. Union of India, ¶ 29.
[35] Bijoe Emmanuel & Ors. v. State of Kerala & Ors., (1986) 3 SCC 615.
[36] Samuel Kamalesan v. Union of India, ¶ 73.
[37] Union of India v. Capt. S. K. Rao, (1972) 1 SCC 144.
[38] Army Act, 1950, No. 46, Acts of Parliament, 1950 (India).

and discipline, drawing its support from Section 39 of the Army Act and Army Regulations, including Regulations 332 and 1385.

The Supreme Court's dismissal of the SLP endorsed institutional deference to the army's internal assessment. Establishing an approach that presumes the Army Act's blanket Article 33 compliance, deeming orders lawful by fiat and rendering refusals punishable without rights adjudication. A proportionality framework, as in *Anuradha Bhasin v. Union of India* (2020)[39], would instead require evidence of minimal impairment of rights while achieving disciplinary aims.

3.4. Proportionality of Punishment

The petitioner's dismissal under Section 19, read with Rule 14(2), resulted in the forfeiture of pension after six years of unblemished service. It manifestly violates the proportionality doctrine. As established in *E.P. Royappa v. State of Tamil Nadu* (1974)[40] and *Om Kumar v. Union of India* (2000)[41], any administrative penalties must not "shock the conscience" and require advance exploration of any legal sanctions before invoking terminal actions. Counsel for the petitioner highlighted the Army's failure to consider the least restrictive alternatives, including reassignment to a non-ritual leadership position, delegation of inner-sanctum duties to a JCO, or transfer to a unit that does not require participation in the sanctum.[42]

In analogy to *Lt. Col. Prathiba Singh v. Union of India* (1986)[43], the Court justified the denial of a pension as a means to ward off the erosion of the regimental ethos. The Delhi High Court upheld the penalty, reaffirming the discretionary nature of Rule 14 and the

[39] Anuradha Bhasin v. Union of India, 2020 3 SCC 637.
[40] E.P. Royappa v. State of Tamil Nadu 1974 AIR 555.
[41] Om Kumar v. Union of India (2000), AIR 2000 SC 3689.
[42] Samuel Kamalesan v. Union of India, W.P.(C) 7564/2021, ¶ 48.
[43] Lt. Col. Prathiba Singh v. Union of India, AIR 1982 SC 1413.

procedural impracticability of the certification required under its proviso.[44]

This outcome exposes the structural divergence between Rule 14's and Article 21's procedural fairness mandates. Expedited administrative action circumvents the need to satisfy the proportionality and balancing prongs, allowing severe sanctions without evidence that the least restrictive measures have already been implemented. Judicial reform should require concrete proof that less strenuous measures failed to preserve discipline, thereby necessitating authorised dismissal.

4. Court's Judgement and Ratio

4.1. The "Misfit" Characterisation and Moral Disposition

The Bench described the petitioner as a "complete misfit," who prioritised "religious ego" over institutional cohesion.[45] This rhetorical shift shifted the judicial inquiry away from the legality of the command toward the officer's perceived moral deficiency. By prioritising the insistence on collective conscience and moral defect over a constitutional claim, the Court effectively delegitimised the invocation of Article 25 within a "disciplined force." Such as the Indian Army.[46]

4.2. Subordination of Conscience to the ERP Doctrine

The Supreme Court upheld the High Court's narrow application of the Essential Religious Practices ("**ERP**") test.[47] By relying on a third-party opinion, such as the pastor's advice that temple entry was doctrinally permissible, the Court subordinated individual conscience to external religious authority. This approach ignores the subjective dimension of "freedom of conscience" under Article

[44] Samuel Kamalesan v. Union of India, ¶ 69.
[45] *Id.*
[46] Lt. Col. Prithi Pal Singh Bedi v. Union of India, (1982) 3 SCC 140.
[47] Comm'r, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, 1954 SCR 1005.

25, conflating physical presence with spiritual participation, and allowing the State to dilute religious claims whenever a clerical disagreement exists.[48]

4.3. Absolute Judicial Deference to Military Ethos

The Court concluded that an officer has a duty to "lead by example," asserting that respect for the "collective faith" of a command is an inextricable component of military leadership.[49] In doing so, the Court exercised extreme judicial deference, accepting the Army's assertion that non-participation in religious rituals is inherently divisive, independent of any evidence.[50] Notably, the Court declined to consider the "less restrictive" models utilised by the Navy and Air Force, treating the Army's regimental customs and traditions as necessary to the organisation.

