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I, Dr. Pradeep Kumar, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Sd/-

Date: June, 30, 2026 **Dr. Pradeep Kumar**

The Legal Investment Framework of 2022: A Progressive Way of Retrogression for Zambia

Prof. Chipasha Mulenga[1]

Abstract:
There is an age-long belief that a friendly investment environment, policy, and legislation lead to an increase in local and foreign investment, which is needed to spur the host country's economy. Driven by the desire for a quick economic turnaround and realigning the legislation to the party's agenda, the Government announced its intention to revise the *Zambia Development Agency* (*ZDA) Act* No. 11 of 2006. In 2022, the *ZDA Act* No. 17 of 2022 and the *Investment, Trade, and Business Development* (ITBD) *Act* No. 18 of 2022 were enacted. They repealed and replaced the *ZDA Act* 2006 together with its amendments. Although the two *Acts* breathe new life into the investment framework, they have not attended (or effectively so) to the problems encountered in the enforcement of the *ZDA Act* 2006, but have instead created new problems. These problems could have been averted if the amendment process, including stakeholder engagement or consultation, had been thorough. In this article, it is argued that the ZDA *Act* 2022 and the ITBD *Act* 2022 are ineffective and, though seemingly progressive, are in effect retrogressive, for they do not guarantee the government the maximum benefits of investment. The defects under the two *Acts* are compounded by the absence of an effective Parliamentary process.

Keywords: Business; Parliamentary Committee; Foreign Direct Investment; Zambia Development Agency.

1. Introduction:

Fostering investment, whether foreign or local, requires a conducive environment that ensures that an investment confers benefits on both the investor and the host state. Undoubtedly, foreign direct investment (FDI) remains a viable route from which Zambia's economy can grow. Over the last decade, statistics show that FDI inflows have reduced from US$1.11 billion to US$-0.82 billion. Similarly, the contribution of FDI to the national gross domestic product (GDP) has dropped from 4.73% in 2011 to -3.72% in 2021.[2] To turn around this narrative, the government is intent on attracting FDI into the country. In 2022, during the European Union–Zambia Forum, the President of the Republic of Zambia, Mr. Hakainde Hichilema, reiterated the following:

It is our firm belief that domestic and foreign direct investment bring the much-needed capital, technology, management techniques, and knowledge of foreign markets; our government's

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[1] ***Associate Professor, ZCAS University, Lusaka, Zambia, Email: mulenga.chipasha@gmail.com.***

[2] According to Microtrends, FDI inflow was US$1.11bn and 4.73% contribution to GDP; 2012 (US$1.73bn, 6.79%); 2013 (US$2.1bn, 7.49%); 2014 (US$1.51bn, 5.56%); 2015 (US$1.58bn, 7.45%); 2016 (US$0.66bn, 3.16%); 2017 (US$1.11bn, 4.28%); 2018 (US$0.41bn, 1.55%); 2019 (US$0.55bn, 2.35%); 2020 (-0.17bn, -0.95%); and 2021 (US$-0.82bn, -3.72%). Available at: *https://www.macrotrends.net/countries/ZMB/zambia/foreign-direct-investment#:~:text=Zambia%20foreign%20direct%20investment%20for,a%2034.16%25%20increase%20from%202018.* (Accessed 28 December 2025).

commitment is to providing a conducive investment climate and sound economic policies for the private sector to thrive.[3]

A conducive environment has been created through non-discrimination of foreign investment, macroeconomic and political stability, the abundance of attractive investment opportunities, the strengthening of economic and political institutions, the existence of money and capital markets, and a private sector-driven economy.[4] The Report of the Bank of Zambia, the Zambia Statistical Agency, and ZDA classifies the ease of doing business, the availability of resources, competitive investment incentives, market potential, and institutional support as the key factors that influence investment and reinvestment in Zambia.[5] The ZDA, Zambia Tourism Agency, Public Private Partnership Unit, and Industrial Development Corporation are established to promote investment and accelerate industrial growth. These efforts have culminated in continuous economic growth, diversification, improved productivity, and a low cost of doing business.[6]

Further to these factors, an enabling policy and legislative framework must be in place; where these are excluded, it renders these efforts mundane. A policy framework sets goals, objectives, implementation programs, responsible institutions, management of the process, and planned activities to achieve them. The legislative framework provides for a law that establishes the required institutional and legal framework. Since time immemorial, the government has not developed a policy on investment; however, laws on investment have been in place since 1965, when the *Pioneer Industries (Relief from Income Tax) Act* was enacted.

The period from 1965 to 2006 saw the enactment of numerous pieces of legislation on investment. The *ZDA Act* 2006 was enacted to foster the country's economic growth, attract and facilitate inward and aftercare investment, support micro and small business enterprises, promote greenfield investments, and streamline bureaucratic procedures stemming from a multiplicity of legislation governing investment. Although the *Act* was significantly amended in 2010, 2012, and 2013, its weaknesses still abound. In 2021, following the ushering into office of a new government dubbed the 'new dawn,' it became clear that change was needed. On 19 April 2022, the Minister of Commerce, Trade, and Industry, Chipoka Mulenga, MP, said that "the Ministry has instituted changes to the investment licensing framework in line with the manifesto of the United Party for National Development (UPND)."[7] The changes included the strengthening of the checklist for applications to improve the quality and levels of investment in the country, the promotion of partnerships between foreign direct investors and domestic investors, and the introduction of annual returns and the scaling up of aftercare services for companies to improve value addition.[8]

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[3] Speech by the President of the Republic of Zambia, Mr Hakainde Hichilema, European Union–Zambia Economic Forum, Mulungushi International Conference Centre, Lusaka, Zambia, 18 May 2022, 3-5.
[4] BOZ, CSO & ZDA *Foreign Private Investment and Investor Perceptions in Zambia* (2018) 1, 5.
[5] BOZ, ZSA & ZDA *Private Sector Foreign Investment and Investor Perception Survey Report* (2021) 3.
[6] Ministry of Commerce, Trade and Industry *National Investment Promotion Strategy 2018 to 2022* (2018) 2.
[7] *https://zda.org.zm/suspension-on-issuance-of-investment-licenses-under-zda-act-lifted/* (accessed 30 June 2026).
[8] *https://zda.org.zm/suspension-on-issuance-of-investment-licenses-under-zda-act-lifted/* (accessed 30 June 2026).

These changes resulted in the repeal of the *ZDA Act* 2006, which was replaced with the *ITBD Act* 2022 and the ZDA *Act* 2022, separating the legal from the institutional framework. The *ITBD Act* 2022 provides for a private sector-led economic development strategy, promotes diversification of the economy, protects and monitors domestic and FDI, promotes joint ventures and partnerships, promotes research, and facilitates the protection of infant industries. The *ZDA Act* 2022 redefines the functions of the Agency and also re-constitutes the Board.

The objectives are twofold: first, to examine the extent of the effectiveness of the *ZDA Act* 2022 and *ITBD Act* 2022 in ensuring that the government derives the maximum benefits from investment; and second, to examine the effect of the parliamentary process on the enactment of the *ZDA Act* 2022 and *ITBD Act* 2022.

2. Ramifications Of The Current Legal Investment Framework:

2.(1) Progression?

The *ITBD Act* 2022 and the ZDA *Act* 2022 present a new paradigm shift in Zambia's investment framework. Arguably, the Acts have, in some respects, introduced progressive provisions by remedying some of the weaknesses of the *ZDA Act* 2006. This is evidenced in the following provisions:

Minimum investment threshold for a local investor

Although the *ZDA Act* 2006 did not discriminate *de jure* between foreign and local investors, it was *de facto* discriminatory. The minimum investment threshold of US$500,000 which applied to all investors was too high for local investors to meet. The *ITBD Act* 2022 has addressed this issue through the introduction of s 30(2)(a), which provides for US$50,000 as a minimum investment threshold for a local investor. To avoid investors who may not qualify from latching onto the benefits thereof, the *Act* defines a “local investor” as a person who is a citizen or a company incorporated in Zambia and whose equity is wholly owned by citizens.[9]

Promotion of Brownfield Investments

Brownfield investments have become a common form of investment that complements traditional greenfield investments. Often, an investor regards unusable facilities or those not operating at full capacity as investment options for new or other production. Unlike the *ZDA Act* 2006, which focused on greenfield investments, the *ITBD Act* 2022 embraces brownfield investments. According to s 11(1)(e), the Agency shall recommend to the Minister development strategies to “encourage the growth of brownfield investment.”

Inspection of Records and Books of Account

Inspection of records and books of account ensures the soundness of an investment and grants the Agency access to the company’s operations. This prevents an investor from falsifying facts regarding the financial position of the company.[10] Section 76 of the *ZDA Act* 2006 permits the

[9] Section 2.
[10] C Mulenga *Foreign Direct Investment and the Law in Zambia* (2020) 91.

Agency to inspect records and books of account. However, following its amendment by *Act No. 1 of 2010*, this power was removed. The *ITBD Act* 2022 has reintroduced the repealed s. 76; s. 45(2) obliges an investor to produce books, records, documents, and other information required by the authorised officer.

Promotion and Business Development

he Agency is mandated to undertake market research, participate in international and regional conferences, and facilitate the growth of a business.[11] This, in effect, allows the Agency to collaborate with institutions, consultants, and academic researchers. This is a positive addition that could be enhanced by obliging the Agency to deliberately engage with registered institutions that can provide capacity building and skills development.

Expanding Approval Considerations

The *ZDA Act* 2006 prescribed the conditions for the grant of an application for a licence, permit, or certificate of registration. Section 69(1) provided that the Board would consider: *(a)* the need to promote economic development and growth; *(b)* employment creation and human resource development; *(c)* the applicant's pledge for employment creation and citizen training; *(d) the project*'s export orientation; *(e) the impact* of the proposed investment on the environment; and *(f)* the possibility of the transfer of technology. These considerations apply not only to an application for a licence, permit, or certificate of registration but also to the determination of entitlement to an incentive. The implication was that the grant of the application automatically conferred incentives on an investor.[12]

The *ITBD Act* 2022 has added further considerations: *(a)* the extent of utilisation of domestic raw materials, supplies, and services; and *(b)* the capacity to adopt value addition in the processing of local materials and agricultural resources.[13] These additions reaffirm the dire need for the utilisation of local raw materials, which will spur production and reduce imports that can deplete foreign reserves. The requirement for value addition presents a paradigm shift from exporting raw, unprocessed, or semi-processed products that have low value. The emphasis on value addition on local raw materials fortifies the government's desire to ensure the proper exploitation of natural resources. Value addition to local products makes them capable of being exported, thereby contributing to foreign reserves.

Notification for inability to implement

The investor must implement the investment once the licence, permit, or certificate of registration has been granted. Section 74 of the *ZDA Act* 2006 obliged an investor to notify the Agency of the reasons for its failure to implement the investment. The absence of such an explanation made the licence, permit, or certificate of registration susceptible to suspension or revocation under s 75(1)(c). The amendment of the *ZDA Act* 2006 by *Act No. 1 of 2010* repealed

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[11] Section 12(5) and 14, *ITBD Act*2022.

[12] Section 69(1), *ZDA Act* 2006 (as amended by Act No 15 of 2012).

[13] Section 19(1)(c)(d).

s 74. This implied that the investor could be sanctioned even though there was no requirement to notify the Agency of its inability to implement. This, in itself, presented confusion.

The *ITBD Act* 2022 has rectified this problem in s 22(1), which requires an investor to notify the Agency of its inability to implement the investment. The investor must provide reasons within thirty days of becoming aware of the non-implementation. Where such notification is made to the Agency, the investor shall apply for a variation of a licence, permit, or certificate of registration; and the Agency may exercise its powers under the *Act*.[14] This means that the Agency may decide to accept or reject the investor's application for a variation. The acceptance may realign the investor's licence, permit, or certificate of registration to the new circumstances. A rejection may entail that the circumstances presented by the investor are not so grave as to hinder the implementation of the investment. Whichever the case, the Agency is allowed to consider all circumstances before rendering its decision. This prevents investors from presenting "false or baseless" circumstances to delay the implementation of the investment.

Industries excluded from investment

Investment laws, no matter how much they may be 'open', actually limit the activities that may be invested in. The limitation could be on account of safety, health, national security, or defence. These may be controlled either by the nationals or by the state itself.[15] Section 4(1)(2) of the *ITBD Act* 2022 allows an investor to invest in a sector, industry, or any region except an industry specified in the Schedule. Unlike the Second Schedule of the *ZDA Act 2006*, which only had three exceptions, the First Schedule under the *ITBD Act* 2022 has included a fourth exception: "An industry manufacturing a product that is restricted by any written law." This exception has wider coverage; hence, it is a positive inclusion.

Limiting the functions of the Zambia Development Agency

The Agency was established after an amalgamation of the Small Enterprises Development Board, the Export Board of Zambia, the Zambia Export Processing Zone Authority, the Zambia Privatisation Agency, and the Zambia Investment Centre. Consequently, the constitutive Acts that governed the amalgamated entities were also merged into one—the *ZDA Act* 2006. The merging resulted in the Agency having twenty-six functions, making their attainment infeasible and thus requiring streamlining.

The *ZDA Act* 2022 has streamlined the functions of the Agency. According to s 5(2), the Agency is responsible for *(a)* issuing licences, permits, or certificates of registration under the *ITBD Act* 2022; *(b)* advising the Minister; *(c)* implementing and monitoring policies and strategies; *(d)* assisting in securing permission, exemption, authorisation, licence, bonded status, and land from a State institution; *(e)* facilitating and promoting the development of special economic zones; *(f)* promoting and facilitating partnerships, joint ventures, business linkages, access to

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[14] Section 22(2). This power of the Agency is fortified by s 24 which empowers it to vary or amend any conditions of a licence, permit or certificate of registration on the application by an investor where there are changes to an investment.

[15] J Salacuse *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (2013) 93.

capital, and other strategic alliances; *(g)* maintaining regular, productive, and effective dialogue and cooperation with the public and private sectors; *(h)* providing business development services; and *(i)* collecting, collating, and disseminating information.
These functions are reasonable and streamlined to enable effective implementation by the Agency. Unlike the *ZDA Act* 2006, which reposed administrative functions in the Agency, the *ZDA Act* 2022 places the Agency at the apex of investment decision-making.

Limiting the Board's Expenditure
The *ZDA Act* 2022 provides the functions of the Board in s 7(2) as—*(a)* approving policies, programmes, and strategies of the Agency; *(b) approving* the annual work plan, action plans, and activity reports of the Agency; *(c)* approving the annual budget estimates and financial statements of the Agency; and *(d) promoting* effective corporate governance of the Agency. The *Act* limits the Board by obliging it to seek ministerial approval before investing any of the Agency's funds that are not immediately required.[16] This is an innovative provision that aligns with prudent financial management by the Government and its agencies, as stipulated by the *Public Finance Management Act* 2018.

2.(2) Retrogression?
Though the positive attributes abound, critics argue that the changes made are cosmetic and do not address the most critical problems that engulfed the *ZDA Act* 2006. The *Acts* also remain comprehensive in dealing with the problems that currently affect the investment environment. Suffice it to say that the *Acts* have also created their problems. These concerns are seen in the following provisions:

Investment Definition
The *ITBD Act* 2022 has expanded the term "investment" in s. 2 to mean the "contribution of capital, in cash or kind, by an investor to a new business, to the expansion, rehabilitation or diversification of an existing business or to the purchase of an existing business from the Government or the purchase of an existing private Business." This definition includes 'diversification' and 'purchase of an existing private business'. Though a laudable act, it still falls short of the expected standards and does little to ameliorate the definition deficiency under the *ZDA Act* 2006. Mulenga, commenting on the definition under the *ZDA Act* 2006, observed thus:

The flaw in this definition seems to be that the contribution of capital is only for starting, expanding and rehabilitating and not a continuing act. This definition does not expressly include 'assets like most of the BITs that Zambia has signed. Most of these BITs embrace the traditional asset-based approach in their quest to define the term 'investment'. This approach covers 'every kind of asset' or 'any kind of asset'.[17]

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[16] Section 14(4).
[17] C Mulenga *Foreign Direct Investment and the Law in Zambia* (2020) 16.

This observation fortifies the fact that the changes to the definition are cosmetic and far from the expected standard. For instance, the definition does not give a definitive period when an activity qualifies to be called an ‘investment’; thus, leaving the door open to construe any business activity as an investment.

Principles of Investment

The *ITBD Act* 2022 lists the principles governing the promotion of investment in Zambia; among these are ensuring industry development in an ecologically sustainable manner, promoting appropriate incentives to encourage biodiversity conservation and climate resilience initiatives, and promoting and upholding environmental, social, and governance factors.[18] This provision reinforces the modern global trends of dealing with the effects of climate. Although the law encourages sustainable investment, it provides no sanctions for non-compliance or enforcement mechanisms. Consequently, investors may ignore sustainability obligations, undermining biodiversity conservation and climate action. Without climate legislation, these provisions remain largely aspirational rather than legally binding.

The reconstitution of the Board (which had a representative from the Zambia Environmental Management Agency) and the alteration of its functions under the *ZDA Act* 2022 cast further doubts on the competence of the Agency, which now approves licences, permits, and certificates for investment. Also, there is no provision which requires the Agency, Minister, or Board to consider any of these principles in the execution of their duties. For instance, the grant of a licence, permit, or certificate of registration (s 19) should have been made subject to the principles. Similarly, the suspension or revocation of a licence, permit, or certificate of registration (s 25) ought to have considered the principles. This would have enabled their enforcement where there is non-compliance or non-fulfilment.

Investment Protection and Promotion Agreement or Bilateral Investment Treaty?

The term "Investment Promotion and Protection Agreement" remains undefined under the *ITBD Act*, 2022. This notwithstanding, s 6(1) allows the Minister, subject to the approval of the Attorney-General, to enter into an investment protection and promotion agreement (IPPA) on behalf of the Government with another government in which both parties shall agree on development and investment matters.[19] In s 6(2), the Agency can, subject to the approval of the Minister and the Attorney-General, enter into an IPPA on behalf of the Government with an investor. The contents of such an agreement include employment creation, technology and skills transfer, local business development, licensing and permits, an undertaking to complete the necessary environmental requirements, and the financial progression of a proposed project. The similarity of s 6(1) and (2) is that both the Minister and the Agency can enter into IPPAs; the distinguishing factor determining the nature of the IPPA is who enters into it. This creates

[18] Section 5(d)(e)(j).
[19] The section allows a Minister to enter into an IPPA, however, ‘Minister’ is not defined in the definition section. This makes it unclear which Minister has the authority to enter into an IPPA. While it may be assumed that it is the Minister of Commerce, Trade and Industry, such an assumption could be erroneous.

confusion; however, an IPPA is the one in s 6(2) which is mirrored in s 17(2)(3) of the repealed *ZDA Act* 2006.[20] Section 6(1), in effect, is a bilateral investment treaty (BIT).

A BIT is an agreement between two states on the reciprocal promotion of foreign investment in each other's territories. Its general purpose is to protect and promote foreign investment, albeit within a single framework that is acceptable to both State parties. BITs are said to reduce political risk by protecting FDI from discriminatory treatment by the host state. They are also a means to attract inward investment, which, in turn, leads to economic development.[21] According to UNCTAD, 2,832 BITs have been signed globally, out of which 2,220 are in force. Zambia has signed 16 BITs with other countries, of which 10 are in force: Germany (1972); Switzerland (1995); China (2014); France (2014); Netherlands (2014); Italy (2014); Finland (2014); Mauritius (2016); Turkey (2020); and United Arab Emirates (2021). Six BITs are signed but not yet in force: Cuba (2000); Egypt (2000); Ghana (2001); Belgium-Luxembourg Economic Union (2001); United Kingdom (2009); and Morocco (2017).[22]

Although these agreements were seemingly signed on mutuality, the negotiation capacity of Zambia is doubtful due to the country's desperate need for FDI inflow. This is evident in the failure of the government to adopt the 'new generation' of treaty conclusion, which has resulted in the continued signing of BITs that are devoid of safeguards to enable the attainment of development objectives.[23] This is exacerbated by s. 6(1), which is poorly drafted; the provision, though it lists some of the contents of the agreement, does not guarantee the attainment of the maximum benefits to the state. The Minister and the Attorney General are appointees of the President; therefore, the motivation for entering into 'IPPAs' is made subject to political dictates, which lead to the signing of agreements that benefit foreign investors without any corresponding benefits to the host country. In any case, there is no empirical data which demonstrates that the conclusion of BITs directly enhances the economy of the host state. These agreements may well be concluded on "goodliness" rather than on an economically beneficial basis.

A concern for s 6(1) and (2) lies in its focus on foreign investment protection rather than the promotion of domestic investment. This was observed by the Committee on National Economy, Trade, and Labour Matters as it considered the ITBD Bill, recommending that the Bill "be revised to clearly provide for investment promotion, focusing on domestic investment, supplemented by foreign investment."[24] Unfortunately, this was not done, thus compounding the argument that the promotion of domestic investment was not a priority for the government.

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[20] *ZDA Act* 2006 (as amended by Act No 15 of 2012).

[21] C Mulenga *Foreign Direct Investment and the Law in Zambia* (2020) 241.

[22] UNCTAD *International Investment Agreements Navigator—Zambia* 2023. Available at: *https://investmentpolicy.unctad.org/international-investment-agreements/countries/232/zambia* (accessed 10 January 2026).

[23] J Simumba 'Zambia's Bilateral Investment Treaties Review and Evaluation' A Report prepared for the Ministry of Finance and the Ministry of Commerce, Trade and Industry 2017 21.

[24] Committee on National Economy, Trade and Labour Matters *Report on the Consideration of the Investment, Trade and Business Development Bill N.A.B. No. 20 of 2022,* Second Session of the Thirteenth National Assembly (2022) 5, 8.

Declaring Priority Sector

A "priority sector" is a "sector or product that has a high growth potential, as may be prescribed."[25] The Minister is to declare a sector as a priority following consultation with the Minister responsible for finance and approval of the Cabinet.[26] The irony of this process is the potential lack of objectivity. The Agency advises the Minister, who is part of the Cabinet and Government, on investment matters, and implements and monitors policies and strategies in investment.[27] This, in effect, gives excessive power to the executive to determine priority sectors. It also strengthens the Agency's role to carry out the political will of the Government, which may not always be done in the best interest of the country. Unfortunately, the Board is private sector-oriented, thus bereft of authority to create appropriate checks and balances, having seen its role reduced to that of a mere spectator. If Vision 2030 is to be attained, creating an enabling environment for sustainable socio-economic development should not be left solely to the determination of the executive, whose desires may be more of political aggrandizement.

Protection from Compulsory Acquisition

An investor's property or an interest in or right over shall not be compulsorily acquired except as provided for in the *Constitution* and the *Lands Acquisition Act*.[28] Article 10(4) of the *Constitution* 2016 forbids the government from compulsorily acquiring an investment, except under customary international law and subject to Article 16(1). Article 16(1) allows the taking of property or any right or interest therein, but on condition that 'adequate compensation' for the property is made.[29] Section 10 of the *Lands Acquisition Act* (LAA) 1970 states that compensation paid shall not exceed the value of the land acquired. Section 12*(b)* of the *LAA*, though requiring that the value of the property be taken into account in determining compensation, does not spell out the calculation thereof.