4.4. Rejection of Proportionality

Describing the refusal as "the grossest kind of indiscipline by an army officer,"[51] the Court summarily rejected the proportionality challenge. The judgment omitted any weighing of the petitioner's six-year blemish-free record or the possibility of alternative sanctions.[52] This suggests that in the context of Article 33, a single act of religious dissent can be viewed as a total breach of the contract of service, justifying the harshest administrative penalty, dismissal with forfeiture of all benefits.[53]

4.5. Article 33 as an Expansive Shield

The ruling interprets Article 33 not merely as a power for Parliament to restrict rights by statute, but as a broad shield that

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[48] *Cf.* Bijoe Emmanuel v. State of Kerala, (1986) 3 SCC 615.
[49] Samuel Kamalesan v. Union of India, W.P.(C) 7564/2021, ¶ 59.
[50] R. Viswan v. Union of India, (1983) 3 SCC 401.
[51] The Wire Staff, *Supreme Court Dismisses Christian Army Officer's Plea Against Termination for Refusing to Participate in Regimental Religious Parades*, The Wire (25 November 2025) https://thewire.in/law/sc-upholds-dismissal-of-christian-army-officer-who-refused-to-participate-in-regiments-religious-parades (last visited 08 September 2026).
[52] *Id.*
[53] Army Rules, 1954, r. 14(2), Gazette of India, pt. II, (27 Nov. 1954) (India).

elevates military tradition to the status of "law."[54] By validating a dismissal based on regimental custom, the Court diluted the constitutional requirement that restrictions on Part III rights be "determined by law" enacted by Parliament, potentially allowing administrative practice to override constitutional guarantees.[55]

5. Critical Analysis

5.1. Application of Essential Religious Practice Test

The application of the ERP test is fundamentally misplaced when used to negate claims of individual conscience.[56] By attaching the protection of Article 25 to a pastor's deposition, the Court reduced a constitutional right to a "*clerical clearance*", contradicting the precedent in *Bijoe Emmanuel,* where sincerity of belief was emphasised over institutional dogma.[57] Effectively introducing a concept of "*freedom of conscience*" into an ecclesiastically mediated right, alienating the subjective spiritual experience of the believer.[58]

The flaw in the Court's reliance on the ERP doctrine lies in the very structure of the test itself, which, as scholarly criticism demonstrates, is neither textually sound nor doctrinally coherent[59]. The ERP framework compels constitutional courts to assume a quasi-theological role, i.e., deciding what is "essential," "integral," or "core" to a faith, despite lacking both democratic legitimacy and the institutional competence to arbitrate matters of belief.

As Rushil Batra shows, such an inquiry might be the product of a judicial misreading of Shirur Mutt, which in fact rejected the idea that courts should filter religious practices through an essentialist

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54 INDIA CONST. art. 33.
55 Gautam Bhatia, *The Freedom of Conscience and the Armed Forces*, Indian Const. L. & Phil. (22 May 2020).
56 Comm'r, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, 1954 SCR 1005.
57 Bijoe Emmanuel v. State of Kerala, (1986) 3 SCC. 615, 624-25.
58 Gautam Bhatia, *The Freedom of Conscience and the Armed Forces*, Indian Const. L. & Phil. (22 May 2020).
59 Rushil Batra, *The Essential Religious Practice test: A sorry tale of judicial misreading*, 11 &. 12 INDIAN J. CONST. L. 71-110 (2024)

lens. Yet, subsequent jurisprudence inverted this holding, thereby entrenching ERP as a threshold barrier to Article 25 protection. The result is a test that systematically narrows religious freedom by imposing nearly impossible burdens such as optionality, antiquity, scriptural mandate, and the "but-for" transformation of religion, thereby ensuring that most individual conscience-based claims fail at the threshold, not because they threaten public order or discipline, but because they do not conform to a judicially constructed, homogenised version of faith.[60]

5.2. Bypassing Court Martial

Kamalesan was denied the opportunity to be tried by the court-martial. Though the law allows bypassing the court martial if it is inexpedient and impracticable to conduct the same,[61] the present case does not warrant such a bypass. In the present case, no compelling circumstances were demonstrated to justify dispensing with a formal trial process specifically designed to assess contested facts within the military justice system.

There were several factual issues requiring careful and unbiased adjudication. These included whether Kamalesan's conduct had genuinely impacted unit cohesion or discipline, whether his refusal to participate amounted to "misconduct" under the Army Act, and whether the site in question was in fact a *Sarv Dharm Sthal* or functioned as a *Mandir–Gurudwara*. Such determinations cannot rest on declarations and must be supported by evidence and witness examination to support a reasoned finding.

Moreover, Kamalesan had served in the Army since 2017 and had abstained from participating in religious rituals from the beginning of his service. His continued presence posed no emergent or novel threat to the unit that would have justified immediate administrative action. Allowing him to continue in service until the

[60] *Id.*
[61] Army Rules, 1954, r. 14(2), Gazette of India, pt. II (27 Nov. 1954) (India).

completion of a court-martial would not have undermined discipline but would have ensured procedural fairness and legitimacy in determining the consequences of his conduct.

5.3. Lawful Command vs Constitutional Supremacy

The judicial inclination to treat any directive within the military chain of command as a "lawful command" under the Army Act risks insulating military discretion from constitutional scrutiny.[62] A doctrinally sound approach would maintain that a command that would, if followed, violate a core Article 25 right, without specific parliamentary authorisation under Article 33, is *ultra vires* the Constitution.[63] Under the *Mohammed Zubair* framework, the legal validity of a command must be evaluated against the "secular character" of the State's armed forces.[64]

A closer examination of the statutory framework reveals that the offence under the Army Act has a narrow scope, confined to disobedience of a lawful command. Section 41 is not triggered by mere non-compliance with any directive issued by a superior officer; it presupposes that the command in question is lawful and constitutional in the first place. Consequently, where a superior instructs a subordinate to perform a constitutionally invalid act, the very liability on the subordinate to perform collapses.

An unlawful command cannot generate wilful defiance in the eyes of the law. Compelling participation in religious rituals, when such participation directly infringes an individual's freedom of conscience under Article 25, cannot be characterised as a lawful military order. To treat refusal in such circumstances as punishable insubordination is to disregard constitutional ethos, allowing statutory discipline to override fundamental rights, rather than operating within their limits.

[62] Army Act, 1950, §§ 39-41, No. 46, Acts of Parliament, 1950 (India).
[63] INDIA CONST. art. 33.
[64] Mohammed Zubair v. Union of India, (2017) 2 SCC 115.

5.4. *The Erosion of Proportionality*

In light of settled principles of service jurisprudence, the Kamalesan ruling displays a striking absence of analysis of proportionality.[65] The Court sanctioned the harshest possible penalty – dismissal with forfeiture of all benefits - while ignoring other factors, such as the petitioner's blemish-free record. Nor did it meaningfully examine less restrictive alternatives, including transfer to a non-combatant or all-class unit, which are options routinely employed to reconcile discipline with individual rights.[66]

The judgment proceeds on the troubling assumption that cohesion within the armed forces is so fragile that it is threatened by an individual's refusal to participate in religious rituals. Such reasoning overstates the role of ritual conformity and underestimates the institutional resilience of a professional military. Unity in the armed forces has historically endured far greater diversities and differences of belief, language, and background without affecting organisational discipline or conduct.

More fundamentally, removing a soldier on the premise that non-participation in religious rituals undermines unity implicitly acknowledges that no secular bond is sufficiently strong to hold the forces together. This suggests that patriotism, constitutional loyalty, and shared commitment to service are inadequate as alternatives for maintaining unity in the armed forces. Such an implication is normatively troubling, as it redefines military unity as religiously contingent rather than constitutionally grounded.

5.5. *The Colonial Legacy of Class Composition*

The Court's failure to consider the colonial origins of "fixed class composition" ignores the historical function of these units: preventing armed rebellion by segregating armed forces along caste

[65] Union of India v. G. Ganayutham, (1997) 7 SCC 463 (India).
[66] Samuel Kamalesan v. Union of India, (Supreme Court, 25 November 2025).

and religious lines.[67] The success of all-class units in the Indian Navy and Air Force suggests that regimental cohesion does not necessitate such segregation.[68] By affirming these practices, the Court reinforces a system of "*controlled communalism*" which is at odds with the contemporary scheme of constitutional secularism.

5.6. Institutional Symbolism and Secular Neutrality

The judgment arrives amidst an increasing alignment of military symbolism with majoritarian narratives, exemplified by **Project Udbhav** and the wrongly normalised public characterisation of military ceremonies as an imagery of a certain religion's rituals and practices.[69] The growing normalisation of displaying religious symbols, rituals, and invocations on social media while in uniform, combined with compelled participation in "inclusive" religious observances, risks undermining the functioning of such mechanisms for cultural assimilation rather than promoting genuine pluralism. In such an environment, minority faiths bear a disproportionate burden of conformity, raising serious questions about whether institutional neutrality has quietly given way to symbolic religious alignment.