The 2016 *Constitution* acknowledges the taking of investment following customary international law, which has laid down a standard—the Hull Standard. The Hull Standard requires that, where an investment is taken by the government, compensation must be paid promptly, adequately, and effectively. This would imply that the current mechanisms in place are inadequate because they fall short of the expected international standard. This potentially erodes foreign investors' confidence where the protection of their investment is concerned. Ironically, the Hull Standard existed under s 19(2) of the *ZDA Act* 2006.[30] The non-inclusion of a similar provision under the *ITBD Act* 2022 does not appear to match the Government's supposed desire for FDI vis-à-vis its adequate protection.

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[25] Section 2.
[26] Section 8, *ITBD Act* 2022.
[27] Section 5(2)(b)(c), *ZDA Act* 2022.
[28] Section 9, *ITBD Act* 2022.
[29] Article 16(1) provides: '[P]roperty of any description shall not be compulsorily taken possession of, and interest in or right over property of any description shall not be compulsorily acquired, unless by or under the authority of an Act of Parliament which provides for payment of adequate compensation for the property or interest or right to be taken possession of or acquired.'
[30] Section 19(2): 'Any compensation payable under this section shall be made *promptly* at the *market value* and shall be fully transferable at the applicable exchange rate in the *currency in which the investment was originally made*, without deductions for taxes, levies and other duties, except where those are due.' (Emphasis mine).

Externalisation of Funds

An investor can transfer out of Zambia funds in foreign currency, but on condition that the relevant taxes and liabilities have been paid.[31] All the proceeds are transferred without limitation, thus leaving no room for the host state to compel the foreign investor to reserve some of its proceeds. This section is a rehash of s. 20 of the *ZDA Act 2006,* except for *(e),* which relates to 'any other liability'. While s 10 effectively serves the foreign investor's interest, it is not so for the host state, which is deprived of the foreign currency necessary for it to maintain an economic equilibrium and meet its balance of payment obligations.[32]

During its consultation period, the Committee on National Economy, Trade, and Labour Matters noted the concerns of stakeholders who submitted that the ITBD Bill did not prescribe any limitations on the amount of money that could be externalised. If this was not redressed, the balance of payments could be destabilised. These submissions were accepted by the Committee, which recommended capping how much can be externalised through the introduction of a single discretionary allowance and the granting of additional incentives to investors who did not externalise their profits.[33] The Committee's recommendation was not adopted, meaning that, without adequate safeguards, the availability of capital for investing in local businesses and projects remains affected.

Imposing of Conditions

The Agency may impose conditions on the issuance of a licence, permit, or certificate of registration.[34] This provision gives the Agency discretion to impose conditions on the issuance of a licence, permit, or certificate of registration. Discretionary powers potentially lead to abuse; therefore, the *Act* ought to have provided conditions upon which the Agency would base its decision. This would have been invaluable, as it would have provided an understanding to investors, especially since investing in Zambia is anchored on an 'open door' policy, which requires transparency.

Validity of Licence, Permit, or Certificate of Registration

A licence, permit, or certificate of registration is valid for five years.[35] This is unlike the *ZDA Act* 2006, wherein the validity period was ten years.[36] During the consultation, stakeholders submitted that the reduction of the period was contrary to the government's desire to reduce the cost of doing business, asserting that the validity period be reverted to ten years.[37] The Committee on National Economy, Trade, and Labour Matters accepted the submission and

[31] Section 10.
[32] C Mulenga *Foreign Direct Investment and the Law in Zambia* (2020) 95.
[33] Committee on National Economy, Trade and Labour Matters *Report on the Consideration of the Investment, Trade and Business Development Bill N.A.B. No. 20 of 2022,* Second Session of the Thirteenth National Assembly (2022) 5, 8.
[34] Section 20.
[35] Section 21(1), *ITBD Act* 2022.
[36] Section 71, *ZDA Act* 2006.
[37] Committee on National Economy, Trade and Labour Matters *Report on the Consideration of the Investment, Trade and Business Development Bill N.A.B. No. 20 of 2022,* Second Session of the Thirteenth National Assembly (2022) 6.

recommended that the validity period be reverted to ten years; however, this was not considered by the whole House.[38]

Licence Renewal and Land Ownership

The validity of a licence, permit, or certificate of registration is five years, renewable for a similar period.[39] Where an investor acquires land for purposes of their investment, such land has a lease of 99 years.[40] This implies that the investor maintains their right over land; the right cannot be taken away without payment of compensation. There is no requirement under the *ITBD Act* 2022 that the land acquired must be used for purposes of implementing the investment. The change of use of land, other than for that for which the licence, permit, or certificate of registration was issued, may affect those benefiting from such an investment. Analysing the *ZDA Act* 2006, Mulenga reiterates the following:

Given the fact that the land is granted subject to the validity of the licence, permit or certificate of registration, the question is what happens if the licence, permit or certificate of registration ceases to be valid? Does this mean that the lease also ceases? Or should the period of the lease be tied to that of the investment? Assuming that the investor decides not to renew the licence, what are the effects on the investment and any title it may hold?[41]

The repeal of the *ZDA Act* 2006 has not corrected this problem, thus leading to uncertainty and unpredictability. To ameliorate this, it would be beneficial if the period of investment were tied to the land lease period. This preserves the land and allows the government to determine the continuation of the investment or the leasing of the land to similar investors.

Incentives and their Structure

Incentives were primarily designed to attract foreign investment into Zambia.[42] Under the *ZDA Act* 2006, s 56 provided criteria for the grant of incentives—investing a minimum of US$500,000 in a priority sector. The flaws in the incentives regime included: (i) the absence of an inquiry into the origin of the US$500,000; (ii) no requirement that the US$500,000 must come from outside Zambia; and (iii) no requirement that the investor maintain a balance of $500,000 in a commercial bank account.[43]

The *ITBD* Act 2022 has, in s 30(2), created multiple thresholds for eligibility for incentives: *(a)* a local investor investing a minimum of US$50,000; *(b)* a citizen-owned company investing a minimum of US$100,000; *(c)* a citizen empowerment company investing a minimum of US$150,000; *(d)* a citizen-influenced company investing a minimum of US$500,000; or *(e)*

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[38] Committee on National Economy, Trade and Labour Matters *Report on the Consideration of the Investment, Trade and Business Development Bill N.A.B. No. 20 of 2022*, Second Session of the Thirteenth National Assembly (2022) 9.
[39] Section 21(1)(2).
[40] *Lands Act* 1995.
[41] C Mulenga *Foreign Direct Investment and the Law in Zambia* (2020) 93.
[42] K Mwenda 'Legal Aspects of Foreign Direct Investment' (1999) 6 *Zambia Law Journal* 4.
[43] C Mulenga *Foreign Direct Investment and the Law in Zambia* (2020) 94.

investing US$1,000,000. This notwithstanding, the flaws under the *ZDA Act* 2006 have not been remedied under the *ITBD Act* 2022. This leaves the problem of depletion of foreign reserves, especially where foreign investors borrow locally to invest (it is presumed that a foreign investor brings foreign currency into the host country). It also leaves the possibility of obtaining a licence, permit, or certificate, but the investor has no operating capital. This may open up the country to 'unserious' investors whose target may not be to create lasting investments but to deplete natural resources.[44]

These incentives are granted to investors that invest in a new project or an expansion project in a special economic zone, priority sector, rural area, or farm block.[45] The Minister of Finance may, on the recommendation of the Agency, approve the grant of incentives to a qualifying investor.[46] The Minister may also, on the recommendation of the Director-General of the Zambia Revenue Authority, grant an investor relief or an exemption from any tax or duty to which the investor is eligible.[47] The recommendations given by either the Agency or the Director-General do not guarantee their acceptance by the Minister, thus leaving the possibility of their rejection. Also, the *Act* gives unfettered discretion to the Minister, the Agency, and the Director-General to grant incentives, which is a recipe for abuse of authority. The recommendation by the Committee on National Economy, Trade, and Labour Matters that all incentives and the criteria for qualifying for them be "consolidated in a schedule that reflects the country's national planning and budgeting documents" should have been accepted.[48]

Under the *ZDA Act* 2006, the failure of an investor to create employment and training for citizens led to the suspension or withdrawal of incentives by the Commissioner-General of the Zambia Revenue Authority.[49] The effect of a suspension or withdrawal was the remission of taxes due for any charge year in which incentives were assessed or accrued. Where an investor was aggrieved by the suspension or withdrawal, the only route available was s. 78, which directed any aggrieved investor to appeal to the Minister of Commerce, Trade, and Industry. There were no guidelines given to the Minister on what to consider in dealing with such a matter. Unfortunately, the *ITBD Act* 2022 has not dealt with this issue.[50] This leaves the possibility of employing political reasons in an investment issue, especially since the Minister is a political appointee.

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[44] C Mulenga *Foreign Direct Investment and the Law in Zambia* (2020) 94.
[45] Section 30(1), *ITBD Act* 2022 (as amended by Act No. 3 of 2024).
[46] Section 33.
[47] Section 35.
[48] Committee on National Economy, Trade and Labour Matters *Report on the Consideration of the Investment, Trade and Business Development Bill N.A.B. No. 20 of 2022,* Second Session of the Thirteenth National Assembly (2022) 10.
[49] Section 69(3), *ZDA Act* 2006 (as amended by Act 15 of 2012).
[50] Section 34(1)(2) permits the Commissioner-General to suspend or withdraw the tax incentive and an investor who is dissatisfied with this decision may appeal to the Minister responsible for finance.

Transfer of Registered Business

A registered business is entitled to an incentive that is valid for the period stipulated under the law.[51] Where such a business transfers ownership to another business during the validity period, it ceases to enjoy the incentives.[52] The weakness of the *Act* lies in its failure to guide what would amount to a "transfer"; suffice it to say that most investments are foreign-owned, therefore, such a provision may present a red flag. Termination of incentives after the transfer may make the new (or prospective) investor reluctant to proceed. This is primarily because a foreign investor may transfer at any time, and the loss of incentives is unfair, especially since the license of such a business is still valid and the business remains a going concern. It is argued that restricting transfers may raise concerns of indirect expropriation on the part of the government.

Appeal

An investor who is aggrieved by a decision of the Agency may, within fourteen days of receiving the decision, appeal to the Minister against the decision.[53] The appeal to the Minister may denote expediency; however, there are no guidelines on which the Minister's decision on the appeal is anchored. This subjects the decision of the Minister to his/her whims and caprices. Ironically, where a decision is one with which an investor is dissatisfied (not on appeal), there is no provision in the *Act that* allows him or her to challenge it.

Investor Submission of Information

The *ZDA Act* 2006 was criticised for its lack of provisions that enabled the Agency to enforce compliance. Although the *Act* had s. 76, which required an investor to furnish information to the Agency, an amendment by *Act* No. 1 of 2010 removed this requirement. Under the *ITBD Act* 2022, s 45(1)(2) obliges an investor to furnish the Agency with any other information it considers necessary, including the production of books, records, and documents. Where an investor does not provide the required information, its incentives can be withdrawn or suspended for that year.[54] This provision enables the Agency to inquire into the running of the business to avert false reporting. The threat of loss of incentives may not compel an investor to produce the required information, nor does it present a deterrent to an erring investor; therefore, s 45(3) should have been reinforced by s 25(1), which enables the Agency to suspend the licence, permit, or certificate of registration.[55]

Annual Return Submission and Enforcement

An investor must submit annual returns and audited financial statements.[56] It is an offence for an investor to fail to submit annual returns or to wilfully and intentionally submit misleading

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[51] Section 17(1), *ITBD Act* 2022.
[52] Section 17(2), *ITBD Act* 2022.
[53] Section 44(1).
[54] Section 45(3).
[55] Section 25(1) permits the Agency to suspend or revoke a licence, permit or certificate where (a) fraud, negligence or misrepresentation preceded its acquisition; (b) subletting or transfer without Agency prior approval; (c) failure to comply with any term or condition; or (d) business activities are contrary to the Act or other relevant written law.
[56] Section 46(1), *ITBD Act* 2022.

information to the Agency.[57] The proof of intentional and willful failure to submit may not be easily ascertained, thus rendering the exercise otiose. The *Act*, unfortunately, is devoid of provisions on enforcing compliance by bringing an action against a defaulting investor.[58] This is clear from the absence of provisions relating to investigation and other punitive actions by the Agency. Generally, the *Act* gives a leeway to resolve amicably, and remedial actions are taken where an investor fails to comply. The drafters should have considered remedial measures as a way to ameliorate the failure to submit annual returns.

The *Act* is also not clear on whether such failure is accompanied by suspension or revocation of the license, permit, or certificate of registration as provided in s 25. Section 25(1)(c)(d) allows the Agency to suspend or revoke a licence, permit, or certificate where the investor "*(c)* fails to comply with any term or condition of the licence, permit, or certificate of registration; or *(d)* operates the licensed, permitted, or registered business activities in contravention of this Act or any other relevant written law." It is asserted that for the breach of s 46(1)(3) to fall within s 25(1)(c), submission of annual returns must be a term or condition upon which the license, permit, or certificate of registration has been granted.[59]

Micro, Small, and Medium Enterprises

Micro, Small, and Medium Enterprises (MSMEs) remain an integral part of Zambia's economic emancipation. The *ZDA Act* 2006, though providing for the promotion and development of MSMEs, did not ensure their full support and growth into 'fully fledged' companies. The *Act* was criticised for its failure to balance local and foreign investors, thus creating a disparity in the grant of incentives. The *Act* did not consider that the threshold for incentives (US$500,000) was beyond MSMEs. Further, there was no deliberate effort from the government to promote and protect MSMEs in the same manner as FDI.

In 2021, Section 56 of the *ZDA Act* 2006 was amended by Act No. 48 to introduce a threshold of US$50,000 for a local investor. It was expected that this amendment would usher in a new dawn for MSMEs. However, the *ITBD Act* 2022 is bereft of provisions relating to MSMEs. Strangely, in s 11(2), the Agency is obliged to facilitate and protect infant industries. There is no other provision on 'infant industries' or their facilitation and protection. There is speculation that MSMEs would have their own legislation, especially since they are now managed under the newly created Ministry of Small and Medium Enterprises; however, in the absence of a policy framework, it is unimaginable that such legislation would be created.

Special Economic Zones

A 'special economic zone' is "an area that is subject to unique economic regulations and includes multi-facility economic zones, industrial parks, inter-country trade zones, and export

[57] Section 46(2)(3), *ITBD Act* 2022.
[58] Enforcement, it can be argued, would not be in line with the core objective of the *ITBD Act* 2022 of 'foster economic growth and development by promoting trade, business development and investment.'
[59] Section 25(1)(d) relates to the operation of the license, permit or certificate of registration, therefore, failure to comply is not directly linked to the 'operation' of the business.

processing zones."[60] Their history is traceable to the enactment of the *Export Processing Zones Act* (EPZ) No. 7 of 2001.[61] The *Act*, despite its seemingly elaborate provisions, was riddled with negative concerns stemming from foregone revenue through taxation and unjustified tax incentives offered to firms operating in the zones.[62] In 2006, the *EPZ Act* 2001 was repealed by the *ZDA Act 2006*, which created multi-facility economic zones (MFEZs). These are not a 'typical' type of special economic zone, but a combination of free trade zones, export processing zones, and industrial parks zones concept.[63] The objective of the MFEZs was to stimulate industrial and economic development through increased manufacturing activities coupled with value addition to raw materials for both domestic and export-oriented businesses.

The *ZDA Act* 2006 empowered the Minister to declare an area, land, or building as an MFEZ.[64] The Agency was obliged to facilitate the development, regulation, and promotion of the MFEZ among investors.[65] As was the case with its predecessor, the *ZDA Act* 2006 was bereft of proper provisions that would ensure the attainment of the objective for its setup: lack of a cohesive, absorbent regulatory framework to ensure domestic spillovers; lack of clarity on the skills or expertise needed in the zones; reform of the education system to ensure the training of appropriate skills and knowledge required in the zones; labour standards for those working in the zones; absence of modalities for recovery of foregone revenue; the Government's perceived unwillingness to distribute proceeds from the zones; lack of linkages between the zones and local firms operating outside the zones; and failure to ensure full participation of local investors.[66]

The repeal of the *ZDA Act* 2006 by the *ITBD Act* 2022 has not changed the previous provisions or their effect.[67] The *ITBD Act* 2022 is a mere rehash of the *ZDA Act* 2006 insofar as zones are concerned; therefore, the rationale for their development is unlikely to be achieved because

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[60] Section 2, *ITBD Act* 2022.
[61] The *Act* facilitated the development of zones by investors and developers, administering, controlling and regulating zones and ensure their compliance with the *Act*, and promotion and marketing of zones among investors s 3 & 6(1), *Export Processing Zones Act* No 7 of 2001.
[62] D Kanjungu 'Export Processing Zones in Zambia: What Lessons Can Be Learnt?' (2010) 29.
[63] F Mutati, Minister of Commerce, Trade and Industry, 'Ministerial Statement on Multi-Facility Economic Zones (MFEZs)' Daily Parliamentary Debates for the Third Session of the Tenth Assembly, 18 February 2009.
[64] Section 18, *ZDA Act* 2006.
[65] Section 5(2)(0) – (r)
[66] JC Maswana 'Exploring Areas of Potential Sources of Growth for African Economies' 2018; C Mulenga *Foreign Direct Investment and the Law in Zambia* (2020) 136; KE Sikozi 'Opportunities and Challenges of Zambia's Manufacturing Industry, in the Wake of the Multifacility Economic Zones' Unpublished MSE Degree, University of Zambia, 2016 128; KE Sikozi, L Siaminwe & HM Mwenda 'Multi-Facility Economic Zones in Zambia: An Assessment of the Local Manufacturing Industry Readiness' (2016) *2 Journal of Natural and Applied Sciences* 33; M Phiri & S Manchishi 'Special economic zones in Southern Africa: white elephants or latent drivers of growth and employment? The case of Zambia and South Africa' SA-TIED Working Paper 152, 2020 20.
[67] For instance, the Minister can declare an area to be a special economic zone provided: (i) consultation has been made with the Minister for finance; and (ii) approval has been granted by the Cabinet. The Minister may, before declaring an special economic zone, issue a statutory instrument providing for the type and nature, unique regulatory conditions, limits, facilities provided and maintained, prohibited activities, and investor obligations, s 7(1)(3), *ITBD Act* 2022. The Minister may make regulations which provide for different types of SEZs, s 50(2)(b).

there is no attempt under the *ITBD Act* 2022 to rectify the problems under the *ZDA Act* 2006. It is unfortunate that the *Act* also subjects this enormous responsibility to the Minister, who, at his or her discretion, may develop regulations for special economic zones.

Board of the Agency

The Board established under the *ZDA Act* 2006 had 16 members, of whom 10 were representatives from the government. This potentially affected its efficacy, as the members were likely to present a position taken by the governmental entity they represent rather than acting within the core objectives of the *Act*. Mulenga postulates that the "absence of academics or experience related to investment weakens the board, as it is bereft of persons who would be properly qualified."[68] The *ZDA Act* 2022 has remedied the problem by reconstituting the Board and prescribing qualifications. The Board, which is arguably private sector-led, has 8 members who are representatives of *(a)* the Ministries of: Commerce and Industry and also Finance; *(b)* the Attorney-General; *(c)* the Zambia Institute of Chartered Accountants; *(d)* the private sector association; (e*)* a civil society organisation involved in trade and investment; and *(f)* three persons with experience and knowledge in trade and investment.[69]

The *ZDA Act* 2006 also did not provide for disqualification. It was necessary, therefore, to guard against the appointment of undesirable persons by adding provisions relating to disqualifications for appointment to the board. This would. This has been addressed by s 6(5) of the *ZDA Act* 2022, which disqualifies a person from being nominated or appointed as a member if they are legally disqualified, an undischarged bankrupt, previously convicted and sentenced to imprisonment for over 6 months, or convicted of an offence for fraud or dishonesty under any written law. Suffice it to state that the *Act* has remedied the deficiencies regarding the Board and its constitution.

The composition of the Board fortifies the government's desire that investment be private sector-led; however, its functions suggest otherwise.[70] Section 7(1) of the *ZDA Act* 2022 enunciates the core function of the Board as "perform the functions of the Agency and provide strategic policy direction to the Agency." Specifically, the Board approves policies, programmes, strategies, annual work plans, action plans, and activity reports, annual budget estimates, and financial statements, and promotes effective corporate governance of the Agency.[71] The Board also deals with the transfer of a licence, permit, or certificate of registration and matters relating to the management of the Fund.[72] It is clear that, though the composition suggested a private sector-led approach, the functions of the Board are restricted to the administration of the Agency. Whereas under the *ZDA Act* 2006, the Board made decisions on investment matters, this is no longer the case. The Board is reduced to a mere

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[68] C Mulenga *Foreign Direct Investment and the Law in Zambia* (2020) 68.

[69] Section 6(1), *ZDA Act* 2022 (as amended by Act No. 70 of 2026).

[70] The preamble to the ITBD Act 2022 states, in part, 'An Act to foster economic growth and development by promoting trade, business development and investment in the Republic through an efficient, *effective and coordinated private sector-led economic development strategy*….' (Emphasis mine).

[71] Section 7(2), *ZDA Act* 2022.

[72] Section 26, 38-41 & 43, *ITBD Act* 2022.

spectator, leaving the Government, through the Minister and Agency, to solely determine investment matters.

Strangely, the Minister is empowered to "give to the Board directions relating to the performance of its functions, and the Board shall give effect to those directions to the extent that they are not inconsistent with this Act."[73] Under the *ZDA Act* 2022, s 6(2) empowers the Minister to appoint the members of the Board. In effect, this grants unfettered powers to the Minister to interfere in the affairs of the Board, thereby thwarting its ability to act independently. There is a possibility that the Minister may hide behind the cloak of a "*performance contract*" to remove a member if they disagree with his or her position. This renders the functions of the Board superfluous, as its decisions or actions are potentially made subject to the 'concurrence' of the Minister. Suffice it to say that s. 6(2) deprives the Board of its independence. Its indolence to act against the Minister's desires thwarts continuity and stability, thereby harbouring political dictates that may not always positively affect the growth of investment in Zambia.