6. Comparative Analysis

6.1. United States: The Least Restrictive Means Standard

Under the Religious Freedom Restoration Act (RFRA) 1993 and DoD Instruction 1300.17, the U.S. military must accommodate religious exercise unless it demonstrates that denial is the "least restrictive means" of furthering a "compelling governmental interest."[70] Unlike the Indian approach, no "Essential Religious

[67] DAVID OMISSI, THE SEPOY AND THE RAJ: THE INDIAN ARMY, 1860–1940 81-85 (Palgrave Macmillan UK 1994).
[68] Ministry Of Defence, Performance Analysis Of All-Class Vs. Fixed-Class Recruitment (2023) (India).
[69] Rahul Bedi, *The Indian Army's Visible Adherence to the Majority Religion Can No Longer Be Ignored*, THE WIRE (08 December 2025).
[70] 42 U.S.C. §§ 2000bb to 2000bb-4; U.S. Dep't Of Defense, Instruction 1300.17: Religious Liberty In The Military Services (2020, rev. 2024).

Practice" test is applied; the legal threshold is the sincerity, not the doctrinal necessity, of the belief.[71] This has led to routine accommodations for turbans, beards, and hijabs, shifting the burden of proof from the soldier to the institution.[72]

6.2. United Kingdom: Presumptive Accommodation

UK Ministry of Defence guidance mandates that religious dress and observance should be permitted. Unless otherwise specified, these specific, evidence-based operational requirements are sufficient to justify a restriction.[73] The British model respects the individual's right to exercise and express their religion, placing the onus on the Armed Forces to prove that a limitation is proportionate to a legitimate military aim.[74]

6.3. Canada: Strict Proportionality

Canadian military doctrine applies a rigorous "minimal impairment" test to any restriction on Charter Rights.[75] Any limitation on the freedom of conscience must be specifically tailored and supported by evidence of "military necessity," ensuring that constitutional rights are not broad-brushed aside by vague appeals to tradition.[76] Collectively, these models demonstrate that robust religious accommodation is entirely compatible with maintaining elite, disciplined combat forces.

7. Legal and Constitutional Analysis

7.1. The Subordination of Rights to Tradition

The *Kamalesan* ruling effectively subordinates Article 25 rights to uncodified regimental custom. By treating tradition as quasi-

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71 Holt v. Hobbs, 574 U.S. 352 (2015).
72 Cong. Rsch. Serv., R44411, Religious Accommodations In The Armed Forces (2024).
73 Ministry Of Defence, Jsp 760: Tri-Service Regulations For Leave And Other Types Of Absences (2024) (UK).
74 Human Rights Act 1998, C. 42, Sch. 1, Art. 9 (Uk).
75 Canadian Charter Of Rights And Freedoms § 2(A), Part I Of The Constitution Act, 1982, Being Schedule B To The Canada Act, 1982, C 11 (U.K.).
76 R. v. Gladstone, [1996] 2 SCR 723 (Canada).

statutory for Article 33, the Court has adopted a "tradition as statute" approach.[77] These risks ossify colonial-era structures such as caste-based units that are fundamentally antithetical to the egalitarian values of the modern Republic.

7.2. Secularism Through Coercive Integration

The *Sarva Dharma Sthal* model, originally intended to symbolise secular inclusivity, has been judicially transformed into a site of "coercive participation."[78] Rather than maintaining State neutrality, the current interpretation mandates participation in the rituals of others as a non-negotiable metric of "respect" and "leadership," effectively creating a mandatory civic religion within the military.

7.3. Impact on Minority Recruitment and Cadre Diversity

The judgment sends a chilling message to potential recruits from minority faiths: a refusal to participate in majority rituals, even when grounded in sincere theological convictions, can result in summary dismissal and forfeiture of all social security benefits,[79] with minimal judicial protection available under the current interpretation of Article 33. The professional path for religiously observant minorities may become increasingly precarious.

8. Reform Proposals

8.1. Adoption of the "Least Restrictive Means" Test

To harmonise military necessity with individual liberty, Indian courts should transition from a policy of absolute deference to a proportionality-based review. Under this framework, the military must demonstrate: (1) a concrete, compelling objective; (2) empirical evidence that accommodation would substantially impair

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[77] Gautam Bhatia, *The Freedom of Conscience and the Armed Forces*, INDIAN CONST. L. & PHIL. (22 May 2020).
[78] ABHINAV CHANDRACHUD, REPUBLIC OF RELIGION: THE RISE AND FALL OF COLONIAL SECULARISM IN INDIA 145-48 (Viking 2020).
[79] Samuel Kamalesan v. Union of India, (Supreme Court, 25 November 2025).

that objective; and (3) that no less restrictive means are available.[80] This mirrors international best practices and ensures that Article 33 functions as a narrow exception rather than a blanket waiver of constitutional and fundamental rights.[81]