Discretionary Powers of the Minister

The discretionary powers granted to the Minister enable the ease of executing his or her duties under the *Act*. It was argued that the Minister's discretionary powers under the *ZDA Act* 2006 were excessive. For instance, the Minister had the power to give directions to the board (s 10(2) and 15); declare an area an MFEZ (s 18); retain a golden share in state-owned enterprises (s 27); sign final sales agreements to transfer shares (s 44); direct the use of privatisation proceeds (s 53(2)); make regulations for incentives (s 54); receive the appeals of any aggrieved investors (s 78); and make regulations (s 82). Under the *ITBD Act 2022,* the Minister[74] has discretionary powers to enter into an investment protection and promotion agreement (IPPA) on behalf of the Government with another government (s 6(1)); approve the Agency to enter into an IPPA on behalf of the Government with an investor (s 6(2)); declare a sector as a priority sector (s 8); declare an area to be a special economic zone (s 7); recommend incentives for a business investing in a priority sector (s 16); recommend incentives for an exporter of locally produced goods and services (s 13); approve monies of the Fund (s 38); request other information in the annual report (s 43(2)(c)); receive appeals of aggrieved investors (s 44(1)); make regulations (s 50(1)); and amend the Schedule to the Act (s 50(3)). From the foregoing, it can be stated that the discretionary powers have not abated under the *ITBD Act* 2022; bestowing such immense powers on the Minister has the potential to affect the objective fulfilment of the *Act*.

3. Process on Alteration of Legislation:

There are times when it becomes necessary for a law to be amended, repealed, or replaced. An amendment updates, adds to, or removes a provision(s) of a statute or legislation. Amendments are often done whenever it becomes necessary to change the legislation without enacting a new one. A repeal removes or reverses a law that was in effect.[75] It is generally done whenever a law

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[73] Section 6(5), *ZDA Act* 2006.
[74] The *Act* does not define who is referred to as the 'Minister'; however, some provisions relating to incentives refer to the Minister responsible for finance.
[75] The *Interpretation and General Provisions Act*1994 defines "repeal" includes 'revoke, rescind or cancel', s 3.

becomes ineffective or is no longer in tandem with current expectations, thereby posing negative consequences. A repealed law can be replaced with another. Irrespective of whether it's an amendment, repeal, or replacement, there is a process that guides how this shall be done.

The *Constitution* 2016 vests the legislative power in Parliament.[76] Article 62(3) forbids a person or body other than Parliament from enacting legislation, except if conferred by the *Constitution*. This entails that any alteration to legislation, whether by amendment, repeal, or replacement, must go through the parliamentary process as prescribed by the *Constitution* and the National Assembly of Zambia *Standing Orders,* 2021. There are four stages a Bill goes through before it is passed by the National Assembly: *(a)* First Reading; *(b)* Second Reading; *(c)* Committee; and *(d)* Third Reading.[77] A Bill introduced in the National Assembly, whether by a Minister or Member, must undergo the *first reading*, where the title and objectives of the Bill are read.[78] The Bill is thereafter referred to an appropriate committee for a detailed examination.[79] Unless the time is extended by the Speaker, the committee has twenty working days within which to examine the Bill.[80] In the *second reading,* the Bill is read a second time, and the Chairperson of the committee that considered it presents the report to the House.[81] The report gives a detailed explanation of the implications, merits, and demerits of the Bill. At the *Committee stage*, each clause of the Bill is read and examined together with the corresponding marginal note.[82] In the *report stage,* a Bill is amended further notwithstanding its amendment at the Committee stage.[83] During the *third reading, it is* reviewed in its final form; there are no debates or amendments, and once it has gone through, it is considered passed by the House.[84] It is thereafter sent to the President for assent, thus becoming law.[85]

The stage being examined herein is the first stage where Parliamentary committees are established. Parliamentary committees of the National Assembly of Zambia are created under Article 80(1) of the *Constitution* 2016. According to Article 80(2), these committees must be established at the first sitting of the National Assembly after a general election and after the election of the Speaker and the Deputy Speakers. The Standing Orders Committee appoints members to serve on a Committee at the commencement of each session.[86] In the selection of members of a Committee, the Standing Orders Committee takes into account gender, political party representation, and the experience of members. The Clerk of the National Assembly is the Chief Advisor to all the Committees and is assisted by a secretariat of Committee staff.

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[76] Article 61, *Constitution* 2016.
[77] Standing Order 103, National Assembly of Zambia *Standing Orders* 2021.
[78] Article 64, *Constitution* 2016; Standing Order 104, *Standing Orders* 2021.
[79] Standing Order 104, *Standing Orders* 2021.
[80] Standing Order 105, *Standing Orders* 2021.
[81] Standing Order 106, *Standing Orders* 2021.
[82] Standing Order 107, *Standing Orders* 2021.
[83] Standing Order 111, *Standing Orders* 2021.
[84] Standing Order 112, *Standing Orders* 2021.
[85] Standing Order 119, *Standing Orders* 2021.
[86] Standing Order 165(2), *Standing Orders* 2021.

Committee on National Economy, Trade, and Labour

The Committee on National Economy, Trade, and Labour is a portfolio committee that oversees the operations of the ministries responsible for commerce, trade, industry, finance, mines and minerals development, national development and planning, labour and social security, cooperatives, and departments and agencies under their portfolios.[87] The members of the Committee are Members of Parliament whose qualifications are set out in Article 70 of the *Constitution* 2016. According to this Article, one qualifies to be elected as a Member of Parliament if that person is a citizen; is at least 21 years old; is a registered voter; has obtained, as a minimum academic qualification, a Grade Twelve certificate or its equivalent; and declares their assets and liabilities. Standing Order 166(1) obliges 'every member' to 'belong to a general-purpose or portfolio committee.' It is clear from these qualifications that there is no requirement for members who form part of the Committee to possess a skill set or specialised training and experience.[88] This potentially affects their perception and appreciation of the niches of investment. Even in situations where experts are consulted and, in turn, provide proper guidance, their perception of the Bill may not change due to limited understanding. Though Parliamentary Committees may have competing needs, the bare minimum of a grade 12 certificate may not serve a valuable purpose in certain Committees whose work is technical and highly specialised. It would, therefore, be beneficial if the qualifications for members of the Committee were to go beyond the criteria set out in Article 70(1) of the *Constitution* 2016.[89] Alternatively, the Committee must be compelled to seek two independent expert opinions on the Bill before soliciting opinions from the public.

The concern of the political party to which members of the Committee belong deserves attention. This is in recognition of situations where the composition of the Committee is largely that of the ruling party.[90] In such instances, political interference cannot be ruled out and is bound to distort or forestall submissions that would enhance the Bill. The ZDA Bill Number 19 of 2022 and the ITBD Bill Number 20 of 2022 were motivated by the desire of the government to align the investment law with the party manifesto. This potentially rendered pertinent submissions that would have enriched the Bill unacceptable.

Generally, Committees create opportunities for public participation in the legislative process. This makes the Committee proceedings more transparent and open to public scrutiny.[91] The Committees, as part of their function, solicit the views of members of the public and interested

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[87] Standing Order 197, *Standing Orders* 2021.

[88] The members meet the qualifications set in Article 70 of the *Constitution* 2016, however, their skill-set or specialised training is not related to investment but business administration, human resource, accounting and trade. Available: *https://www.parliament.gov.zm/node/6579* (accessed 5 January 2026).

[89] This implies that the minimum educational qualification must not be restricted to Grade 12 certificate, thus, an amendment to Article 70 would ameliorate the problem.

[90] Out of the 10 members, 5 are from the ruling party, the UPND (Mubika Mubika, Elliot Kamondo, Gift Simuunza Sialubalo, Njavwa Simutowe & Sibeso K Sefulo); 4 from the opposition (David Mabumba, Davies Chisopa, Ronald Kaoma Chitotela & Mutotwe L Kafwaya); and 1 independent member (Binwell Mpundu). Available: *https://www.parliament.gov.zm/node/6579* (accessed 5 January 2026).

[91] P Burnell 'Parliamentary Committees in Zambia's Third Republic: Partial Reforms; Unfinished Agenda' (2002) *28 Journal of Southern African Studies 2* 297.

stakeholders.[92] In 2022, the Committee invited 22 stakeholders to present submissions on the ramifications of the two Bills.[93] It is observable that the majority of the 'consultees' are governmental or quasi-governmental bodies; therefore, they are not reflective of the government's reiteration that investment matters must be private sector led. This explains the retention of clauses that were problematic under the repealed *Act* in the *ITBD* 2022 and *ZDA Act* 2022. Invitations must have been extended to other entities (such as the Private Sector Development Association), scholars, and researchers. This would have been more enriching, considering the pertinence of the Bills, which were in dire need of diverse knowledge and expertise.

The Committee prescribes the time within which stakeholders must respond to the request. In a letter to the Law Association of Zambia, the Committee requested that the Association provide a memorandum within 7 days on the ramifications of the two Bills.[94] The time frame given to the Association by the Committee to examine the Bill was inadequate, thus robbing it and other stakeholders of the opportunity to scrutinise the Bill and make appropriate responses.[95] Burnell argues that the timelines given by the Committee for responses are tight and "may permit only minimal opportunity for detailed external scrutiny and public discussion."[96] The implication of a 'rushed' submission is its lack of the necessary minute details that should form the basis upon which the Committee can be properly informed. The inadequacy of the time given could fortify the perception that submissions are academic and a mere 'fulfilment of scripture'.

The Committee may invite public submissions but is not required to consider every recommendation it receives. This limits meaningful stakeholder participation and may weaken legislative scrutiny. Requiring Committees to consider submissions from relevant experts and institutions would enhance transparency, strengthen public confidence, improve accountability, and reinforce the Committees' independence from executive influence.

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[92] Standing Orders 174 and 197, National Assembly of Zambia *Standing Orders* 2021.

[93] The stakeholders invited were the Ministry of Justice; the Ministry of Small and Medium Enterprise Development; the Ministry of Finance and National Planning; the Minister of Commerce, Trade and Industry; the Ministry of Commerce, Trade and Industry Permanent Secretary; the Law Association of Zambia; the Citizens Economic Empowerment Commission; the Bankers Association of Zambia; the Industrial Development Corporation; the University of Zambia; the Zambia Development Agency; the Zambia Environmental Management Agency; the Centre for Trade Policy and Development; the Zambia Association of Manufacturers; the National Economic Advisory Council; the Development Bank of Zambia; the Common Market for Eastern and Southern Africa; the Bank of Zambia; the Zambia Institute for Policy Analysis and Research; the Zambia Chamber of Commerce and Industry; the Zambia Revenue Authority; and the Zambia Institute of Chartered Accountants. See: Committee on National Economy, Trade and Labour Matters *Report on the Consideration of the Investment, Trade and Business Development Bill N.A.B. No. 20 of 2022*, Second Session of the Thirteenth National Assembly (2022) 13; and the Committee on National Economy, Trade and Labour Matters *Report on the Consideration of the Zambia Agency Development Bill N.A.B. No. 19 of 2022*, Second Session of the Thirteenth National Assembly (2022) 11.

[94] Clerk of National Assembly Letter to the Law Association of Zambia, NAS/11/13/7, 20 September 2022.

[95] Unless the Speaker extend the period at his/her discretion or the Committee requests for additional time, it has twenty days within which to conclude on a Bill. Standing Order 105(1)(2)(3), *Standing Orders* 2021.

[96] P Burnell 'Parliamentary Committees in Zambia's Third Republic: Partial Reforms; Unfinished Agenda' (2002) *28 Journal of Southern African Studies 2* 298.

The Committee, even where the Bill has been manifestly impugned by the public or stakeholders, cannot do anything about the Bill other than to receive viva voce submissions, present a report to the House on the submissions received, and make a recommendation. The Committee should have the power under the *Standing Orders* 2021 to refer the Bill back to the Cabinet where the submissions received are overwhelmingly negative. This would ensure wide engagement and consultation before the Bill is presented to Parliament, thus eliminating objections from those who may not have been part of the drafting process. It also prevents the drafting of Bills by the Government according to its party dictates, which may not always be in favour of the country at large. Consultation, through stakeholder or public engagement, cannot be overemphasised; it is necessary for information gathering, which, in turn, raises the level of debate and promotes the objective of a more open government.[97] Where the process is bereft of consultation, the Committee cannot ask the most searching questions or have the ability to probe deeply. It is not clear the extent of consultation that was done by the government; however, it can be concluded that little was done. This is evident from the retention of most problematic provisions under the *ZDA Act* 2006 and other cosmetic changes.

The Committee requires information for it to function effectively. It follows that a policy must be in place to provide more information on the Bill and what it is premised on. For a very long time, there has been no policy on investment; neither the *ZDA Act* 2006 nor its predecessor (*Investment Act* 1993) was preceded by a policy, and neither is the *ITBD Act* 2022 nor the *ZDA Act* 2022. The absence of a policy could be due to 'contradictions between government policy and investment legislation ', especially since independence; numerous pieces of legislation on investment have been enacted, but without any significant corresponding increase in the level of investments.'[98] Notwithstanding this plausible explanation, the functioning of the Committee can be enhanced where there is no policy vacuum, policy confusion, or lack of clarity.[99] This lack of a policy could negatively affect the Committee, depriving it of much-needed information.

The Committee, upon considering the submissions, prepares a report, which is submitted to the Speaker for the consideration of the whole House. The recommendations made by the Committee are not binding on the whole House, thus potentially rendering the process academic. During the consideration of the ZDA Bill 2022, several recommendations were made but were not considered. For instance, the Committee's recommendation that the ZDA be limited to receiving grants and/or donations from official development partners and non-governmental organisations was rejected.[100] Similarly, the recommendation to amend Clause 14(2)(b) of the ZDA Bill so that it does not contravene s. 26 of the *Public Finance Management Act* 2018 was

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[97] P Burnell 'Parliamentary Committees in Zambia's Third Republic: Partial Reforms; Unfinished Agenda' (2002) *28 Journal of Southern African Studies 2* 299.
[98] DA Ailola & ER Kalula 'The constraints of Government policy and plans on foreign investment: an example from Zambia' (2001) *34 Comparative and International Law Journal of Southern Africa* 135.
[99] P Burnell 'Parliamentary Committees in Zambia's Third Republic: Partial Reforms; Unfinished Agenda' (2002) *28 Journal of Southern African Studies 2* 298.
[100] Committee on National Economy, Trade and Labour Matters *Report on the Consideration of the Zambia Development Agency Bill N.A.B. No. 19 of 2022*, Second Session of the Thirteenth National Assembly (2022) 8.

not accepted.[101] The clauses on the functions of the Agency, the composition of the Board, externalisation of funds, the Investment Protection and Promotion Agreement, and the incentives structure were impugned by the stakeholders, and the Committee made appropriate recommendations to either expunge or enhance them; however, these were not accepted by the whole House.[102]

In light of the foregoing, it is argued that the *ITBD Act* 2022 and the ZDA *Act* 2022 were enacted without due consideration of numerous issues. Unfortunately, the Committee process under the *Standing Orders* 2021 is ineffective at forestalling Bills that would have debilitating effects. The process, therefore, needs radical changes that would ensure effective scrutiny of Bills before the Committee. Additionally, the revision must be subjected to the *Zambia Law Development Commission* (ZLDC) before drafting the Bill; the *ZLDC Act* mandates the Commission to recommend the revision and reform of the law in Zambia.[103] The Commission conducts law reform or development following receipt of instructions from any government ministries and departments, statutory bodies, civil society organisations, or private individuals. It employs diverse methods of data collection and analysis—desk review of data sources[104], comparative study visits[105], stakeholder consultation[106], and validation meetings[107].

4. Conclusion:

The objectives of the article were twofold: *first*, to examine the extent of the effectiveness of the *ZDA Act* 2022 and the ITBD *Act* 2022 in ensuring that the government obtains the maximum benefits from investment; and *second*, to interrogate the effect of the parliamentary process on the enactment of the *ZDA Act* 2022 and the ITBD *Act* 2022. Concerning the *first* objective, it was found that the two *Acts*, though seemingly breathing new life into Zambia's investment regime, are replete with defects arising largely from their failure to deal with the weaknesses of the repealed *ZDA Act* 2006. In some instances, the *Acts*, despite adding other provisions absent from the repealed *Act*, have presented other problems. In its current state, it is hard to fathom how the government will obtain the maximum benefits from the investment.

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[101] This is seen from s 14(2)(b) which provides: "The Agency may— (b) subject to the approval of the Minister responsible for finance, raise by way of loans or otherwise, monies that the Agency may require for the discharge of the Agency's functions."

[102] Committee on National Economy, Trade and Labour Matters *Report on the Consideration of the Zambia Development Agency Bill N.A.B. No. 19 of 2022,* Second Session of the Thirteenth National Assembly (2022) 7-8; Committee on National Economy, Trade and Labour Matters *Report on the Consideration of the Investment, Trade and Business Development Bill N.A.B. No. 20 of 2022,* Second Session of the Thirteenth National Assembly (2022) 8-9.

[103] Section 4(2)(a), *Zambia Law Development Commission Act* (as amended by Act No. 4 of 2019).

[104] Desk study of data enables the Commission to review the literature to monitor the trends and identify gaps.

[105] Comparative study visits allows the Commission to learn the best practices from other countries by conducting interviews with key officials.

[106] Stakeholder consultations teases out problematic areas of the law and provide a panacea.

[107] Validation workshops confirm the authenticity of submissions made thus ensuring their acceptance by all the consultees.

On the *second* objective, it was found that the process and procedure for the alteration of legislation are provided under the *Constitution* 2016, which is complemented by the *National Assembly Standing Orders* of 2021. The ZDA Bill Number 19 of 2022 and the ITBD Bill Number 20 of 2022 were presented in Parliament and underwent the prescribed process leading to the repeal of the *ZDA Act* 2006 and the enactment of the *ZDA Act* 2022 and the *ITBD Act* 2022. It is argued that the process followed by the Portfolio Committee, as provided under the *Standing Orders* 2021, is inherently defective, thus contributing to the enactment of legislation replete with deficiencies.

It is concluded that the two *Acts*, though seemingly progressive, are in effect retrogressive in ensuring that the government obtains the maximum benefits of investment. This situation is unfortunately compounded by the absence of an effective parliamentary process.

Abortion Law in India: Need to Curb the Menace of Female Foeticide Without Compromising Reproductive Autonomy of Women

Prof. Manoj Kumar Padhy[1]

Abstract
Amongst various areas of reproductive autonomy of women, one which has drawn much attention of policy makers and thinkers is the right to abortion. This right has remained a focal point of discussion, as it has been recognised as a species of the right to reproductive choice of women, a fundamental right enshrined under Article 21 of the Indian Constitution. In India, abortion has been forbidden except under some special circumstances under the Medical Termination of Pregnancy Act, 1971. Even before the passing of this Act, the Indian Penal Code criminalised the act of miscarriage. Miscarriage is continues to be a crime under the recently enacted BNS. Before the passing of any legislation, the act of abortion had been looked upon as an unethical practice. Indian society has never given free hands to any women to abort her fetus. Indian law and policy adopt a prohibitive approach on right to abortion. Therefore, even though the said Act allows the abortion on certain grounds, it has never been recognized as a fundamental or legal right. In recent past however, the Indian legislature and judiciary have diluted this approach up to some extent by increasing the time limit to abort a fetus. It is pertinent to note that initially, the American policy on abortion was quite open and liberal. But in recent past, the American law has adopted somewhat conservative approach towards abortion. It is interesting to note that Indian society which is mainly a conservative society has adopted a liberal approach on abortion unlike United States of America, which is basically a liberal society but has adopted a conservative approach.

Keywords: Abortion, Medical, Pregnancy, Autonomy & Women

1. Introduction:
Amongst various rights that are conferred to Indian women under the Constitution and other laws, the right to reproductive autonomy is very crucial. Reproductive autonomy is a species of the right to privacy on one hand and right to bodily integrity and self determination on the other. One of the species of reproductive autonomy is the right to terminate the pregnancy or abortion. Often, there is confusion between some words like ‘Abortion’, ‘Miscarriage’ and ‘ Termination of pregnancy’. Though the word ‘abortion’ has not been defined officially under any legislation, but it means: “A medical procedure used to terminate a pregnancy through medication or surgery, depending on the duration of pregnancy and the individual’s medical needs.” Indian Penal Code\BNS criminalizes the act of miscarriage but the word ‘miscarriage’ is neither defined in IPC nor under BNS.

However, literally ‘miscarriage’ is: “The natural, spontaneous loss of a pregnancy before the 20th week.” Whereas, an abortion is a medical or surgical procedure intentionally used to terminate a pregnancy. The phrase ‘Termination of Pregnancy’ is defined under the MTP Act,

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1971, which means: "a procedure to terminate a pregnancy by using medical or surgical methods."[2]

Before the passing of the Medical Termination of Pregnancy Act, 1971, the act of miscarriage was forbidden under the Indian Penal Code. IPC criminalised the act of miscarriage, but it failed to provide a complete jurisprudence on it. Therefore, to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto the Medical Termination of Pregnancy Act, 1971 was enacted. The said Act has recognized the importance of safe, affordable, accessible abortion services to women who need to terminate pregnancy under certain specified conditions. However, with the passage of time and advancement of medical technology for safe abortion, there is a scope for increasing upper gestational limit for terminating pregnancies especially for vulnerable women and for pregnancies with substantial foetal anomalies detected late in pregnancy.

Further, there was also a need for increasing access of women to legal and safe abortion service in order to reduce maternal mortality and morbidity caused by unsafe abortion and its complications. Considering the need and demand for increased gestational limit under certain specified conditions and to ensure safety and well-being of women, it is proposed to amend the said Act. Consequently, the MTP was amended in 2021. Besides this, several Writ Petitions had been filed before the Supreme Court and various High Courts seeking permission for aborting pregnancies at gestational age beyond the present permissible limit on the grounds of foetal abnormalities or pregnancies due to sexual violence faced by women. The Supreme Court and High Courts, instead of restricting themselves within the literal compulsion of the legislation, have adopted a humanitarian approach and liberalised the law relating to abortion and thereby succeeded in developing an indigenous jurisprudence on the right to abort.

In USA 'abortion' before the Supreme Court's judgement in 1973 in *Roe v. Wade*[3], was regulated by the individual State laws rather than a single federal policy. As a result, it was completely banned in 30 States; Restricted/conditional access in 16 States; and legal/accessible in 4 States. In *Roe v. Wade*[4], the US Supreme Court has recognized the right abort as a Constitutional right protected under Fourth Amendment of US Constitution. However, in June 2022, the Supreme Court has completely overturned *Roe v. Wade* in a case known as *Dobbs v. Jackson Women's Health Organization*[5]. The Apex Court ruled that the U.S. Constitution does not confer a right to abortion.

This decision effectively ended the constitutional protection for abortion rights and allowed individual states to strictly regulate or completely ban the procedure. It is interesting to note that initially, the American policy on abortion was quite open and liberal. But through Dobbs's case, the American law has adopted somewhat conservative approach towards abortion. It is not out

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[2] Section 2(e).
[3] 410 U.S. 113 (1973).
[4] *Ibid.*
[5] 597 U.S. 215 (2022).

of the purview to note that Indian society which is primarily a conservative society has adopted a liberal approach on abortion unlike United States of America, which is basically a liberal society but has adopted a conservative approach.

2. Concept, Origin and Development of Abortion and Abortion Laws:

The word "Abortion" has no official definition. Sometimes it is read as synonymous with "miscarriage" and sometimes with "medical termination of pregnancy". Literally, abortion is a medical procedure used to terminate a pregnancy and is a critical component of reproductive healthcare. The procedure can be carried out through medication or surgery, depending on the duration of pregnancy and the individual's medical needs.[6] According to WHO: "Abortion is a simple health care intervention that can be safely and effectively managed by a wide range of health workers using medication or a surgical procedure."[7] Another definition of abortion by WHO is also available as per which : "The expulsion or extraction from its mother of a fetus or embryo weighing less than 500 grams."[8] According to Encyclopedia Britanica: "Abortion is the expulsion of a fetus from the uterus before it has reached the stage of viability (in human beings, usually about the 20th week of gestation). An abortion may occur spontaneously, in which case it is also called a miscarriage, or it may be brought on purposefully, in which case it is often called an induced abortion."[9]

The legal regime and the medical profession of many countries have made attempts to define the word "Abortion". Sir Stanley Clayton and John Newtonin their pamphlet titled "A Pocket Obstetrics," which was published in 1972 stated that: "Expulsion of the conceptus prior to the 28th week of pregnancy is what designate as abortion". This viewpoint is still upheld by British legal precedent.[10] Ralph Benson in the "Handbook of Obstetrics and Gynecology has defined Abortion as: "The termination of pregnancy before the fetus is viable." When the fetus weighs slightly more than 600 grams, technically speaking, viability is achieved between the ages of 23 and 24 weeks.[11] In the United States, the laws relating to abortion differ from state to state, but in general, an abortion can be performed on the patient at any time during the first trimester of pregnancy. During the second trimester, however, there are more limits placed on specific

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[6]https://www.ncbi.nlm.nih.gov/books/NBK518961/, accessed on 5/29/2026.

[7]https://www.who.int/news-room/fact-sheets/detail/abortion, accessed on 5/29/2026. The Report further states that around 73 million induced abortions take place worldwide each year. Six out of 10 (61%) of all unintended pregnancies, and 3 out of 10 (29%) of all pregnancies, end in induced abortion. Six out of 10 unintended pregnancies end in induced abortion. Abortion is a common health intervention. It is very safe when carried out using a method recommended by WHO, appropriate to the pregnancy duration and by someone with the necessary skills. However, around 45% of abortions are unsafe. Unsafe abortion is an important preventable cause of maternal deaths and morbidities. It can lead to physical and mental health complications and social and financial burdens for women, communities and health systems. Lack of access to safe, timely, affordable and respectful abortion care is a critical public health and human rights issue.

[8]Bennett M. Abortion. In: Hacker N, Moore JG, editors. Essentials of Obstetrics and Gynecology. 3rd. Philadelphia: Saunders Co.; 1998. pp. 477–486.

[9]https://www.britannica.com/science/abortion-pregnancy, , accessed on 5/29/2026.

[10]https://pmc.ncbi.nlm.nih.gov/articles/PMC9760240/ accessed on 5/29/2026.

[11]Benson R. 6th. Middle East Edition, Lebanon: Lange Medical Publication; 1977. Handbook of Obstetrics and Gynecology; p. 260.

medically justified circumstances. Abortion, according to contemporary consensus in the medical community, is the process of delivering a conceptus prior to the fetus's viability, which is defined as 20 weeks of pregnancy or a fetus weighing 500 grams or more. In several states, the weight requirement for viability has recently been reduced to 300 grams.[12] Though the terms "abortion" and "miscarriage" are not defined in any statute, the MTP Act, 1971 defines "Termination Pregnancy" as: "a procedure to terminate a pregnancy by using medical or surgical methods".[13]

While tracing the origin and development of abortion it is evident that, abortion is as old in India as the Indian civilization itself. It is pertinent to note that, in spite of the debatable ethical acceptability of abortion, nearly all cultures and social systems adopted it and attempted to control and regulate it through moral codes, mores, religious taboos, and governmental laws. Moral codes and religious taboos of some of the earliest civilizations that flourished in western and southern Asia before the Christian era dealt with abortion. References to induced abortion can be found in ancient Indian scriptures - *Rig Veda, Dhamra Sutras, and Smritis.* All mention it and condemn it as a sin. In the later epics, like the Mahabharata and Ramayana, some references to abortion are also found. The basic reason for such condemnation seems to be the fact that the dominant Hindu view about women as reflected in ancient texts is that they are the object of honor and respect. For example, Manu, in his *Dharmashastra*, is of the opinion that "where women are honored there the very Gods are pleased, but where they are not honored, no sacred rites even could yield reward."[14]

Abortion is considered to be unethical by the Indian society. Therefore, they are being carried out secretly and privately. Therefore, as in the case of some other demographic data, statistics on abortion in India are not available. Some estimates have been based on family planning clinic records, hospital statistics, and the like, but these are far from being precise. Potter and his colleagues[15] studied the abortion patterns of a rural population in the Khanna District in the state of Punjab, and found that, in 1,765 pregnancies covering a five-year period, there were 100 abortions per 1,000 pregnancies. Other studies give similar results.[16] The Report of the Abortion Committee of the Government of India suggests that, for every 73 live births, 25 abortions take place, 15 of which are induced. The report goes on to say that there are approximately 13.5 spontaneous, and eight induced (the estimated crude birth rate is 39) abortions per 1,000 population annually.[17]

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[12]Bennett M. Abortion. In: Hacker N, Moore JG, editors. Essentials of Obstetrics and Gynecology. 3rd. Philadelphia: Saunders Co.; 1998. pp. 477–486. https://pmc.ncbi.nlm.nih.gov/articles/PMC9760240/ , accessed on 5/29/2026.
[13] Section 2(e).
[14] Manu, quoted by P. Prabhu, Hindu Social Organizations, Fourth edition, Bombay: Popular Prakashan, 1963, p. 269.
[15] R. Potter et al., "Foetal Wastage in Eleven Punjab Villages," Human Biology, September 1965.
[16] Agarwala, "Abortion Rate Among a Section of Delhi's Population," Medical Digest, January 1962; The Mysore Population Study, New York: United Nations, 1961.
[17] Report of the Committee to Study the Question of Legalization of Abortion, New Delhi: Ministry of Health and Family Planning, 1960, p. 18.

The legislative history of law relating to abortion shows that the first law on abortion is part of the Indian Penal Code, which was enacted in 1860 by the British authorities of that time. According to this law, induced abortion is criminalized and considered as a serious offense.

In 1964, on the recommendations of the Central Family Planning Board of the government of India, an Abortion Study Committee was appointed. The committee submitted its report to the government in 1966 and made several recommendations for the liberalization of abortion laws. After many debates, a bill was introduced by Dr. S. Chandrasekhar in the Upper House and, after it was adopted, the Lower House concurred in the motion in December 1969. After some amendments, the bill was passed by the Upper House on May 27, 1971, and by the Lower House on August 7, 1971.

3. Indian Law on Abortion:

The objective of legal regime on abortion should not only to check illegal abortion but also to regulate the permissible abortions within the purview of law. Further, the said legal regime shall be consistent with the Constitutional mandate.

(A) Indian Constitution

The Constitution of India is silent about abortion. However, it has been construed in Article 21 of the Constitution. Article 21 of the Indian Constitution provides that: “No one shall be deprived of his life and personal liberty except according to the procedure established by law.” The Supreme Court of India in a number of cases has interpreted Article 21 to include women’s “reproductive rights” and thereby has elevated the expression "Right to Life" to a new level of significance. It is in this scenario that the question of whether the right to life encompasses the right to abortion arises. In the landmark case of *Suchita Srivastava v. Chandigarh Administration,*[18] a 19 to 20 year-old orphaned and mildly to moderate mental retarded women staying at a government-aided welfare institution in Chandigarh became pregnant due to alleged rape. In the lack of of a person who can give consent, the Chandigarh administration moved P&H High Court to take approval for abortion. Even though a medical expert body found that she expressed a desire to keep the child and that there were no major health risks, the High Court ordered the termination of the pregnancy.

The victim's representatives immediately appealed the High Court's decision to the Supreme Court of India. The Apex Court held that a woman's right to make reproductive choice is a dimension of her personal liberty under Article 21 of the Indian Constitution. This right includes bodily integrity, privacy, and the choice to procreate or abstain from procreating. The Court further held that diluting this consent requirement guaranteed under the MTP Act, 1971 for a mentally retarded person of legal age would be an arbitrary restriction on her rights. The Court supported its ruling on the ‘best interest test’ of the victim, who was an advanced stage of pregnancy. Further, the Court has differentiated between a ‘mentally ill’ person and ‘mental retardation’. The Court has made it clear that while the consent of a guardian is required for a

[18]AIR 2010 SC 235.

'mentally ill person', a person with 'mental retardation' retains the personal autonomy to decide whether they want to terminate a pregnancy.

In this way, the Supreme Court allowed the victim to carry her pregnancy to term. Again in *Devika Biswas v. Union of India*,[19] the Supreme Court has unequivocally and emphatically declared that a woman's reproductive autonomy is a basic right to privacy and that the decision about whether or not to have a child should be made solely by her, with no interference from the government. The apex court expressly held that unsafe, non-consensual, and unhygienic sterilizations violate the fundamental right to life and personal liberty, explicitly stating that the right to health and reproductive rights are integral parts of Article 21.

Further, in the case of *XYZ v. Union of India*[20], the apex court held that the term 'life' in Section 5 of the MTP Act ought to be interpreted broadly following the scheme of Article 21 of the Indian Constitution, considering both the gestational limits with the pregnant women's fundamental right to bodily autonomy and reproductive choice guaranteed under Article 21 of the Indian Constitution. The Court has opined that physical discomfort and mental trauma associated with an unwanted or forced pregnancy. In *Mrs. X vs. Union of India*[21], the petitioner had approached the apex court under Article 32 of the Constitution for medical termination of her pregnancy owing to the elevated risk of intrauterine foetal death. The Supreme Court, in this case, ruled in favour of the petitioner, enabling her to terminate her 22-week-old pregnancy post-due consultation with a medical board constituted by the court, which had affirmed that continuation of such a pregnancy may jeopardise the physical and mental conditions of the woman.

The Court held that "a woman's right to make reproductive choices is likewise a component of her 'personal liberty' guaranteed under Article 21 of the Constitution, and that her right to bodily integrity entitles her to terminate her pregnancy".

Again, the Supreme Court in *KS Puttaswamy v Union of India*[22], held that women have a constitutional right to make their own reproductive choices to bear the child or to undergo an abortion. The apex court explicitly tied the reproductive autonomy of women to right to privacy by holding that an individual's freedom of choice to bear a child or undergo an abortion falls securely within the realm of personal privacy and the state cannot forcibly dictate decisions concerning a woman's body.

(B) Bharatiya Nyaya Sanhita, 2023 (BNS)

In India, causing miscarriage to women was a crime and a punishable offence under the provisions of IPC. Now that the IPC has been repealed, and the BNS has come into force, it is a crime under the later too. It is pertinent to note that under IPC or BNS the word abortion has

[19](2016) 10 SCC 726.
[20]2023 SCC Online SC 1573.
[21] (2017) 3 SCC 458.
[22]AIR 2017 SC 4161.

not been used rather miscarriage[23] is used. However, this term has not been defined under the BNS. Chapter V covers punishment for miscarriage. Section 88 deals with causing miscarriage which states that**: "**whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."[24] In *Rajesh Kumar v. State of Chhattisgarh,*[25] it was held that where the child in the womb was full grown, the accused could not be convicted of causing miscarriage under Section 312 of the Indian Penal Code, 1860 because the section only contemplated expulsion of the child from the mother's womb before the gestation period was completed.

Section 89 deals with causing miscarriage without woman's consent which states that: "whoever commits the offence under section 88 without the consent of the woman, whether the woman is quick with child or not, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine." In *Imtiaz Ismail Shaikh vs State of Gujarat*[26] the petitioner was held liable under the offence of causing miscarriage to a woman for terminating her pregnancy without her consent.

Section 90 deals with death caused by act done with intent to cause miscarriage which states that: "(1) whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine ; and (2) where the act referred to in sub-section (1) is done without the consent of the woman, shall be punishable either with imprisonment for life, or with the punishment specified in said sub-section."[27]

Section 91 states that: "whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both**."**

Section 92 deals with causing death of quick unborn child by act amounting to culpable homicide. This section states that : "whoever does any act under such circumstances that if he thereby caused death, he would be guilty of culpable homicide, and does by such act cause the

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[23] The key difference between 'abortion' and 'miscarriage' is the intention and nature of the pregnancy loss. An 'abortion' is a planned procedure to end a viable pregnancy. A miscarriage (medically called a "spontaneous abortion") is an involuntary, natural pregnancy loss before the 20th week.

[24]It is further given in the explanation that a woman who causes herself to miscarry, is within the meaning of this section.

[25]2024 SCC Online Chh 460.

[26](2008) 3 GLR 2307.

[27]Explanation: It is not essential to this offence that the offender should know that the act is likely to cause death.

death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

(C) The Medical Termination of Pregnancy Act, 1971

The Medical Termination Pregnancy Act, 1971 came into force from 1st April 1972 to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto. Section 3 deals with the length of the pregnancy, before which it can be terminated by registered medical practitioners. It states that: "Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.[28] This section further goes to state that: "Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner[29]-

a) where the length of the pregnancy does not exceed twenty weeks, if such medical practitioner is, or-
b) where the length of the pregnancy exceeds twenty weeks but does not exceed twenty-four weeks in case of such category of woman as may be prescribed by rules made under this Act, if not less than two registered medical practitioners are, of the opinion, formed in good faith, that-
(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman[30] or of grave injury to her physical or mental health[31]; or
(ii) there is a substantial risk that if the child were born, it would suffer from any serious physical or mental abnormality.

It should be noted that the provisions of sub-section (2) relating to the length of the pregnancy shall not apply to the termination of pregnancy by the medical practitioner where such termination is necessitated by the diagnosis of any of the substantial foetal abnormalities diagnosed by a Medical Board.[32]

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[28] Section 3(1).
[29]Section 3(2).
[30] In a notable 2022 Supreme Court ruling [*X v. Principal Secretary, Health and Family Welfare Department*, Civil Appeal No. 5802 of 2022 (arising out of Special Leave Petition (Civil) No. 12612 of 2022)], the court expanded the definition of "women" to include unmarried women, reinforcing that reproductive choice is independent of marital status.
[31]Explanation 1.-For the purposes of clause (a), where any pregnancy occurs as a result of failure of any device or method used by any woman or her partner for the purpose of limiting the number of children or preventing pregnancy, the anguish caused by such pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.
Explanation 2.-For the purposes of clauses (a) and (b), where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by the pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.
[32] Section 3(2)2B.
Section 3(2)2C: Every State Government or Union territory, as the case may be, shall, by notification in the Official Gazette, constitute a Board to be called a Medical Board for the purposes of this Act to exercise such powers and functions as may be prescribed by rules made under this Act.

The Indian judiciary in a number cases have extended the scope of section 3 of the MTP Act, 1971. For example, in *Suchita Srivastava v. Chandigarh Administration*[33]**,** and more recently in cases like *X v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi*[34]The Supreme Court has repeatedly upheld the right of minors to access safe abortions in high-risk pregnancies, asserting that denying reproductive choices subjects individuals to "irreversible consequences". Similarly, in a notable 2022 Supreme Court ruling, *X v. Principal Secretary, Health and Family Welfare Department*[35], the court expanded the definition of "women" to include unmarried women, reinforcing that reproductive choice is independent of marital status.

Consent is a vital element to legalise abortion under this Act. The Act provides that: "No pregnancy of a woman who has not attained the age of eighteen years, or who, having attained the age of eighteen years, is a mentally ill person, shall be terminated except with the consent in writing of her guardian."[36] Further, no pregnancy shall be terminated except with the consent of the pregnant woman.[37] However, the consent of the spouse is irrelevant. The Punjab and Haryana High Court in the case of *Dr Mangla Dogra & Others v. Anil Kumar Malhotra & Others*[38] upheld the inalienable right and agency of a woman to seek an abortion on her own irrespective of the consent of her husband. The Court considers the consent form contained in the MTP Act and finds that the Act "neither expressly nor implicitly allows for the express or implied permission of the spouse."

It has been observed that most of the illegal abortion are carried out in private and unauthorised hospitals. To check this practice section 4 provides the place where pregnancy may be terminated. Which says that: No termination of pregnancy shall be made in accordance with this Act at any place other than[39]-

(a) a hospital established or maintained by the Government; or
(b) a place for the time being approved for the purpose of this Act by the Government or a District Level Committee constituted by that Government with the Chief Medical Officer or District Health Officer as the Chairperson of the said Committee.

Section 3(2) (2D) The Medical Board shall consist of the following, namely:
(a) a Gynecologist;
(b) a pediatrician;
(c) a Radiologist or Sonologist; and
(d) such other number of members as may be notified in the Official Gazette by the State Government or Union territory, as the case may be.

[33] (2009) 9 SCC 1.
[34] AIR 2022 SC 4917.
[35] (2022) 9 SCC 433.
[36] Section 3(4)(a).
[37] Section 3(4)(b).
[38] 2011 SCC Online P&H 16211.
[39] Section 4.

Section 5 provides that the provisions of section 4, and so much of the provisions of sub-section (2) of section 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.[40] The Indian Judiciary has on several instances allowed medical termination of pregnancies owing to the risk that it poses towards the mother's life. In *Tapasya Umesha Pisal vs. Union of India*[41], the Court allowed the petitioner, a woman in her 24th week of pregnancy, to undertake abortion under section 3(2)(b) of the MTP Act as the anomalies of her fetus posed an imminent risk to her life. Similarly, the Supreme Court in *Meera Santosh Pal vs. Union of India*[42] held that women's right to make a reproductive choice is also a dimension of personal liberty as understood under Article 21 of the Constitution and thereby permitted the petitioner to terminate her pregnancy of 23 weeks on the apprehension of danger to her life.

In *Minor R Thr Mother H v State of NCT of Delhi &Anr*[43], The Delhi High Court has issued instructions to be followed by investigating officials in cases when the pregnancy of a sexual assault victim exceeds 24 weeks. Justice Swarana Kanta Sharma remarked that a Board's delay in issuing orders for medical examinations of victims endangers the victim's life. In a comprehensive order, the court stated that a Urine Pregnancy Test will be required during the medical evaluation of a victim of sexual assault. Justice Sharma ordered that if the victim is determined to be pregnant as a result of sexual assault, and if she is a minor who consents and expresses a wish for MTP, the investigating officer would ensure that she is brought before the medical board on the same day.

It is pertinent to note that several judgements of the Supreme Court permitted the termination of pregnancies based on humanitarian grounds. In the case of *Murugan Nayakkar vs. Union of India & Ors*[44], the Supreme Court allowed the termination of a 13-year-old rape victim's 32-week pregnancy, ruling that she be allowed to terminate her pregnancy owing to her age, trauma, and the agony that she is undergoing. A similar application of law can be observed in *Indu Devi vs The State of Bihar & Ors*[45] wherein the Patna High Court permitted the petitioner, a 24-week pregnant rape survivor, to obtain medical termination of pregnancy. The court delivered its judgement duly taking note of the fact that the petitioner had chosen to proceed with the abortion at the 13-week mark of her pregnancy which however was hampered by bureaucratic and legal delays.

Notwithstanding anything contained in the Indian Penal Code (45 of 1860), the termination of pregnancy by a person who is not a registered medical practitioner shall be an offence punishable with rigorous imprisonment for a term which shall not be less than two years but

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[40] Section 5(1).
[41] AIR 2017 SC 3931.
[42] (2017) 3 SCC 462.
[43] 2023 SCC OnLine Del 383.
[44] 2017 Supreme Court (SC) 1866.
[45] (2017) 14 SCC 525.

which may extend to seven years under that Code, and that Code shall, to this extent, stand modified.[46] Further, whoever terminates any pregnancy in a place other than that mentioned in section 4, shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.[47]Any person being owner[48] of a place which is not approved under clause (b) of section 4 shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.[49]

In order to maintain the privacy of a woman who has undergone the procedure of medical termination of pregnancy, section 5A provides that: "No registered medical practitioner shall reveal the name and other particulars of a woman whose pregnancy has been terminated under this Act except to a person authorised by any law for the time being in force."[50] Whoever contravenes the provisions of sub-section (1) shall be punishable with imprisonment which may extend to one year, or with fine, or with both.[51]

Every State Government or Union territory, as the case may be, shall, by notification in the Official Gazette, constitute a Board to be called a Medical Board for the purposes of this Act to exercise such powers and functions as may be prescribed by rules made under this Act. The Medical Board shall consist of the following, namely: - (a) a Gynaecologist; (b) a Paediatrician; (c) a Radiologist or Sonologist; and (d) such other number of members as may be notified in the Official Gazette by the State Government or Union Territory, as the case may be.[52]

Comparative Study of Indian and American Law on Abortion

Before the decision of USA Supreme Court in 1973 in *Roe v. Wade*[53], abortion law were determined entirely by individual state legislatures, resulting in a heavily restricted and inconsistent legal landscape across the country. *The Roe v. Wade*[54] was a landmark 1973 U.S. Supreme Court case that established a constitutional right to abortion. The court ruled that a woman's right to choose to terminate a pregnancy falls within the fundamental right to privacy

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[46] Section 5(2).
[47] Section 5(3).
[48]Explanation 1.For the purposes of this section, the expression "owner" in relation to a place means any person who is the administrative head or otherwise responsible for the working or maintenance of a hospital or place, by whatever name called, where the pregnancy may be terminated under this Act.
[49]Section 5(4).
[50] Section 5(A)(1)
[51]Section 5(A)(2)
[52] Section (3)2C.
(2D) The Medical Board shall consist of the following, namely:
(a) a Gynecologist;
(b) a Pediatricians;
(c) a Radiologist or Sonologist; and
(d) such other number of members as may be notified in the Official Gazette by the State Government or Union territory, as the case may be.".
[53] 410 U.S. 113 (1973).
[54] *Ibid.*

protected by the Fourteenth Amendment. However, the court also allowed States to increase regulations as pregnancy progressed.

The Apex USA Court in the 7-2 ruling, struck down a Texas law that made abortion illegal except by a doctor's orders to save a woman's life. The objective of the judgment was to balance a woman's right to privacy with the State's interest in protecting potential life. The Court created a trimester framework. During the 1st trimester, States could not prohibit or heavily regulate abortion and the decision was left to the woman and her physician; during the 2nd trimester, States could impose regulations on abortion, but only to protect the mother's health, not to ban the procedure; and during the 3rd trimester, Once the fetus reached "viability" (the ability to survive outside the womb), States could prohibit abortions entirely, except when necessary to preserve the life or health of the mother.

In June 2022, the Supreme Court completely overturned *Roe v. Wade*[55] in a case known as *Dobbs v. Jackson Women's Health Organisation*[56]. The 5-4 majority ruled that the U.S. Constitution does not confer a right to abortion. This decision effectively ended the constitutional protection for abortion rights and allowed individual states to strictly regulate or completely ban the procedure.