8.2. Military Religious Accommodation Code

Given the *ad hoc* nature of religious exemptions, Parliament should enact a formal code for them. Key elements should include a presumption in favour of accommodation, an express prohibition on compelled participation in the rituals of other faiths, and a requirement that all restrictions be grounded in specific, written regulations.[82] Such codification would fulfil the Article 33 mandate that restrictions be "determined by law" rather than by uncodified regimental tradition.[83]

8.3. Phasing Out Fixed Class Composition

The military should finalise the transition to "*All-India Class*" units across all arms. By detaching religious facilities from command expectations and making observance strictly voluntary rather than obligatory, the Army may be able to recentre unit cohesion on professional training and shared mission objectives rather than communal and religious rituals.[84] The historical success of the Navy and Air Force in maintaining elite discipline without religious segregation provides the necessary evidence for this restructuring.[85]

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[80] Modern Dental Coll. & Rsch. Ctr. v. State of M.P., (2016) 7 SCC 353.
[81] Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4; *see also* K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.
[82] ABHINAV CHANDRACHUD, REPUBLIC OF RELIGION: THE RISE AND FALL OF COLONIAL SECULARISM IN INDIA 180-82 (Viking 2020).
[83] INDIA CONST. art. 33.
[84] AMIT AHUJA, ABHINAV CHANDRACHUD & DEVESH KAPUR, THE INDIAN ARMY AND THE POST-COLONIAL STATE, IN THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 320, 325-27 (Oxford University Press 2016).
[85] Ministry Of Defence, Performance Analysis Of All-Class v. Fixed-Class Recruitment (2023) (India).

9. Conclusion

The Kamalesan decision marks a significant step back from the standard of religious liberty by prioritising institutional convenience over an individual's constitutional right. By allowing obscure, unchecked regimental tradition and command perceptions of "ethos" to override Article 25, the Court has effectively insulated the Armed Forces from meaningful constitutional oversight. The characterisation of the petitioner as a "misfit" driven by "religious ego" rhetorically pathologises conscientious dissent, suggesting that institutional loyalty requires the total submission of conscience, even when accommodation is possible.

The judicially approved "*secularism through coercion*" poses serious dangers, especially in a society where the symbolism of the majority is becoming powerful in the state system. It normalises the notion that inclusivity in institutions is achieved through participation in the majority culture's rituals. While it is not a matter of injustice for the military to enjoy a special status in the Republic, where they are seen as the fundamental protectors of the Constitution, it is one of injustice if the military is allowed to trample upon fundamental rights without any legal basis whatsoever.

A constitutionally faithful approach to military service would recognise that effective armed forces do not require theological uniformity. Yet, the interpretation of this principle hinges entirely on the state's adopted model of secularism. While true secularism in the Western sense signifies state neutrality rather than enforced participation, rooted in a strict formal separation between religious and state authorities, the Indian model is traditionally inspired by a Gandhian ethos of participatory, active pluralism. This Indian concept of *Sarva Dharma Sambhava* (equal respect for all religions) does not merely seek a separation of power. Still, it actively embraces pluralism in spirit, which the Army operationalises through the "*eat, pray, and fight together*" philosophy.

In the case of Lieutenant Samuel Kamalesan, the choice between these two models is determinative; under a Western separationist model, the judgment would likely have been reversed, as the state would be barred from compelling participation in any religious ritual, viewing such a command as an unconstitutional entanglement. However, under the existing Indian model, the Supreme Court upheld the dismissal by re-characterising regimental rituals as "secular, motivational functions" essential for unit cohesion and *esprit de corps*. This current judicial stance treats Article 33 not as a tool for narrowly tailored restrictions but as a broad justification for the collective military ethos, allowing the "*engine of discipline*" to override individual freedom of conscience.

Regarding which model is more desirable, many scholars and veterans argue that while the participatory model is rooted in the "martial race" and "fixed class" traditions of the colonial era, it is increasingly seen as a "colonial mindset" that fails to align with modern constitutional values. They point to the Indian Navy and Air Force—which operate successfully on a merit-driven, all-class basis without institutionalised prayer halls or mandatory religious parades—as evidence that a more neutral, separationist model is both operationally viable and more protective of fundamental rights. Therefore, a more desirable approach would involve a shift toward the "reasonable accommodation" and "least restrictive means" standards used in other diverse democracies, ensuring that Article 33 does not function as a "blanket exemption" that grinds down the very rights the military is sworn to defend.

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Gujarat National Law University, Gandhinagar
Attalika Avenue, Knowledge Corridor,
Koba, Gandhinagar – 382426.

Gujarat, India.
gnluslr@gnlu.ac.in