As already pointed out in the introduction that one of the objectives of this paper is to make a comparative study of USA and Indian Laws on abortion, so as to unveil the reason why the Indian society, which is mainly a conservative society has adopted a liberal approach on abortion unlike United States of America, which is basically a liberal society but has adopted a conservative approach. The head-on comparison between Indian and US law on abortion has been presented as follows:

(i) Indian law on medical termination of pregnancy allows legal abortion under certain conditions, the objectives of which are vitiated due to traditional gender norms, cultural stigma and inadequate healthcare infrastructure. Whereas, in the USA, reproductive autonomy of a woman is protected under a patchwork of laws across states. This variability creates disparities in access to reproductive healthcare and disproportionately affects marginalised communities.

(ii) India's Medical Termination of Pregnancy Act, 1971, gives an opportunity to the pregnant women a reproductive autonomy to choose abortion. Recently, the 2021 Amendments expanded the scope of the Act by allowing 20 weeks for minors and survivors of rape and 24 weeks for vulnerable groups. The Act also mandates that abortion must be performed by qualified practitioners legally and women must give informed consent. Whereas, the USA's legal recognition of women's right to choose abortions was based on the *Roe vs Wade*[57] case decision in 1973, which granted women's the right to make decisions without government interference. However, subsequently, the *Dobbs v. Jackson* [58] case allowed states to regulate

[55] *Ibid.*
[56] 597 U.S. 215 (2022).
[57] 410 U.S. 113 (1973).
[58] 597 U.S. 215 (2022).

and ban abortions which created a legal landscape with varying access affecting marginalized communities and complicating women's autonomy.

(iii) The Indian Supreme Court while upholding the Medical Termination of Pregnancy (Amendment) Act, 2021 addressed historical discrimination against unmarried women by recognizing her right to abort and thereby promoted gender equality. Whereas, USA in post *Dobbs vs Jackson* [59] had witnessed regression in abortion rights following the Women's Health Organization and *Roe vs Wade*[60]. This led to states enacting laws that severely limit access to abortion and fetal rights over women's autonomy.

(iv) India faces barriers to reproductive rights due to legal constraints, limited access to healthcare and decision-making power. Whereas, the USA faces numerous barriers to reproductive autonomy in accessing abortion and other reproductive health services. These barriers are affecting marginalised communities like women of colour, low-income individuals and those with disabilities. Legal restrictions, financial challenges, logistical difficulties, social factors, and provider discrimination contributes to these disparities.

(v) The role of State policies and societal attitudes in India's reproductive decisions is crucial because it provides legal protections for abortion. The role of Indian judiciary is crucial to adopt a holistic approach in fostering women's autonomy as a fundamental human right. Whereas, the USA reproductive decisions are influenced by state policies particularly in the context of abortion rights. The legal framework and constitutional protections for abortion vary widely across the country, and some states are enacting laws that protect and expand access to abortion, while other states have stringent restrictions or bans. State constitutions and courts play a critical role in protecting reproductive rights while public funding for abortion services varies by state to state.

Conclusion:

It is pertinent to note that even in this day and age, where countries are struggling hard to provide and build an environment that is unbiased to females, adopting stringent abortion laws that compromise a female's rights does not look good on the country. One of the objectives of abortion laws is to curb the menace of female foeticide, for which appropriate laws, without infringing the rights of females, should be drafted. Considering the adverse impact of abortion on the bearing female, rules that do not allow abortion after a certain tenure can be adopted. Such a law, on one hand, has to be consistent with the constitutional mandate and on the other hand in line with the medical and technological proficiency of the country. For example, the current Indian laws do not allow abortion after 20 weeks of pregnancy since it can be harmful. But, with the current medical and technological progress of the country, this upper limit has been sought to be extended to 24 weeks through an amendment. Such procedures have to be followed.

Most of the countries allow abortion if the physical health or the life of the pregnant woman will be at risk if the pregnancy is continued. To add on to this, while considering the rights of the prenatal child, abortion on grounds of abnormalities of the fetus or medical futility of the

[59] *Ibid.*
[60] 410 U.S. 113 (1973).

fetus is also considered. But, in case of sensitive and mentally disturbing instances like pregnancy arising out of rape and incest, aborting the same should be allowed since they have adverse impacts on the mental health of the bearing female. If not done so, it would be unfair and unjust towards the rape/incest victim. Therefore, while drafting abortion legislation, all countries should consider the rights of the female, the rights and health of the prenatal child, and the physical and mental condition of the woman if she is not allowed to terminate her pregnancy. In this way, the law will be fair and just.

The differences in societal attitudes towards women's rights and reproductive autonomy have paved way for the development of abortion laws in India and the USA. India's Medical Termination of Pregnancy Act, 1971 has adopted a balanced approach, firstly, to recognise the reproductive autonomy of women and secondly, to curb the evil practice of female foeticide. Current and recent amendments in the legislation have increased the gestational limits up to 24 weeks for aborting in certain cases recognizing the importance of greater freedom within reproductive rights. The above study has shown that the current legal provisions in the United States have gone through tremendous evolution after the Supreme Court judgment held in *Roe v. Wade*[61] and in *Dobbs v. Jackson Women's Health Organization*[62] resulted in state level restrictions that violate women's rights. It is almost impossible for most women to access safe legal abortion services though there are guidelines and frameworks interpreted in both countries. And it is a sad truth that both countries are still fighting for reproductive justice and women's rights through legal frameworks.

[61] 410 U.S. 113 (1973).
[62] 597 U.S. 215 (2022).

Creditor-Debtor Relationship under the Insolvency and Bankruptcy Jurisprudence: A Critical Analysis

Mr. Vishal Kher[1]

Abstract:
Earlier, if a person needed a loan, they had to go to a moneylender or bank and ask for it. Today, the situation has reversed; banks and lending companies now approach people and offer them loans, often without being asked. This paper looks at how and why this change happened in India, and what it means for the law. It starts by explaining how lending used to work in the past, based on personal trust and reputation, and then explains how things changed after the economy opened up in 1991 and after digital credit scores came into use. The paper also studies the Insolvency and Bankruptcy Code, 2016, which changed the rules for what happens when a borrower is unable to repay a loan, giving more power and control to lenders. Using a doctrinal research method, the paper studies relevant laws, court judgments, and reports to understand whether this new system is fair to both lenders and borrowers. The paper finds that while lenders now have stronger legal protection under the IBC, borrowers, especially small suppliers, operational creditors and ordinary consumers affected by unclear credit scoring methods, do not have equally strong protection. The paper ends with suggestions to make lending practices more responsible and credit scoring more transparent, so that the law can better balance the interests of both lenders and borrowers.

Keywords: Creditor-Debtor Relationship, Insolvency and Bankruptcy Jurisprudence.

1. Introduction:

A key legal relationship in commercial law is the creditor-debtor relationship, which serves as the foundation of credit transactions that drive global economic activity.[2] This relationship, at its core, includes an obligation on the part of the borrower to return borrowed funds or perform a contractual obligation to the creditor who has extended credit or financial accommodation.[3] The Indian Contract Act of 1872, which regulates the formation, execution, and enforcement of contractual obligations among parties, establishes the legal foundation for this relationship in India.

The history of the creditor-debtor relationship shows an obvious evolution from personal, trust-based transactions to advanced, information-driven credit systems. Lending in India has evolved considerably over time, from personal, reputation-based money lending by traditional lenders such as *sahukars* and *mahajans* to today's data-driven, credit-score-based system, in which lenders now proactively compete to extend credit rather than borrowers seeking it out. The historical evolution of this concept and its legal implications are analysed in detail below. The enactment of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC" or "the Code") marked a landmark event in Indian commercial law, basically changing the

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[2] Roy Goode, Principles of Corporate Insolvency Law, 4th ed. 2011, pp. 23-25.
[3] Section 2(h) of the Indian Contract Act, 1872.

dynamics of the creditor-debtor relationship. The Code established a comprehensive framework for insolvency resolution and bankruptcy, shifting the emphasis from debtor-in-possession to a creditor-in-control framework during insolvency proceedings.[4]

The creditor-debtor relationship is not merely a commercial transaction but a legal relationship that entails significant consequences for parties' rights, obligations, and remedies. Legislative intervention has not only furnished creditors with strengthened rights and remedies but has also established a time-bound process for settlement, thereby decreasing the unpredictability and delays that marked earlier insolvency regimes.[5] This research paper provides an in-depth analysis of the creditor-debtor relationship in the context of Indian bankruptcy and insolvency legislation.

The research design includes an analysis of the historical development of the relationship, the present condition of credit markets, the impact of the Insolvency and Bankruptcy Code on creditor and debtor rights, and the role of credit scoring systems in modern lending practices. This research aims to contribute to the academic discourse on insolvency law and provide insights into the changing nature of creditor-debtor relationships in India by examining legal provisions, judicial interpretations, and regulatory modifications.

This research is important because it analyses how legal frameworks have evolved to align with new business conditions, seeking a fair balance between lenders' rights to recover debts and borrowers' legitimate interests in obtaining relief from unsustainable financial burdens. The Insolvency and Bankruptcy Code, 2016, serves not merely as a mechanism for debt recovery but as an essential component of the financial architecture that affects lending decisions, capital allocation, and economic development.[6]

2. Literature Review:

Tirthankar Roy,[7] examined how pre-independence credit markets were structured around personal networks, caste- and community-based trust, and informal moneylending institutions such as sahukars and mahajans, with limited statutory oversight until the enactment of provincial moneylenders' legislation in the early twentieth century. This literature establishes the historical baseline for this paper, but it does not extend its analysis into the post-liberalisation or post-IBC credit environment - a gap this paper addresses by connecting historical lending practice to contemporary regulatory design.

Ankeeta Gupta[8] analysed that the Code was designed to resolve long-standing problems of stakeholder identification, non-performing asset resolution, and creditor distrust that plagued India's pre-2016 insolvency framework.

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[4] *Swiss Ribbons Pvt Ltd v. Union of India*, (2019) 4 SCC 17.
[5] Section 12 of the Insolvency and Bankruptcy Code, 2016.
[6] International Monetary Fund, Orderly & Effective Insolvency Procedures: Key Issues, 1999, pp. 5-8.
[7] Tirthankar Roy, The Economic History of India 1857-1947, 3rd ed. 2011, pp. 156-162.
[8] Ankeeta Gupta, "Insolvency and Bankruptcy Code, 2016: A Paradigm Shift within Insolvency Laws in India", The Copenhagen Journal of Asian Studies, Vol. 36 No. 2 2019, pp. 75-99.

Aparna Ravi[9] explained that the inefficiency, delay, and poor recovery rates that characterised the pre-IBC regime, findings that this paper relies upon to justify why reform was necessary. However, her works largely treat the Code's creditor-friendly design as a settled improvement, without deeply interrogating whether "creditor primacy" is actually achieved in practice or adequately balanced against debtor interests.

Indrajit Dube[10] argues that, in light of India's concentrated corporate ownership structures, the IBC's intended objective of "creditor primacy" may not be fully realized in practice and that the regime is "manager-displacing" in law but remains "manager-driven" in actual practice. This critical strand of literature supports this paper's central argument that the shift toward a creditor-in-control framework is more complicated and less complete.

The Bankruptcy Law Reforms Committee[11] emphasised that an effective insolvency framework should focus on value maximisation, creditor confidence, and time-bound resolution of financial distress. The Committee's recommendations formed the conceptual basis of the IBC, 2016 and introduced a creditor-driven insolvency framework in India.

Vanessa Finch and Jay Lawrence Westbrook[12] argue that insolvency law should not merely facilitate debt recovery but must balance competing stakeholder interests, promote business rescue, and ensure economic efficiency. Their scholarship highlights the importance of maintaining equilibrium between creditor rights and debtor protection within modern insolvency systems.

The UNCITRAL Legislative Guide on Insolvency Law[13] further stresses that insolvency frameworks should maximize asset value, encourage corporate rescue, and ensure fair treatment of all stakeholders. These principles have significantly influenced contemporary insolvency legislation across jurisdictions, including India.

While the existing literature has extensively examined the historical evolution of credit markets, insolvency reforms under the IBC, and theoretical aspects of creditor protection, limited attention has been paid to the combined impact of changing lending practices, credit-scoring mechanisms, and the creditor-in-control framework on the contemporary creditor-debtor relationship. This paper seeks to address that gap by critically analyzing the transformation of creditor-debtor relations in the context of India's evolving insolvency jurisprudence.

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[9] Aparna Ravi, "The Indian Insolvency Regime in Practice – An Analysis of Insolvency and Debt Recovery Proceedings", Economic And Political Weekly, Vol. 50 No. 51 2015, pp. 19-46.

[10] Indrajit Dube, "Insolvency and Bankruptcy Code 2016: Revisiting with Market Reality", International Journal of Law And Management, 2020.

[11] Bankruptcy Law Reforms Committee, The Report of the Bankruptcy Law Reforms Committee: Volume I – Rationale and Design, 2015, p. 15–38.

[12] Vanessa Finch, Corporate Insolvency Law: Perspectives and Principles, 2nd ed., 2009, p. 27–35.

[13] UNCITRAL, Legislative Guide on Insolvency Law, 2005, p. 1-15.

3. Research Gap:

The literature available on the Insolvency and Bankruptcy Code (IBC) largely focused on the efficacy of the code as a legal mechanism for insolvency resolution, debt recovery, corporate restructuring and safeguarding of creditors' rights. The Code is assessed in most studies on the basis of the resolution timelines, the recovery rates, the efficiency of the institutions, judicial interpretation and the performance of the insolvency professionals and adjudicating authorities. These contributions have immensely helped to understand the insolvency law in India; however, they have been selectively confined to the creditor–debtor relationship as an immutable and unchanging legal dynamic without taking into account the changes in the economic and technological setting in India. There is comparatively little scholarly attention given to a crucial change that has occurred in the context of credit practices, namely the shift towards a new mode of credit evaluation. In India, the practice of lending money was mostly dependent on personal relationships, local reputation, collateral, and the lender's intuition of the borrower's credibility.

The economic liberalisation, the development of banking services, financial markets and digital financial infrastructure changed this approach completely. The advent of credit bureaus, fintech platforms, artificial intelligence (AI), machine learning, algorithmic credit scoring, and digital lending has transformed lending from a judgment-based approach to data-driven risk assessment models. Such changes have changed the risk distribution, access to credit, and power dynamics between creditors and debtors. There is, however, little legal research on the impact of technological innovation on the legal nature of the creditor–debtor relationship. The impact of algorithmic decision-making, automated credit evaluation, digital lending platforms, and the extensive use of data on the traditional principles of contract law, fairness, transparency, informed consent and borrower protection has not been investigated in existing studies. Likewise, there is a lack of understanding of how these technological innovations affect insolvency proceedings under the IBC, especially when increasingly automated lending decisions and digital financial ecosystems are impacting insolvency. A second concern that can be observed is related to the evolution of the relationship between creditor and debtor from a historical perspective.

The majority of the research focuses on IBC as a standalone legislation from 2016 without considering it as a part of the overall development of Indian credit markets. The evolution of informal reputation-based lending, to nationalised institutional banking, to post-nationalisation consumer and corporate banking, and finally to algorithmic lending in the digital age has not been analysed as a single legal and economic shift. To comprehend this development is important because insolvency law is not a law unto itself and is shaped by the development of credit markets. Moreover, the change from a debtor-in-possession to a creditor-in-control regime triggered by the IBC has also posed key issues of the effectiveness of legal protection in the digital world. While the Code significantly enhances creditors' rights and facilitates efficient insolvency resolution, there remains a lack of research to critically assess the effectiveness of the protections afforded by the legislation in addressing issues of algorithmic bias, data privacy, transparency in automated credit decisions, unequal bargaining power, digital exclusion and procedural fairness for borrowers.

The growing importance of technology in the credit markets brings enhanced legal challenges that are not confined to classic insolvency law but need interdisciplinary analysis. The aim of the study is to fill these gaps, which are filled with a historical, doctrinal and interdisciplinary approach. It charts the history of the creditor-debtor relationship from classical contract law concepts to the emerging reputation-based lending system, through financial liberalisation and expansion, digital lending, AI credit assessment, and the creditor-driven system laid down by the IBC.

The paper merges the evolution of both contract and financial regulations, technologies, and insolvency jurisprudence to offer a full picture of the development of the legal relationship between creditors and debtors throughout history. It also critically analyses whether India's existing insolvency regime is well suited to regulating technology-driven credit markets and to striking a balance among commercial efficiency, creditor rights, borrower protection, and the principles of fairness, transparency, and due process in the constitution. This co-operative approach is important to the existing literature and can be useful for discussing the future of insolvency law in digital finance and in the age of artificial intelligence.

4. Research Problem:

The enactment of the Insolvency and Bankruptcy Code, 2016, has established a new paradigm in creditor-debtor relationships. While the Code has been commended for introducing a creditor-friendly framework and establishing time-bound resolution processes,[14] Several important issues have arisen regarding its effect on the fundamental nature of the creditor-debtor relationship and the adequacy of safeguards for various stakeholders.

The main research problem addressed by this research concerns the transformation of the creditor-debtor relationship in the context of evolving market dynamics and the regulatory framework established by the IBC. Particularly, the research analyses whether the modern insolvency regime adequately balances the interests of lenders and borrowers, considering the fundamental change from debtor-initiated credit seeking to creditor-driven credit distribution.

The traditional model of the creditor-debtor relationship was characterised by the debtor's active search for loans, resulting in a relationship where the debtor often agreed to disadvantageous terms due to limited bargaining power and urgent monetary requirements.[15] This framework intrinsically recognised the weak position of the debtor and included specific protections within contract law principles such as unfairness, undue influence, and statutory rules and regulations on money lending.[16]

Nonetheless, today's condition of the economy shows a quite different scenario. Driven by profit and competition, banks proactively pursue potential borrowers, often extending credit to individuals and entities that may not completely understand the long-term effects of debt

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[14] Ministry of Corporate Affairs, Report of the Insolvency Law Committee, 2018, pp. 12-15.
[15] Rajesh Kumar, Historical Development of Banking in India, 2005, pp. 67-71.
[16] Section 19(a) of the Indian Contract Act, 1872.

obligations.[17] Rising levels of corporate and consumer debt have resulted from this aggressive loan distribution, making effective debt management and insolvency resolution more difficult.[18]

When financial institutions shifted from personal lending decisions to digital credit scoring, this created three main issues: whether people can still get loans, whether the system treats everyone fairly, and whether the computerised processes contain hidden biases that unfairly disadvantage certain groups.[19] While credit scores purport to offer unbiased assessments of creditworthiness, concerns have been raised about the transparency of scoring methodologies, the correctness of credit data, and the effect of past financial difficulties on future availability to credit.[20]

The objective of maximising asset value for creditor reimbursement is analysed, along with the difficulty of maintaining a balance between the broader financial and social effects of bankruptcy processes, including the consequences for employees, operational creditors, and the capacity to preserve the corporate debtor as a going concern.[21] A key issue in insolvency and bankruptcy law, the conflict between these opposing interests, requires thorough examination in the Indian context.

5. Research Methodology:

The present study is based on doctrinal research methodology and relies on both primary and secondary sources of data. Primary sources include relevant provisions of the Insolvency and Bankruptcy Code, 2016, the Indian Contract Act, 1872, and judicial decisions of the Supreme Court and relevant tribunals. Secondary sources include books, journal articles, committee reports, and publications of the IBBI and RBI, all of which have been critically examined. The study adopts a descriptive and analytical approach to evaluate the evolving creditor-debtor relationship under the insolvency framework and to assess whether the existing legal regime adequately balances the interests of creditors and debtors.

6. Research Objectives:

1. To trace the evolution of creditor-debtor relationships in India, from traditional lending practices to contemporary credit systems.
2. To assess whether the interests of debtors and creditors are sufficiently safeguarded by the existing legal system in light of the changed economic environment.
3. To analyse the fundamental shift in credit dynamics from debtor-initiated borrowing to creditor-initiated lending and its legal implications.
4. To examine landmark judicial decisions that illustrate how the evolution of debtor-creditor laws has changed over time.

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[17]Reserve Bank of India, Report of the Working Group on Introduction of Cross-Sell in Insurance by Banks, 2020, pp. 23-27.
[18]Reserve Bank of India, Financial Stability Report, Issue No. 28, 2023, pp. 45-48.
[19]Manish Kumar, "Credit Scoring and Financial Inclusion: Challenges and Opportunities," Journal of Banking and Finance Law, Vol. 15, 2019, p. 156.
[20]Id., at 3.
[21]*Arcelor Mittal India Pvt Ltd v. Satish Kumar Gupta*, (2019) 2 SCC 1.

5. To provide a future roadmap for effective implementation of the creditor- debtor relationship in India.

7. Research Questions:

This study seeks to answer the following research questions:

1. Whether the evolution from traditional money lending practices to contemporary credit systems in India been adequately reflected in the legal framework governing creditor-debtor relationships?
2. Whether the current legal framework adequately protect the interests of both creditors and debtors in India's economic environment?
3. Whether the fundamental shift from debtor-initiated borrowing to creditor-initiated lending has created new issues and challenges that current laws fail to address?
4. Whether judicial interpretation of debtor-creditor laws has evolved sufficiently through landmark judicial decisions to respond to changing economic conditions and credit market dynamics?
5. What legal reforms and policy measures can be suggested to overcome challenges and provide a roadmap for an effective creditor-debtor relationship in India?

8. Hypothesis:

This paper argues that while the IBC strengthens creditor rights, existing safeguards remain inadequate for operational creditors and credit-scored debtors.

9. Historical Framework of the Creditor-Debtor Relationship

9. (1) Contractual Basis under the Indian Contract Act, 1872:

In India, the creditor-debtor relationship is primarily governed by the Indian Contract Act of 1872, which establishes and enforces contractual obligations.[22] Section 2(h) of the Indian Contract Act, 1872 defines a contract as a legally enforceable agreement that serves as the foundation for credit transactions.[23]

The relationship between creditor and debtor emerges from a contract in which the creditor provides financial assistance or credit to the debtor, who agrees to an obligation to return the borrowed amount along with any agreed-upon interest or charges.[24] This contractual relationship may be established at the instance of the promisor (debtor), the promisee (creditor), or any other person, provided there is consideration[25] and lawful objective[26] supporting the agreement.

Section 37[27] describes the primary obligation of the parties to a contract to fulfill their individual promises, unless such performance is exempted with or excused under the provisions of the

[22]Preamble and Long Title of the Indian Contract Act, 1872
[23]Id., Section 2(h).
[24]Id., Section 2(e).
[25]Id., Section 2(d).
[26]Id., Section 23.
[27]Id., Section 37.

Indian Contract Act or any other law. In the context of a loan agreement, this means the debtor's main obligation to repay the borrowed amount according to the terms and conditions stipulated in the agreement, and the creditor's right to get such repayment.

The Indian Contract Act, 1872 recognises different kinds of security that may be provided by the debtor to the creditor to secure performance of the obligation. Sections 172 to 176[28] relate to, the contract of pledge, by which the debtor (pawnor) hands over goods to the creditor (pawnee) as security for repayment of a debt. In the same way, the Transfer of Property Act, 1882, provides for mortgages of immovable property as a method of securing debt obligations.[29]

The principle of privity of contract, embodied under Section 2(d),[30] provides that only parties to a contract can sue or be sued upon it. However, this principle is subject to certain exceptions, including contracts for the profit of third parties and contracts of guarantee, which have specific relevance in credit transactions.[31]

9. (2) Conventional Lending Practices and Reputation-Based Credit Assessment:

Throughout Indian history, the creditor-debtor relationship was characterised by human connection, community-based trust, and reputation as the primary determinant of financial reliability.[32] Traditional moneylenders, known by various names such as sahukars, mahajans, and chettis depending on the region, controlled the credit market and provided credit facilities to agricultural and commercial borrowers.

The goodwill or credit image of the debtor played an important role in determining whether credit would be granted and on what terms. A borrower with an established reputation for honesty and timely repayment would have access to credit on more favourable terms compared to a borrower without such a reputation. The requirement of collateral in traditional lending served multiple purposes. First, it provided the creditor with a tangible asset that could be liquidated in the event of non-payment, thereby reducing the credit risk. Second, the furnishing of security demonstrated the borrower's obligation to repay the loan, as default would result in loss of valuable assets. Third, in a legal system where the execution of unsecured debts was often difficult and time-consuming, secured lending provided creditors with greater certainty of recovery.[33]

The legal framework governing conventional money lending was initially minimal, with customary practices and community norms playing a significant role in governing credit transactions.[34] However, concerns about predatory lending practices, particularly the imposing

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[28]Id., Section 172-176.
[29]Id., Section 58-104.
[30]Id., Section 2(d).
[31]Id., Section 126-147.
[32]Tirthankar Roy, The Economic History of India 1857-1947, 3rd ed. 2011, pp. 156-162.
[33]Provincial Insolvency Act, 1920, Preamble.
[34]Rajnarayan Chandavarkar, The Origins of Industrial Capitalism in India: Business Strategies and the Working Classes in Bombay, 1994, pp. 234-241.

of usurious interest rates and the use of coercive recovery techniques, led to the enactment of various provincial moneylenders' laws in the early twentieth century. These laws sought to govern money lending activities by requiring registration of moneylenders, establishing highest interest rates, and prohibiting certain unjust practices.[35] The traditional framework of the creditor-debtor relationship placed the burden entirely on the debtor to seek out sources of credit. The debtor, facing monetary need, would reach out to potential creditors and negotiate terms of lending. The bargaining power in these negotiations typically favoured the creditor, particularly when the debtor's need was urgent or when other sources of credit were limited.[36]

10. Transformation Of Financial Markets: From Debtor-Seeking-Creditor to Creditor-Seeking-Debtor:

10. (1) Liberalisation and Banking Sector Reforms:

The economic liberalisation that commenced in India in 1991 marked a turning point in the development of credit markets and the nature of the creditor-debtor relationship.[37] The liberalisation process includes significant financial sector reforms such as interest rate deregulation and the elimination of legal preconditions such as the Statutory Liquidity Ratio and Cash Reserve Ratio, and the liberalisation of banking services and foreign participation. These reforms radically transformed the competitive mechanics of credit markets. Public sector banks, which had earlier enjoyed a near-monopoly over institutional credit, faced competition from new private sector banks, foreign banks, and NBFCs.[38] This growing competition forced financial institutions to proactively seek debtors and expand their customer base to maintain profitability and market share.[39]

The Reserve Bank of India's fiscal policy framework shifted towards using market-based instruments such as repo rate adjustments instead of direct credit controls, further increasing the role of competition in deciding credit allocation. Financial institutions acquired greater autonomy in their lending decisions, comprising the pricing of credit products and the identification of target customer segments.[40]

10. (2) Expansion of Credit Products and Aggressive Marketing:

The liberalised financial environment witnessed a proliferation of credit products designed to meet different borrower needs. Personal loans, credit cards, home loans, vehicle loans, education loans, and various forms of consumer finance became easily accessible to retail borrowers.[41] For corporate borrowers, banks and non-banking financial companies offered

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[35] Bengal Money-Lenders Act, 1940.

[36] B.M. Bhatia, Famines in India: A Study in Some Aspects of the Economic History of India, 2nd ed. 1967, pp. 189-194.

[37] Montek Singh Ahluwalia, "Economic Reforms in India since 1991: Has Gradualism Worked?," Journal of Economic Perspectives, Vol. 16, 2002, p. 67.

[38] Reserve Bank of India, Report on Trend and Progress of Banking in India 1991-92, pp. 15-22.

[39] Reserve Bank of India, Report of the Committee on Financial Sector Assessment, 2009, pp. 78-84.

[40] Reserve Bank of India, Report of the Expert Committee to Revise and Strengthen the Monetary Policy Framework, 2014, pp. 45-52.

[41] Reserve Bank of India, Household Finance Committee Report: Finances of Households in India, 2017, pp. 34-41.

working capital facilities, term loans, project financing, and structured credit products.[42] Financial institutions utilised aggressive marketing strategies to attract borrowers, often reaching out to potential borrowers through direct marketing, telephone solicitation, and online platforms. The emphasis shifted from the debtor seeking credit to the creditor proactively promoting credit availability and encouraging borrowing. This shift has greatly influenced the relationship between lenders and borrowers. While the rise in credit accessibility has prompted investment, spending, and economic growth, it has also raised issues regarding excessive debt, ethical lending practices, and the adequacy of borrower protection.[43] Central Bank of India v. Ravindra[44] is a Constitution Bench decision holding that while compound interest on loans is valid if contractually agreed and RBI-compliant, penal interest cannot be capitalised or charged further interest upon, since it is punitive rather than compensatory.

10. (3) The Rise of Credit Information Mechanism and Credit Scoring:

A crucial factor enabling the transformation from debtor-seeking-creditor to creditor-seeking-debtor has been the growth of comprehensive credit information systems and the widespread adoption of credit scoring methods.[45] These databases give creditors the ability to swiftly and effectively evaluate the creditworthiness of possible debtors by providing data on loan accounts, credit card accounts, repayment histories, defaults, and outstanding balances.[46]

Credit information companies include Credit Information Bureau Limited, Equifax, Experian, and CRIF High Mark, which manage database of credit information collected from banks, NBFCs, and various other credit providers. These databases contain information on loan accounts, credit card accounts, repayment history, defaults, and outstanding balances, enabling creditors to assess the creditworthiness of potential debtors quickly and efficiently.[47]

Creditors now mainly rely on the credit score, which usually spans from 300 to 900, to evaluate credit risk. A higher credit score not only indicates a lower probability of default but also often leads to more favorable loan terms, including reduced interest rates and larger credit limits. Conversely, borrowers with low credit scores face difficulties in obtaining credit or may only receive it under less favorable conditions.[48] A notable shift in how creditworthiness is assessed has taken place with the transition from reputation-based lending to credit-score-driven evaluation. Credit scores are said to provide an objective, data-focused assessment of credit risk, unlike traditional reputation, which was inherently subjective and influenced by social status and interpersonal connections. This transformation carries several significant implications.

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[42]Reserve Bank of India, Report on Trend and Progress of Banking in India 2022-23, pp. 67-73.
[43]*Supra note* 18.
[44] *Central Bank of India v. Ravindra*, (2002) 1 SCC 367.
[45] Statement of Objects and Reasons, Credit Information Companies (Regulation) Act 2005.
[46]Id., Sections 3, 4, 5.
[47]Reserve Bank of India, Master Direction – Credit Information Companies Directions 2016, RBI/DOR/2016-17/26, September 21, 2016.
[48] TransUnion CIBIL Limited, Understanding Your CIBIL Score and Report, https://www.cibil.com, (Visited on January 10, 2026).

Primarily, credit scoring allows lenders to assess creditworthiness at scale, facilitating the quick processing of credit applications and the expansion of credit to previously underserved market segments. Secondly, the accessibility of comprehensive credit information reduces information asymmetry between creditors and debtors, potentially leading to more efficient credit markets. Thirdly, credit scores establish incentives for debtors to maintain good credit behavior, as poor credit history can have long-lasting negative impacts on access to credit.

However, credit scoring also presents issues. The lack of transparency of credit scoring algorithms raises concerns about transparency and fairness. Debtors often have limited understanding of how their credit scores are calculated and what factors affect their scores. Errors in credit data can negatively affect credit scores, and the process for correcting such errors may be cumbersome.[49] Furthermore, credit scoring may perpetuate historical disadvantages, as borrowers who have faced financial difficulties in earlier times may find it difficult to rebuild their creditworthiness despite addressing the underlying issues.

11. The Insolvency And Bankruptcy Code, 2016: Reshaping Creditor-Debtor Relationship

11. (1) Development of Insolvency Law in India:

Before the implementation of the Insolvency and Bankruptcy Code of 2016, India's insolvency structure was fragmented and ineffective, with numerous laws governing various aspects of insolvency and bankruptcy. The Provincial Insolvency Act, 1920, the Presidency Towns Insolvency Act, 1909, and the Companies Act of 2013, and various other acts established a complicated and often contradictory juridical framework for dealing with insolvency matters. This fragmented framework suffered from multiple shortcomings: prolonged and time-consuming proceedings that frequently took years or even decades to settle, low recovery rates for lenders, the absence of a clear distinction between insolvency resolution and liquidation, and inadequate creditor rights, particularly during reorganisation proceedings.[50]

Recognising such shortcomings and their adverse impact on India's business environment and investment climate, the Indian Government constituted the Bankruptcy Law Reforms Committee in 2014 to propose comprehensive reforms to the insolvency framework. The Committee's recommendations formed the basis for the IBC, 2016, which was enacted to consolidate and amend the laws regarding insolvency resolution of corporate persons, partnership firms, and individuals in a time-bound manner, and to optimize the value of assets of such persons.[51]

11. (2) Key Features of the Insolvency and Bankruptcy Code, 2016:

The Insolvency and Bankruptcy Code, 2016 introduces a paradigm shift in India's approach to insolvency by establishing a creditor-in-control framework that prioritises timely resolution and asset optimisation. The IBC, 2016 differentiates between two classes of creditors: financial

[49]Section 20 of the Credit Information Companies (Regulation) Act, 2005.
[50]Bankruptcy Law Reforms Committee, Report of the Bankruptcy Law Reforms Committee, Vol. I: Rationale and Design, 2015, PP. 15-25.
[51]Preamble and Statement of Objects and Reasons of the Insolvency and Bankruptcy Code 2016.

creditors, who have provided credit in the nature of a financial debt with the primary purpose of earning interest on capital, and operational creditors, who have supplied goods or services and are owed payment for such operational transactions.[52]

The Corporate Insolvency Resolution Process can be commenced by a financial creditor, an operational creditor, or the corporate debtor itself at the time a default has occurred in repayment of debt exceeding a specified threshold.[53] Once the bankruptcy application is approved, a moratorium is implemented, which prohibits the continuation of legal actions, asset transfers, and the enforcement of security interests without the tribunal's permission.[54]

A key aspect of the CIRP involves appointing an insolvency professional to take over the control of the corporate debtor from the current leadership, effectively instituting the creditor-in-control model.[55] The Insolvency Professional is responsible for managing the affairs of the corporate debtor, constituting a Committee of Creditors including financial creditors, and facilitating the preparation and approval of a resolution plan.

In *Arcelor Mittal India Pvt Ltd v. Satish Kumar Gupta*,[56] the Court interpreted Section 29A, holding that ineligibility of a resolution applicant is assessed at the time of submission of the resolution plan.

Innovative Industries Ltd v. ICICI Bank[57] was the first major Supreme Court judgment interpreting the IBC. It held that once a financial creditor establishes default, the adjudicating authority must admit the insolvency application and clarified the binding effect of the moratorium under Section 14.

During the CIRP, the Committee of Creditors, consisting exclusively of financial creditors, wields significant power. This authority includes the ability to approve or reject resolution plans, determine whether to retain or replace the Insolvency Professional, and decide on the future actions of the corporate debtor. While operational creditors cannot vote within the Committee of Creditors, they are permitted to attend its meetings and receive payments according to the hierarchy outlined in the resolution plan or liquidation waterfall.[58]

In *K. Sashidhar v. Indian Overseas Bank*,[59] the Court held that the commercial wisdom of the CoC in approving or rejecting a resolution plan is non-justiciable and cannot be interfered with by NCLT/NCLAT. In *Mobilox Innovations Pvt Ltd v. Kirusa Software Pvt Ltd*,[60] the Court laid

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[52]Id., Section 5(7), 5(20), 5(21).
[53]Insolvency and Bankruptcy Code (Amendment) Act, 2020 (threshold increased to Rs. 1 crore).
[54]Section 14 of the Insolvency and Bankruptcy Code, 2016.
[55]Id., s.17.
[56] Supra note 19.
[57] *Innoventive Industries Ltd v. ICICI Bank*, (2018) 1 SCC 407.
[58] Section 53 of the Insolvency and Bankruptcy Code, 2016.
[59] *K. Sashidhar v. Indian Overseas Bank*, (2019) 12 SCC 150.
[60] *Mobilox Innovations Pvt Ltd v. Kirusa Software Pvt Ltd*, (2018) 1 SCC 353.

down the test for determining whether a "pre-existing dispute" bars an operational creditor from initiating CIRP under Section 9.

Under the IBC, 2016, the CIRP must be finalised within 180 days of the approval of the insolvency application. If the adjudicating authority finds that this timeline cannot be met, it may grant an extension of an additional 90 days. This marks a significant change from the prior system, which permitted insolvency proceedings to be prolonged indefinitely, as this new time-bound approach is more structured. Additionally, a resolution plan becomes obligatory for all stakeholders involved, including the corporate debtor, its employees, shareholders, creditors, and guarantors, provided it is sanctioned by the Adjudicating Authority and endorsed by the Committee of Creditors with a minimum of 66% voting share.

11. (3) Impact on Creditor Rights and Remedies:

In the event of a debtor default, the Insolvency and Bankruptcy Code has significantly broadened the rights and remedies available to creditors, particularly those who are financial creditors. The automatic moratorium, which prevents the misuse of assets, the ability to initiate insolvency proceedings upon default, and the creditor-controlled framework established by the Committee of Creditors provide creditors with powerful tools to assert their rights.

In Committee of Creditors of Essar Steel India Ltd v. Satish Kumar Gupta,[61] the Court affirmed the primacy of the CoC's commercial decisions, upheld differential treatment of financial and operational creditors in resolution plans, and read down mandatory timelines to make them directory in nature.

The Supreme Court of India has acknowledged the constitutional validity and creditor-friendly nature of the IBC in various important judgments. In the case of Swiss Ribbons Pvt Ltd v. Union of India,[62] the Court found that the distinction between financial and operational creditors is based on clear differences that logically connect to the objectives the Code aims to achieve.

The adjudicating body recognized that financial creditors, having advanced money to the corporate debtor, have a continuing stake in its survival and are best positioned to assess the viability of the business. However, the enhanced rights given to creditors under the IBC have raised questions about the adequacy of protections for borrowers and other stakeholders. Critics have argued that the creditor-in-control framework may not adequately consider the interests of operational creditors, employees, and the wider economic impact of insolvency resolution. The Supreme Court, while affirming the constitutional validity of the Insolvency and Bankruptcy Code, has also emphasised the need to balance creditor rights with the objective of protecting the corporate debtor as a going concern and protecting the interests of other stakeholders.

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[61] *Committee of Creditors of Essar Steel India Ltd v. Satish Kumar Gupta*, (2020) 8 SCC 531.
[62] *Supra note* 4.

In *Vidarbha Industries Power Ltd v. Axis Bank Ltd*,[63] the Court held that the adjudicating authority has discretion under Section 7 and is not bound to mechanically admit a CIRP application merely because a default is shown, introducing a degree of protection for the corporate debtor.

12. Conclusion:

The relationship between creditors and debtors under India's insolvency and bankruptcy regulations has undergone considerable transformation, reflecting broader changes in financial markets, legal systems, and economic frameworks. A sophisticated, data-driven approach has largely taken the place of the traditional model, with creditors proactively seeking out borrowers and assessing creditworthiness through algorithmic credit scoring, replacing the earlier system defined by personal connections, reputation-based credit evaluations, and the debtor's active quest for lending sources. The passage of the Insolvency and Bankruptcy Code in 2016 marked a pivotal moment in this evolution, establishing a regulatory structure that prioritizes creditors and focuses on swift resolutions, maximizing value, and enhancing creditor rights. Many shortcomings of India's former insolvency framework, such as prolonged procedures, inadequate recovery rates, and weak creditor protections, have been substantially addressed.

The hypothesis that the IBC adequately safeguards both parties stands only partially proven, while creditor protections have strengthened; this study finds debtor and operational creditor safeguards remain insufficient.

The combination of comprehensive moratorium regulations, a time-sensitive resolution process, and the creditor-led control mechanism through the Committee of Creditors has enhanced the efficiency of insolvency resolution while strengthening the position of creditors. However, this shift has also introduced new challenges and raised significant questions about how to justly treat different types of creditors, find a balance between protections for debtors and rights for creditors, and consider the broader social and economic implications of bankruptcy procedures. While this approach is defended on the grounds of business partnerships and risk distribution, the unequal treatment of financial and operational creditors presents potential injustices that warrant further examination and possible reform.

There are pros and cons to substituting trust-based financing with evaluations based on credit scores. Credit scoring has improved efficiency, reduced information gaps, and facilitated the provision of credit; however, it has also raised concerns regarding data accuracy, transparency in algorithms, and the risk of excluding certain borrower demographics from financial services. In today’s market, the aggressive promotion of credit products by financial lenders has contributed to rising debt levels, highlighting the need for regulatory measures to ensure responsible lending practices. The research illustrates that the interaction between creditors and debtors is dynamic and continuously changing in response to shifts in the economy, technological advancements, and regulatory frameworks. As these changes occur, insolvency

[63] *Vidarbha Industries Power Ltd v. Axis Bank Ltd,* (2022) 8 SCC 352.

and bankruptcy laws must evolve to maintain an equitable balance among the competing interests of various stakeholders.

Suggestions:

The recommendations outlined aim to enhance the regulatory framework governing creditor-debtor relationships within the insolvency and bankruptcy system, based on the in-depth analysis carried out for this study:

Regulation of Prudent Lending Practices: Considering the transformation from debtor-seeking-creditor to creditor-seeking-debtor, there is an urgent need for comprehensive regulation of lending practices to stop predatory lending and excessive debt. Regulatory authorities should establish clear norms for responsible lending, including requirements for creditworthiness assessment, disclosure of loan terms, and suitability of credit products for the debtor's financial situation.

Transparency in Credit Scoring: Credit information companies should be mandated to provide greater transparency with respect to credit scoring methodologies, enabling borrowers to understand how their credit scores are calculated and what actions they can take to enhance their creditworthiness. Additionally, mechanisms for prompt correction of errors in credit data should be strengthened, and debtors should have effective recourse when inaccurate information negatively affects their credit scores.[64]

Efforts to enhance financial literacy among debtors should be bolstered to ensure individuals and businesses understand the consequences of their debt obligations and can make informed decisions regarding credit. Additionally, consumer protection frameworks must be improved to address unfair lending practices and provide effective remedies for debtors who have suffered from predatory lending or misrepresentation.[65]

Enhancing Institutional Framework: The institutional infrastructure supporting the Insolvency and Bankruptcy Code, 2016 including the National Company Law Tribunal, the Insolvency and Bankruptcy Board of India, insolvency professionals, and information utilities should be continually strengthened through adequate funding, capacity building, and the enhancement of specialized knowledge in insolvency issues.[66]

Effectiveness and Fairness in Equilibrium: While the CIRP's time-sensitive structure has enhanced efficiency, it is crucial to ensure that thoroughness and fairness are not compromised for the sake of expediency. The system should uphold the necessity for swift resolutions while allowing enough adaptability to address complex situations. Procedures for extending deadlines in exceptional circumstances need to be clearly defined and used sparingly.

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[64] *Supra note* 47.
[65] Reserve Bank of India, National Strategy For Financial Education, 2020, pp. 34-42.
[66] Insolvency and Bankruptcy Board of India, Annual Report, 2023, pp. 12-18.

In light of shifting economic circumstances and regulatory measures, the creditor-debtor dynamic under the IBC, 2016, is continuously evolving. The legal framework for credit recovery and bankruptcy resolution has certainly been strengthened by the IBC, 2016. To ensure a proper balance between the rights of lenders, the protections afforded to borrowers, and broader economic objectives, this framework must continue to develop. The suggestions mentioned earlier are intended to aid the ongoing refinement of India's insolvency legislation, fostering a more effective, efficient, and fair method for addressing financial challenges and encouraging economic recovery.

The fundamental evolution from debtor-seeking-creditor to creditor-seeking-debtor, combined with the shift from reputation-based to credit-score-driven lending, requires a corresponding evolution in the regulatory frameworks to deal with new vulnerabilities and ensure that the benefits of increased credit access are not coupled with unacceptable risks of excessive debt and financial instability. Only through regular assessment, stakeholder engagement, and evidence-based reform can India's insolvency and bankruptcy law fulfil its promise of providing timely, fair, and efficient resolution of financial distress while supporting viable economic growth and development.

Paradox of Simplification: Statutory Uncertainties and Regulatory Pauses in the Industrial Relations Code, 2020

Prof. Rajneesh Kumar Patel[1]

Abstract:
The Code on Industrial Relations, 2020, was enacted with the intent to make industrial life easier by reducing compliance costs, liberalising resolution mechanisms, simplifying century-old provisions, and easing the process of doing business; however, reality appears far from the proclamation. To this end, the article examines certain paradoxes of the so-called simplification of provisions, which aims to bring together three cornerstones of labour laws into one streamlined piece of legislation. The study evaluates how this transformation of labour laws has created several statutory uncertainties, administrative interference, and a half-hearted attempt to protect workers' interests. It finds irony in the fact that the elimination of archaic procedural burdens has been taken over by terminological instabilities, like confusing definitions, foggy provisions, and the unregulated power of the government granting exclusion from the applicability of the code, which creates a juridical vacuum, makes the climate harder in the arena of dispute resolution and weakens the collective bargaining of workers. The Code brings about a huge power swing back towards capital and labour by raising the minimum standing orders to 300 employees, unhindered retrenchment, and establishing a mandatory strike notice in all industrial establishments. The article concludes that although the code is intended to be flexible, the absence of legal certainty leads to a litigatory frenzy and administrative congestion. The study provides a clear idea of such statutory uncertainties, advantageous for practitioners, law teachers, and policymakers to follow, rather than ignoring the gaps in the implementation, which may jeopardise the goal of the code to bring industrial harmony.

Keywords: Industrial Relations, Workers, Industry, Government, Ease of Doing Business.

Introduction:

Indian labour jurisprudence has long been based on paternalistic protection, an approach that arose from a post-colonial necessity to protect workers vulnerable to the tenets of a free-market economy. At the core of this situation, the Industrial Disputes Act, 1947, has played a crucial role over decades, developing into a pillar of social insurance, the ultimate protector of workers' interests, and a founder of peace by resolving disputes efficiently and at the earliest. With the onset of the 21st century, where the worldwide economy shifted to a globalised structure that perceived these protective layers as regulative cholesterol, hard, discontinuous, and detrimental to industrialisation, and now an ambitious attempt to modernise that ecosystem, the Indian Parliament has passed the Code on Industrial Relations, 2020, as part of a four-code renovation that was aimed at consolidating 29 central labour laws.

To have a sense of balance in the tripartite relationship between employers, workers, and the State, it aims to subsume the Industrial Disputes Act,1947, the Trade Unions Act, 1926, and the Industrial Employment (Standing Orders) Act, 1946. In this swing, the avowed objective is ease of doing business, aimed at stimulating investment through a simplified compliance system.

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However, behind this facade of procedural efficiency, several structural hitches, legislative ambiguities, definitional overlaps, and jurisdictional gaps are lurking, which need to be determined at the earliest, considering the strong possibility that it may jeopardise the industrial peace that the 2020 Code is intended to maintain.

To find out the way forward in this respect, the study dissects statutory glitches through a comparative analysis of the 1947 regime, and argues that, although the idea of consolidation was noble, the present form of the Code on Industrial Relations, 2020, is not only deficient in horizontal integration with other codes, but also miss the mark to respect the judicial precedents that have made Indian labour relations stable over the last 78 years.

The Issue of Workers' Rights:

At the opening of this discussion, one should be very clear on the point that the law relating to industrial relations did not provide any alms or handouts to the workers, but it offers only a mechanism for speedy trial and confers some sort of compensation for retrenchment, lay-off, and closure.[2] Unquestionably, the workers bestow their blood and flesh to the industries only for starvation wages; hence, their rights must be protected, and industrial disputes must be resolved speedily. As Justice P. N. Bhagavati points out, the shareholders do contribute capital, but capital is not sufficient; another equally, indeed more, important factor of production is workers who contribute their labour and lives to a concern, making them participants in the very existence of a concern as opposed to mere financial investors.[3] Accordingly, the protection of their rights should be taken as the duty of the State rather than any charity made to them.

The Industrial Disputes Act, 1947, a predecessor of the Code on Industrial Relations, 2020, was aimed at providing the above rights, but scrutiny of the 2020 Code shows a significant shift in the jurisdictional scope of labour rights. Interestingly, the Act of 1947 was understood by the judicial community, most especially in the revolutionary decision of *Bangalore Water Supply and Sewerage Board* v *A Rajappa*,[4] to expand the definition of the term Industry for the wide-ranging application of the Act. Still, the 2020 Code seems to be performing a tactical withdrawal from the earlier objective,[5] where the new model of threshold-based governance essentially deregulates the major portion of the industrial sector, because of increased number of workers to require standing orders and government permission to retrenchment, from 100 to 300 workers, making it now a dual-tier industrial society with workers in small and medium size units being at the mercy of employers and contractors, as a replacement for collective statutory safeguards. The author believes that, undoubtedly, the government's intent in doing so is to ease doing business, but throwing them into the uncontrolled arena of management will make them legal orphans. A study highlighted that this increased threshold for layoffs, retrenchments, and closures has affected approximately 7.07 per cent of factories in the organised manufacturing

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[2] Section 70, the Code on Industrial Relations, 2020.
[3] National Textile Workers' Union v P. R. Ramakrishnan, AIR 1983 SC 75.
[4] (1978) 2 SCC 213
[5] Section 2 (p), the Code on Industrial Relations, 2020.

sector only, apart from which there are significant impact on the other sectors concerning the dilution of worker rights.[6]

While comparing the two enactments, it is also necessary to focus on the governmental intention about its application. It seems that the Industrial Disputes Act, 1947, was designed to gradually cover more industries to ensure industrial peace and protect workers from the arbitrary actions of the employers. In this regard, section 25-K (2) explicitly gave power to the government to apply the strict prior permission retrenchment rules[7] to any industrial establishment, regardless of whether it meets the threshold of 100 workmen, simply by giving two months' notice. Similarly, while defining the term industry, no exception was added, and as a result, the Act was made applicable to any systematically organised activities involving cooperation between labour and capital that produce goods or services for the public.[8]

Further, in section 25-J, it was also in black and white that the provisions of the chapter[9] shall have effect notwithstanding anything inconsistent therewith contained in any other law, including standing orders made under the Industrial Employment (Standing Orders) Act, 1946. One should also not overlook that with the amendment of 1982, the threshold of the concerned chapter was lowered to 100 workers from 300, which clearly indicates the legislative desire to make more establishments subject to governmental control. In contrast, if one examines the present legislative intent concerning this issue, one would find that the Industrial Relations Code, 2020, has forgotten the interest of the workers and shifted its entire focus on simplification by raising thresholds again to 300, requiring prior government permission for retrenchment and for necessary standing orders.[10] This provision automatically left various medium and small-sized establishments that were previously covered by the Industrial Disputes Act, 1947.

Over again, as compared to the 1947 regime, where the thresholds could be changed, if necessary, now section 101 of the code does not permit the Central Government to reduce the threshold under notification, but only to raise it. This provision not only limits the government's power to bring smaller industries back under the prior permission net, but also clearly demonstrates that the government is enthusiastic to exempt the industries from the umbrella of the code, which is undoubtedly a step to hamper the interests of workers working in medium and small-sized industries. Similarly, through the formalisation of fixed-term contracts in section 2(o), the code has opened the door for employers to dismiss workers at the end of the contract duration without the termination being treated as retrenchment, and therefore, the code has ensured that such terminations can be made without notice and compensation.[11] More interestingly, section 96 empowers the appropriate government to exempt any new industrial

[6] Roy, G.K. & Dubey, A. (2022). "A Note on Industrial Relations Code, 2020." The Indian Journal of Labour Economics, 65(2).
[7] See, Chapter V-B of the Industrial Disputes Act, 1947.
[8] See section 2 (j) of the Industrial Disputes Act,1947.
[9] Supra Note, 6.
[10] Section 77 of the Industrial Relations Code, 2020
[11] Ibid, 2(z h) (iv).

establishment or class of establishments from any or all provisions of the code in the public interest. Further, one more power is added now under the definition of the term industry, clearly stating that any activity may not be considered as an industry if the central government notifies in that regard.[12]

The above innovative changes evidently establish that the Industrial Relations Code, 2020, is on a different path, with considerable flexibility, and reflect that even with so-called progressive legislation, the legal protections guaranteed under the code will not be available to most industries and industrial establishments.

The Threefold Tragedy of Mixed Definition:

The Industrial Relations Code,2020, has created an etymological and conceptual incongruity between industry, industrial establishment, and undertaking. As there are differences in legal implications between these three terms, when used interchangeably in the text, they have the potential to cause a litigation explosion instead of the euphoric impact of compliance that they were designed to have. The unclear, overlapping, and confusing definitions of these three may be considered the trickiest glitch in the Industrial Relations Code, 2020. This structural ambiguity is not a semantic lapse; it is an immense statutory hitch that may result in a large-scale jurisdictional scuffle and the evasion of labour laws through corporate restructuring. Further, section 2(b) adds more confusion to the definition concerning the appropriate government, according to which, the Central Government is an authority towards an industrial establishment or an undertaking that is carried on by it. Nonetheless, as there is no clear distinction between establishment and undertaking, there are usually some conflicts as to whether a particular branch in another State should be regulated by the State Government or by the Central Government.

The term industry[13] has been defined as an activity involving cooperation between workers and employers, and on the other hand, section 2 (r) of the code defines an industrial establishment or undertaking to be an establishment or an undertaking in which any industry is conducted. It is a classic statutory tautology; it defines the thing by mentioning the activity as an industry, and again it defines the activity by mentioning the thing. These terms were divided into clear functional areas under the Industrial Disputes Act 1947. Even at that time, an activity was known as an industry, but what courts considered a project or a functional unit was an undertaking. Making them collapse into one, the code does not explain whether a vast, one large, industrial corporation is a single, industrial establishment, but rather that each of its branch offices, like undertakings, merits a separate establishment.

The worst blow of such confusion is experienced in the implementation of the threshold, because the code requires that an industrial establishment having 300 or more workers should obtain government permission concerning layoffs, retrenchments, or closures, that clearly means if in that unit if there is less than 300 workers, then they can be retrenched without

[12] Ibid, Section 2 (p).

[13] Section 2(p), Code of Industrial Relations, 2020.

permission of the government, even in that unit the activity is coming under the purview of industry. It is also interesting to note that under section 2 (r), the term industrial establishment has been defined as a physical structure where industry is going on, but when it comes to section 77, it narrows down the range of the term, and explains the term industrial establishment only in the sense of a factory, mines, and plantations. This provision itself reflects that permission before retrenching the workers is necessary only in factories, mines, and plantations and not in other kinds of industrial establishments, even if they are industries or undertakings. A similar provision indeed existed in the 1947 Act; the so-called progressive code does not make any change, so it is clear that an industrial establishment that does not fall under the above category need not take permission before retrenching the workers, even if it engages more than 300 workers.

It is worth mentioning here that in law, there is always an assumption that when the parliament uses different words, it does not mean the same thing. Therefore, the judiciary might have a hard time determining whether an undertaking, which may be a small unit, is supposed to be treated like an industrial establishment, which can mean a physical factory or workshop. This confusion may result in litigation as to whether a certain business fits the definition. An example is that when a regulation concerns a safety matter at a particular location, an employer may say that their more global operations should not be impacted by regulations intended for a factory floor.

This will cause administrative headaches, and adherence becomes a nightmare. A business may fail to abide by one part of the code, which mandates taking a license to an undertaking and the other mandating a report to an industry, without being aware that they are supposed to abide by both. It also shrinks the authority of the judiciary to interpret the law differently. To illustrate, a company that has five functionally integrated warehouses with 250 employees each can seek to treat each unit as a distinct and detachable place of work. With the Code, and by capitalising on the absence of a stringent statutory functional integrality test, the industry might theoretically escape the 300-worker test per unit, thus exempting the whole enterprise from the need to have the government approve of its retrenchment or have standing orders.

It is preferable, therefore, to select one anchor word or to put a section of definitions that is quite clear, that, amongst other things, undertaking is meant to refer to industrial establishments and industries as defined. It goes without saying that the Industrial Relations Code, 2020, substituted the semi-flexible and judicially-tested definitions of the Industrial Disputes Act, 1947, with an inflexible and baffling statutory definition. The legislature has equipped a litigation playground because it has failed to draw a line between the legal entity, i.e., Industry, the physical location, meaning by an establishment, and the functioning unit, such as an undertaking. Therefore, it needs to mark that this trinity of confusion not only complicates the task of compliance, but also literally undermines the rule of law by rendering the applicability of the rights of labour a matter of corporate organisation decision, not an obligatory statutory guarantee.

This change in the law literally turns the social justice imperative set in the case of *Associated Cement Companies Limited* v. *Their Workmen,*[14] in which the Supreme Court decided that the Act should be construed in a manner that did not cause the artificial division of labour. The Code facilitates cases on severability, placing corporate flexibility above the safety of the workers, and this facilitated the very mischief of industrial atomization that the judiciary had spent decades trying to overcome. It is requested, therefore, that there is an urgent need to reform section 2(r) to make a clear distinction between the legal entity meaning Industry and the physical unit meaning establishment to avoid the tactical division of the businesses to remain below the threshold.

Tumbling the Extent of the Industry

Historically, the definition of the term industry has been the most disputed term during the half of the regime of the 1947 Act, which was finally resolved with the landmark judgment given by Mr Justice Krishna Iyer in *Bangalore Water Supply* v. *A. Rajappa.*[15] In the instant case, through the triple test, the term Industry was described as any organised activity practised by co-operation between an employer and an employee towards the production or distribution of goods or services. Although the above test and its language have been adopted, the Industrial Relations Code, 2020, explicitly excludes institutions that involve charitable, social, or philanthropic services. This puts a case in which a huge industrial establishment, such as a big charitable hospital or educational institute, is strictly an establishment but not an industry under the Code.

As a result, its workers are in a factual void; they are employees of an establishment but possibly not workers in an industry, and therefore they may be denied the right to bring before the court an industrial dispute under section 2(q). It is worth mentioning that even in the Bangalore Water Supply judgement, the Apex Court agreed that purely philanthropic activities may be outside of the coverage of the Act, but using the term social activity along with the charitable and philanthropic serves in the exception clause created an ambiguity regarding the interpretation. As the word social service is wide enough, any literal interpretation of this term will reduce the arena of industry. This is not only a hypothesis made by the author, but this trend is reflected in the recent judgment of *Indravadan N. Adhvaryu Pipala Fali Modhvada* v. *Laxminarayan Dev Trust,*[16] wherein the Supreme Court decided that temples are not an industry. One should not forget that during the regime of the 1947 Act, any business-like activities run by the temple were considered an industry.

It is not out of place to add here that, on March 17, 2026, the Supreme Court, through a nine-judge bench, revisited the Bangalore Water Supply case, where the key question was whether social welfare activity and schemes carried out by the government departments or their instrumentalities should be interpreted as an industry. Ultimately, the judgment was reserved,

[14] AIR 1960 SC 56.
[15] 2026 Live Law (S.C.) 102.
[16] Civil Appeal No. 7549 of 2011, decided on January 29, 2026.

and the question remains unanswered. It is important to note that even if the judgment will be pronounced in future, it will apply to the cases filed before the application of this code.

The Dichotomy of Worker and Employee:

The Industrial Relations Code, 2020, uses the term employee[17] in the most liberal possible meaning, that is to cover anyone who works for wages to perform any skilled, semi-skilled, unskilled, manual, operational, supervisory, and even managerial or administrative work. Conversely, the term worker[18] is defined in such a way as to expressly leave out those who work in a managerial or administrative position and those in a supervisory role who are paid over a fixed amount. Undoubtedly, the Industrial Relations Code, 2020, is purportedly aimed at updating labour classifications and making them more current, but the reality of the situation demonstrates the existence of a serious jurisdictional glitch. The introduction of the bifurcated definitions of employee as in section 2(l) and worker as in section 2(z r) of the code not only offers a false appearance of expansion but also covers a gaping hole around labour rights. Although the terminology of worker seems to be normal and holistic to the general eye, a statutory analysis reveals a legal contradiction that entrap the middle-level employees within a payroll trap.

This paradox is centred on the salary cap of the supervisory personnel. The classification of workmen under the defunct Industrial Disputes Act, 1947, was very broad so that most of the supervisors earning less than 10,000, which was usually increased by judicial sympathy, came under the workmen classification. The Code of 2020 increases this to 18,000 per month, although this is expected to capture inflation, it puts a rather strict statutory wall around the contemporary workforce. Today, in the economic environment, thousands of front-line managers, top technicians, and administrative employees are making over this amount of the statutory limit. Even though these supervisors and other staff lack true managerial or administrative authority, they are strictly excluded from the definition of a worker. This exclusion results in a jurisdictional vacuum. The middle-level employees will no longer enjoy the benefits of specialised legal protection that characterised 20th century industrial jurisprudence since they no longer qualify as workers.

They cannot raise an industrial dispute, they are ineligible for the prior-permission protections against retrenchment under section 77, and they also lose access to the fast-track, pro-labour Industrial Tribunals. It also weakens the judicial elasticity while interpreting it. In about seventy eight years, the Supreme Court formulated a dominant nature test to identify whether a person was a workman or not, provided that the nature of their work was either manual or clerical, operational, or even supervisory, then they were a reed against the winds, even though they were called managers.[19] Hence, the code disregards the fact that in the contemporary era of flat corporate structures, a tier one supervisor and manager may be in the same rank and no longer have an actual right to hire or fire, but rather carry out daily operational duties. This makes these

[17] Section 2 (l) of the Industrial Relations Code, 2020.
[18] Ibid, section 2(zr).
[19] Ananda Bazar Patrika (P) Ltd. v. The Workmen, (1970) 3 SCC 248.

people enter the grey zone; they are too old to be workers and too young to have access to expensive civil law.

Moving further, in the Industrial Disputes Act, 1947, the term workman was used under section 2(s), and now, with an objection that this term was male-oriented, the code uses the term workers, which is gender neutral word. Considering the nations' promise towards the elimination of gender bias, this may be a welcome step, but the author believes that changing only the names and using a gender nutral word can not protect the interests of the women workers.

It depicts frome tha above discussion that, the biggest enforcement tool of the code, the right to initiate an industrial dispute is being conferred solely to the workers. As a result, when one is an employee but not a worker, the obligations of the code apply to him or her, but the remedies are not available. In case such an employee is fired unfairly, then this worker cannot approach the industrial tribunal, but rather he or she must resort to the grievances of this massive demographic to the overburdened and expensive civil courts. The State has choked the entry point of labour justice by a strict salary threshold and succeeded in establishing a charter of exclusion which excludes a crucial piece of the industrial labour force from the specialised statutory protection of the Industrial Disputes Act, 1947.

The Gap in the Collective Bargaining:

The Industrial Relations Code,2020, offers a new idea of a Negotiating Union under section 14 to ease the process of collective bargaining. In case there are multiple unions in an establishment, then the one that has a membership of 51 per cent or above is considered the Sole Negotiating Union, and if no union attains 51 per cent of the requirement, a Negotiating Council will be constituted, consisting of representatives of unions that have at least 20 per cent support. It is submitted that, as a matter of fact, in India, most industries are disjointed, and therefore, 51 per cent may be considered an inflated threshold that has the effect of marginalising smaller, craft-specific unions. This could also be contended as an ignorance of the right to freedom of association,[20]because the code turns a blind eye to minority grievances by imposing a one-size-fits-all bargaining agent, which in the past resulted in wildcat strikes and industrial unrest, what the code is designed to prevent.

The above concern could be understood with this simple example, as in an establishment, there are five active unions, in which Union A has 40 per cent of the membership. Other Unions B, C, D, and E have 15 percent each, hence, under the code, the 51 per cent test of a Sole Negotiating Union does not pass by any unions including the Union A. By this, however, the fact that Unions B, C, D, and E are all under 20 percent of the necessary number of members to secure a seat on the Negotiating Council renders them ineligible to be included at the bargaining table. As a result, Union A, with 40 per cent of the membership, is the only vocal labour group, even though there is 100 per cent unionisation. Union A becomes the single occupant of the Negotiating Council. Even though it represents only 40 per cent of the workforce, any

[20] Article 19(1)(c) of the Constitution of India, 1950.

agreement it signs with the employer will be legally binding on all 100 per cent of the workers, effectively marginalising the 60 per cent majority.

This system gives rise to another disturbing issue related to trade union membership. As the employees who fall under the category of workers are given a seat at the table, other employees who are middle-level employees, such as managers and supervisors, are left in a statutory vacuum due to their managerial exclusion. The code deprives these employees of collective bargaining, and they are denied statutory job security, leaving them vulnerable. These systems constitute a divided workplace where the factory floor workers are vocal in their statutory rights, whilst the middle management is remote and muted. Another thing to consider is the extent of the change since the 1947 Act, which was more liberal in permitting multi-party settlements and provided the minority unions an opportunity to be heard. That flexibility is replaced in the new code by cold arithmetic. It establishes a winner-takes-all atmosphere, which in effect closes the door to the union that fails to achieve the mathematical threshold.

It is submitted that silencing such an immense part of the workforce cannot bring stability, but rather, most probably, drive marginalised unions toward illegal wildcat strikes and industrial unrest to ensure they are heard. The 2020 Code flouts the ethos of the right to equality.[21] and the right to livelihood[22] by creating a group of non-worker employees who have no prospect of any dispute resolution mechanism. This is a fallacy, in the sense that it is presupposed that no protection of tribunals is needed by the employees, without thinking of the kind of power imbalance that the relationship between the employer and the employee, compensation, or position title entails. Therefore, to fix this imbalance, the legislature should consider broadening the definition of a worker so it covers supervisors and middle-level employees, regardless of how much they earn. Alternatively, they could set up dedicated tribunals for middle management grievances, to ensure that a job title like manager does not become a tool for denying the basic right to a fair hearing of employees.

Regulation of Strike:

Another controversial glitch of the Industrial Relations Code, 2020, is that it radically changes the model of collective bargaining and provision of remedies to quarrels. The sincerity of the new class of strikes to cover concerted casual leave and the introduction of a universal notice of 14 days indicate the termination of the constitutional ethos of collective bargaining, bordering on what many critics talk of as nothing less than the de-unionisation of the Indian workforce.[23] Although the Industrial Disputes Act, 1947, attempted to reconcile the economic arms of the strike and the lock-out, the code has constructed a procedural maze to the effect that a legal strike is a mathematical and temporal impossibility.

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[21] Ibid, Article 14.
[22] Ibid, Article 21.
[23] Industrial Relations Code: An Attack on the Right to Strike and to Organise, Workers' Resistance Journal, the All-India Central Council of Trade Unions, June 2021.

It is to be noted that section 22 of the Industrial Disputes Act, 1947, limited the 14 days of prior notice before a strike to only the public utility services like water, electricity, and transport. At non-public utility services, employees were technically allowed to go on strike without giving any prior notice if no conciliation was pending. Taking a sweeping tune, section 62 of the code fails to differentiate public utility and non-public utility services.

It is interesting to note that section 62(1) (a) not only forbids a strike that occurs during the pendency of conciliation proceedings, but also, in the absence of pendency, it takes place without notice.[24] The Conciliation Officer is, however, bound to intervene as soon as a notice is given. Therefore, as conciliation begins immediately a notice is served, the formal period of striking will never come into existence. This is a trapping statute, where the universal compulsory notice makes a strike illegal that was legal in the 1947 regime.

Moving further, the Industrial Relations Code, 2020, presents a radical and much-deplored broadening of the meaning of strike,[25] which now includes concerted casual leave on a day by half or more of the workers in an industrial establishment. It is worth mentioning here that in the arena of labour jurisprudence, the concept of casual leave used to be a vested right of an employee for personal exigencies.[26] In contrast, the code makes the employer decide on the purpose of the workers by classifying a mass leave as a strike. Consequently, when half of the employees in a plant sign a local emergency, such as a local festival, or to attend a funeral ceremony of any worker, and request leave, they might be accused of an illegal strike. This clause applies to flash strikes, yet it does not offer a way to draw the line between a legitimate collective grievance and an accidental mass absence, which results in the risk of victimisation of workers and infringement of their right to take leave.

To clarify the line of reasoning of these anomalies, reference to the Indian Constitution Socialist Prism may be given, where, in the case of *Gujarat Steel Tubes Limited* v. *Gujarat Steel Tube Mazdoor Sabha,*[27] Mr Justice Krishna Iyer noted that the right to strike is a key weapon in the arsenal of collective bargaining, but in moving the power balance to the employer, the 2020 Code makes the weapon unattainable. Likewise, in *B.R. Singh* v. *Union of India,*[28] the Apex Court ruled that though the right to strike is not a fundamental right, it is a legal right that must not be deprived without any reason. It is submitted, therefore, that there is an urgent need to remove the requirement of a universal notice system and declaration of mass leave application from the arena of strike.

Interference with Judicial Awards:

One of the prime anomalies, as far as the rule of law is concerned, perhaps, lies in section 47 of the code, which gives the power to the appropriate government to remain or make amendments

[24] Section 62(1)(d), the Code on Industrial Relations, 2020.
[25] Section 2(z k), the Code on Industrial Relations, 2020.
[26] Standard Vacuum Oil Co. Ltd., Madras v. Gunaseelan M.G. (1954) II LLJ 656 (Mad)
[27] (1980) 2 SCC 593
[28] AIR 1990 SC 1.

in an award of an industrial tribunal in case the government feels that the award would impact the economy of the state or social justice, and the government itself is a party in the dispute. It is interesting to note that there was a similar provision in section 17-A of the Industrial Disputes Act, 1947, which was, however, famously put to the test in *Andhra Bank Officers Association* v. *Union of India*,[29]and later, in the case of *Tamil Nadu Magazines* v. *State of Tamil Nadu*,[30]where the Supreme Court has time and again found that the executive cannot exercise any judicial power over a judicial body. In the case of *S.R. Bhagwat* v. *State of Mysore*,[31] the Supreme Court also held that once a judicial or quasi-judicial authority, like a labour court or a tribunal, has reached a final decision and granted specific rights to a party, the executive cannot use its power to nullify or change that decision. Doing so would be a direct interference with the judicial role and a violation of the constitutional doctrine of the separation of powers.[32]

Thus, the key aspects of these decisions were the principle of finality of judgments, which says that once a judgment is delivered and becomes final, it creates a vested right for the winning party.[33] The government does not just give an order and say that the judgment is no longer in effect. The Constitution itself separates the powers between three wings of the government, and accordingly, in case the executive were allowed to alter the court awards whenever they like, the judiciary would no longer be independent. This is not only true in the context of the regular courts but also in the case of the so-called quasi-judicial courts such as labour courts, tribunals, taxes instance, and land tribunals. It has also been restated in the case of *In Re Cauvery Water Disputes Tribunal*,[34] in a different regard, the court held that an executive ordinance could not be employed to reverse or disregard a judicial or quasi-judicial order on the issue of water sharing.

Despite this obvious judicial interpretation, this power is confirmed in the code, which leaves a legal stalemate whereby a worker may win a suit against a public sector undertaking after years of court battle, only to have the government decline to have the award implemented because of economic reasons of its own.

While considering this issue, one should also not forget that in the 1947 Act, the tribunal, labour courts and National Industrial Tribunals were constituted chiefly by the members of the judiciary, but now the code also added the administrative member along with the judicial member. This novel form of the industrial tribunals[35]or National Industrial Tribunal[36]may be taken as either the violation of the second principle of natural justice or the interference in the arena of the judiciary.

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[29] (1994) 4 SCC 150.
[30] 1995 AIR 264.
[31] (1995) 6 SCC 16.
[32] Article 50, the Constitution of India, 1950.
[33] Bhuta, A. (2022) "Imbalancing Act: India's Industrial Relations Code, 2020." The Indian Journal of Labour Economics, 65(3).
[34] AIR 1992 SC 522
[35] See section 44 of the Code on Industrial Relations, 2020.
[36] Ibid, section 46.

The Gig Economy Vacuum:

Although the Code on Social Security, 2020, acknowledges the Gig Workers and Platform Workers to be the subject matter of some social securities, the Industrial Relations Code, 2020, is not walking together. It is necessary to clarify that under section 2(z r) of the Industrial Relations Code, 2020, the definition of the term worker remains based on master-servant relationship model,[37] under which there is the concept of wages, employment, direction, and control; consequently, gig and platform workers, like Uber drivers, Zomato partners, and Myntra delivery boys, are frequently referred to as independent contractors, lacking the basic rights available to workers. As under the Industrial Relations Code, 2020, they are not considered workers; they will be unable to constitute a trade union under the code, or to bring an industrial dispute on account of wrongful de-platforming. It creates a statutory apartheid with one group of workers having a right to bargain, and the other, which is the fastest-growing sector, at the mercy of terms and conditions and algorithms.

It will not be out of place to mention here that courts in the United Kingdom[38] and the United States of America[39] have now started acknowledging the status of gig workers and giving them full worker rights. Unfortunately, in India, the Code on Social Security, 2020 offers right of insurance and accidental claim to them, but at the same time the Industrial Relations Code, 2020, does not propose such workers a bridge, which implies that the booming segment of the Indian economy is in a statutory dark zone, with no way of collective bargaining or securing against arbitrary dismissal.

The Practicality Gap of the Worker Re-skilling Fund:

The 2020 Code also talks about a Worker Re-skilling Fund under section 83 for the retrenched workers, wherein employers are required to pay 15 days' wages of the workers, into this fund, who are retrenched. However, this model of funding is considered a statutory half-measure, as the code does not provide a timeline within which these funds will be utilised, or in case the government fails to provide training. It is convincing that the wages paid in 15 days are the bare minimum only. In the absence of a centralised, professionally administered body as spelt out in the statute, this fund will be an unspent pool of dead money held by the government.

It is requested that this is not enough to have meaningful professional retraining in the contemporary economy. Moreover, the code does not specify the management of the fund, the process of conducting the training, or whether the worker can influence the kind of re-skilling offered. Therefore, in the absence of the details, the fund will be an inactive tax on retrenchment instead of an active labour-market instrument.

Strain Between Individual and Industrial Disputes:

The 2020 Code radically alters the way an employee will deal with a workplace issue compared to the previous Industrial Disputes Act of 1947. The whole system was constructed previously

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[37] *Dharangadhra Chemical Works Limited. v. State of Saurashtra*,1957 SCR 152.
[38] *Uber BV and others v Aslam and others*, (2021) UKSC 5.
[39] *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903.

based on the idea of strength in numbers. In case one employee had any issue, about being dismissed or his or her salary mishandled, his or her trade union could have officially supported him or her. This converted an individual grievance into a general industrial difference, taking the entire burden of the union on that individual at the outset. It was a philosophy based on the belief that no employee can be forced to bear the burden of a large corporation by himself.

The 2020 Code reverses it by transforming the process to be much more individualistic. It imposes an internal Grievance Redressal Committee in any workplace that employs 20 or more employees and provides them with a narrow time frame of 30 days to solve the problem. Theoretically, a 30-day limit would appear victorious in terms of efficiency, but as a matter of fact, it incarcerates the conflict within the walls of the company itself. By imposing this committee as an initial obligatory visit, this law virtually puts the union out of the loop in these crucial initial moments. One worker must now sit facing a committee of managers to argue their positions, and from that perspective, this argument can be so overwhelming without a union representative being present with the individual. Under the 1947 Act, a union was able to employ an immediate collective pressure in the form of a quick protest or demonstration to pressure management into hearing a grievance of an individual.

That instant collective support is no longer an option, however, because the 2020 Code has now established a 14-day notice of the strike in any industry. The remaining thing is sterile, administrative, with the worker detached as an individual part of the group. It is not a system that is made to promote justice, but rather a corporate human resource policy made into law. By the end of this 30-day internal process, which is mandatory for an employee, the impetus to any collective action tends to die rapidly, and hence the capacity of the union to defend its members on a day-to-day basis would be highly compromised.

The Executive Creep on the Sovereignty of the Parliament:

The extent to which the Code of Industrial Relations, 2020, relies on subordinate legislation, i.e., government-established rules rather than parliamentary law, is one of the most worrying flaws in the document. Sections 99 and 127 confer the power to determine the conditions to be observed by the relevant government, be it central or state, by mere notifications. This is a colossal departure from the 1947 Industrial Disputes Act, in which basic protections, such as the meaning of the term continuous service or the enumeration of the so-called unfair labour practices, had been directly incorporated into the parent legislation. The 2020 Code, as it stands today, has several provisions that specify that something can happen as may be prescribed, in effect delegating the heavy workload to be carried out behind closed doors by the executive. This development poses a constitutional concern of serious significance as to the doctrine of non-delegation.

The legislature cannot merely delegate its key functions to the executive, as seen in the historic Supreme Court decision.[40] The Parliament has, in effect, left the debate and conclusion of the fundamental pillars of labour legislation to the executive through the fact that the government

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[40] in Re, Delhi Laws Act (1951).

makes key determinations on matters such as the renewal of a fixed-term employment or the precise terms of negotiating with unions through executive rule-making. The outcome is a shifting sands environment for both the workers and the industries. The fact that the following definitions are now buried in the rules and not the Act may mean that with a change in the ruling party at the state level, there is an immediate overhaul of what constitutes a wage or the so-called supervisory salary limit. This causes a disjointed terrain in India because such is done by notification as opposed to discussion in parliament. It creates an opening to a race to the bottom, in which states may struggle to erode the protections granted to workers by mere changes in the rules as a favour to encourage investment, bypassing the democratic process entirely that the 1947 Act was meant to ensure.

Concluding Observations:

The Code on Industrial Relations, 2020, which was presented as a shining example of the simplification to promote industrial harmony and economic development, in fact, proved to be a complicated paradox only. Although it manages to cut down on the sheer amount of paperwork and merge several statutes, it substitutes that previous old-world bureaucracy with a new sort of terminological instability. The Code has succeeded in redefining the parliamentary sovereignty of the 1947 Act and substituting it with numerous provisions, which remain to be prescribed by the executive. The study in this paper indicates that the efforts of the code to personalise the relations of labour considerably undermine the collective bargaining of the workforce. It indicates that the Indian workers are made powerless by the efforts of the code to personalise the relations of labour, and the workforce is forced to compete in the race to the bottom.

The policy of introducing compulsory Grievance Redressal Committees and a rigid 30-day time period may seem effective in theory, but it alienates workers from the safety that the trade union can provide. The Code, in combination with the universal nature of a 14-day strike notice and an extension of the definition of a strike to encompass concerted casual leave, practically de-unionises the workplace. This has very much shifted the balance towards capital, that is, the increase in the minimum threshold of standing order to 300 employees and the liberalisation of the retrenchment regulations. This is no way to instil a feeling of togetherness, but instead it is a breach of administrative barriers with less statutory assurances and more bureaucracy.

In conclusion, legal ambiguity cannot be what is meant by the ease of doing business. The Industrial Relations Code, 2020, is expected to bring a litigatory frenzy to the courts, which will have to work out any ambiguities in its provisions and resolve conflicts arising from discrepancies between state-level rules, contrary to what it promises to do. To practitioners, law teachers, and policymakers, the way forward goes beyond acceptance of these gaps; it needs restoration of legal certainty. To become a real generator of industrial peace, the code needs to abandon the rule-by-notification approach and go back to the more balanced approach that would view labour as not only a cost of doing business, but as a vital stakeholder in the economic process of a nation. Devoid of these corrections, the so-called flexibility, which is meant to help the industry, is likely to result in the so-called administrative congestion that can lead to the standstill of the industry.

The vision of the Industrial Relations Code, 2020, was to free the Indian labour market from the torch of the mid-20th century, the so-called inspector raj. Nonetheless, as this discussion shows, the quest to have a beneficial result in terms of the ease of doing business has led to an irony of simplification. The legislature has brought about procedural brevity at the expense of substantive legal certainty by compiling 29 laws into four codes. The statutory glitches, such as the circular definition of what constitutes industry, or the procedural straitjacket, are not just drafting glitches; they represent a radical change that can give an unwanted boost to industrial unrest by making it difficult to resolve disputes through formal mechanisms.

The worst aspect is the trend of de-judicialization of labour disputes. Giving the executive the authority to make or leave changes to tribunal awards threatens the fundamentals of the constitution as defined by the separation of powers. Moreover, the increase of the threshold to 300 workers in standing orders creates a kind of protection-less vacuum in almost 90 per cent of industrial units in India, which may lead to the arbitrary contractualization of permanent employment.

Accordingly, the Industrial Relations Code prioritises ease of doing business over workers' welfare and the right to collective bargaining. The critique is directed at the expansion of hire-and-fire regimes, restrictions on the right to strike, the accumulation of executive power, and the decline of labour protection.[41]To sum up, it is requested that, in the name of ease of doing business, the basic rights of the workers should not be ignored, as the happiness of any nation depends upon the happiness of its nation builders.

[41] Shyam Sundar, K.R. (2020). "Critiquing the Industrial Relations Code Bill, 2019." Economic and Political Weekly, 55.

Institutionalising Commercial Mediation in India: A Critical Analysis of the Mediation Act, 2023 and the Emerging Judicial Framework

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Abstract:
This paper critically examines the evolution of commercial mediation in India, focusing on the transformative impact of the Mediation Act, 2023, within the broader framework of the country's dispute resolution system. It traces the development of mediation from judicial initiatives, particularly the introduction of Section 89 of the Code of Civil Procedure, 1908, which encouraged courts to refer disputes to alternative dispute resolution mechanisms, and Section 12A of the Commercial Courts Act, 2015, which made pre-institution mediation mandatory for specified commercial disputes. These developments laid the foundation for India's first comprehensive mediation legislation, marking a significant shift from a litigation-centric approach to a more collaborative and business-oriented dispute resolution framework. The paper analyses the key features of the Mediation Act, 2023, including mandatory pre-litigation mediation, recognition of mediated settlement agreements, confidentiality safeguards, time-bound procedures, and the establishment of the Mediation Council of India to regulate standards, accreditation, and institutional development. It argues that the Act represents an important step towards strengthening commercial confidence by providing a structured legal framework for mediation while reducing the burden on courts. To evaluate India's progress, the paper compares the Indian framework with leading international practices, including the Singapore Convention on Mediation, the institutional success of the Singapore International Mediation Centre (SIMC), and Turkey's mandatory commercial mediation model. These comparative perspectives highlight the importance of robust institutional support, professional mediator training, international enforceability, and business confidence in creating an effective mediation ecosystem. The paper concludes that although India has made substantial legislative and institutional progress, important challenges remain, including the shortage of professionally trained commercial mediators, inconsistencies in enforcement practices, limited awareness among businesses, and the need for greater integration of technology through e-mediation. It recommends ratification of the Singapore Convention, strengthening specialised mediation institutions, developing rigorous accreditation and training frameworks, promoting corporate awareness, and embracing digital mediation platforms to establish India as a globally competitive centre for commercial dispute resolution.

Keywords: Mediation Act,2023, Commercial Dispute, Cross-border enforcement, Pre-Litigation Mediation, Singapore Convention, 2018.

Introduction:

In India, the situation regarding commercial litigation is a result of how the system is organised rather than a collection of random events. It is a fact that courts are full of unresolved cases,

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take a long time to reach final decisions and follow slow official steps. Due to those factors, the standard legal process is ineffective for resolving disputes when companies need to know their legal status quickly.[3] For many businesses, the time that passes is more than just a problem for their schedules. By waiting for decisions, companies find that their money is stuck in a fixed state, their networks for moving goods are broken, and the public's view of their honesty is harmed. Additionally, the value of the rights in their agreements decreases over time. Even if the legal arguments are powerful and likely to succeed, a slow forum makes the help it provides less useful in practice.[4] And when the delays happen, the trust that people have in the legal system to act as a structure that helps businesses grow is diminished.[5]

The solution to this problem is that many parties now choose commercial mediation to resolve disagreements because traditional court cases and arbitration do not satisfy the requirements of current business activities.[6] It is common for commercial conflicts to require quick results so that parties can preserve their professional connections and limit their spending. By using this method, people participate in a process that is faster plus more adaptable to business needs than a standard legal judgment.[7] As the legal environment changes, there is a movement in India toward the use of formal systems for alternative dispute resolution.[8]

This development has led to the rapid evolution of ADR within commercial governance. The Indian policy is progressively favouring pre-trial settlements, mediations, and other such consensual procedures in order to alleviate the burden on the judiciary and enhance the mechanism for resolving disputes.[9] ADR is compatible with commercial governance since it facilitates dispute resolution by enabling it to be conducted confidentially, flexibly, and rapidly without necessarily compromising the ability to negotiate.[10] Mediation in particular holds great importance in commercial governance since it does not involve parties ceding control over the results but rather creating their own solution.[11]

Commercial mediation is characterised by voluntariness, confidentiality, and facilitation. In this resolution system, there is a third party who helps the other parties to reach a solution which is agreeable to all parties.[12] Unlike arbitration and litigation, which are more decision-oriented, mediation involves facilitation.[13] Its essential elements include voluntariness, confidentiality, flexibility, quickness, and the capacity to offer customised solutions better suited to commercial

[3] Govt. of India, Ministry of Law & Justice, The State of Indian Judiciary (2023).
[4] World Bank Blogs. Resolving Disputes, Avoiding Litigation in India, https://blogs.worldbank.org/en/governance/resolving-disputes-avoiding-litigation-india.
[5] The Mediation Act, No.32 of 2023.
[6] *Ibid.*
[7] UNCITRAL, International Commercial Mediation
[8] *Supra note* 5.
[9] Commercial Courts Act, Act No. 4 of 2015.
[10] NALSA, Mediation, https://nalsa.gov.in/mediation
[11] UNCITRAL, Notes on Mediation (2021), https://uncitral.un.org/en/texts/mediation (last visited 28 April,2026).
[12] *Supra note* 5.
[13] *Supra note* 5.

relations.[14] This makes business mediation highly effective for resolving conflicts in commercial dealings, such as supply agreements, joint ventures, service agreements, and cross-border business relationships.[15]

The development of institutional mediation across the globe proves that mediation is not only a reform process in India but also marks a broader shift in the international commercial dispute resolution system. UNCITRAL's mediation framework, such as the Notes on Mediation of 2021, illustrates how mediation has been recognised internationally as a method that requires formality, predictability, and institutionalisation to be effective.[16] The Singapore Convention on Mediation was another step towards the evolution of mediation into an organised and enforceable method of dispute resolution.[17]

The economic justification for mediation is clear. It lowers transaction costs, speeds up dispute resolution, and minimises the cost of lost opportunities due to conflict. [18]Companies not only reduce their legal representation costs but also their costs of managerial attention, reputational damage, and business plan interruptions.[19] The legal justification is no less compelling. Mediation promotes access to justice through its simpler, less formal, and more flexible means of reaching an agreement, as well as through its efficient use of court resources where adjudication is necessary. [20]Thus, commercial mediation advances both private and public interests.[21]

The research issue posed by this paper is whether the use of mediation for commercial disputes in India has been institutionalised as a viable mechanism for resolving disputes, or whether it continues to take a back seat to litigation and arbitration as dispute-resolution tools. This is important since it is not just the existence of legislation that determines whether mediation will work but also the nature of its institutionalisation, as well as mediators' skills and the attitudes and confidence of those involved in the dispute. The research objectives of this paper are thus to identify the problems with commercial litigation, discuss the emergence of mediation in commercial governance, explain the fundamental attributes of commercial mediation, and place India in the context of global trends in mediation.

The scope of this paper has been intentionally restricted to laying down the theoretical and contextual basis of commercial mediation in India. From a methodological perspective, the paper follows a doctrinal and analytical approach, drawing on comparative and policy-based literature. The paper has used legislation, authoritative literature, international treaties, and

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[14] *Supra note* 11.
[15] United Nations Convention on International Settlement Agreements resulting from Mediation, https://www.singaporeconvention.org/convention/text
[16] *Supra note* 11.
[17] *Supra note* 3.
[18] *Supra note* 5.
[19] *Supra note* 11.
[20] *Supra note* 5.
[21] *Supra note* 15.

academic research literature to build a critique of the significance of commercial mediation in India.

From Judicial Experimentation to Legislative Status:

In this chapter, the development of mediation in India will be traced historically and juridically from its inception as a court-annexed process and legislative mediation initiatives, through its emergence as an established institution within the framework of dispute resolution, even before the Mediation Act, 2023. This analysis will explore how the judicial process, through judicial rulings and innovations, as well as law-making through statutory developments and Law Commission recommendations, led to the institutionalisation of mediation in India.[22]

Early Historical Roots and Hybrid Alternative Dispute Resolution Mechanisms:

The idea of mediation was not foreign to Indian jurisprudence; rather, it had been practised alongside formal adjudication in India's judicial system for some time, in the form of panchayat- and Lok Adalat-based dispute resolution.[23] The first statutory scheme for mediation in India came into existence with the enactment of the Legal Services Authorities Act, 1987, which encouraged amicable dispute resolution through Lok Adalats and pre-trial conciliation.[24] This served as the foundation for future experiments with mediation within the framework of litigation.

Over time, the National Legal Services Authorities (NALSAs), along with other legal service providers, started referring cases to dispute resolution mechanisms like mediation on an informal basis without a specific statute for guidance.[25] These consensual procedures lacked formality and operated in parallel to litigation, but they showed that the Indian judiciary and policymakers were receptive to experimenting with alternative methods of dispute resolution.[26]

Section 89 of the Code of Civil Procedure,1908:

Section 89 of the Code of Civil Procedure, 1908 was enacted to promote the settlement of civil disputes through methods other than conventional court proceedings whenever an amicable resolution is possible. The provision encourages courts to refer appropriate cases to alternative dispute resolution (ADR) mechanisms, including mediation, arbitration, conciliation, Lok Adalats, and judicial settlement. Its purpose is to make the justice delivery system more efficient by reducing delays, lowering litigation costs, and limiting unnecessary adversarial proceedings. At the same time, it gives parties greater control over the outcome of their disputes, encourages

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[22] *Supra note* 11.
[23] Legal Services Authorities Act, No.39 of 1987.
[24] See generally NALSA, Pre-Institution Mediation in Commercial matters, https://nalsa.gov.in/mediation, which describes the growth of mediation and ADR centres under the 1987 act.
[25] Government of India, Ministry of Law & Justice: Annual report (2022-23 statistics), available at https://cdnbbsr.s3waas.gov.in/s380537a945c7aaa788ccfcdf1b99b5d8f/uploads/2024/07/202407041095928324.pdf, Pageno. 236.
[26] Law Commission of India, Report No.129- Urban Litigation-Mediation as an alternative to Adjudication, available at https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022080882-1.pdf

cooperative problem-solving, and helps preserve personal and commercial relationships while ensuring timely and effective access to justice.

By the application of Section 89 of the Civil Procedure Code (Amendment) Act, 1999, effective from 2002, mediation in India began to be considered an institution in its own right.[27] Under Section 89, there was a provision to establish a formal judicial framework whereby courts were authorised to refer pending civil cases to alternative dispute resolution mechanisms, such as mediation, arbitration, and conciliation, upon detecting factors conducive to a settlement.[28] It is noteworthy that the term "mediation" in Section 89 clearly indicates that it is an intrinsic part of the legislative approach to resolving disputes under the CPC.[29]

According to Section 89, there was an in-court stage followed by an out-of-court stage, and it was provided that, upon a reference being made to mediation, the court should either render a proper judgment in accordance with the settlement reached or resume the ordinary trial in the event of no settlement.[30] The scheme of referral and return made mediation a procedure embedded in the judicial process while preserving its confidentiality and voluntary nature.[31] It is thus evident that the provision started to establish mediation as a routine step in civil litigation.[32]

Judicial Foundation Case: *Salem Advocate Bar Association v. Union of India:*
The interpretative framework of Section 89 itself has been determined by the Supreme Court in *Salem Advocate Bar Association, Tamil Nadu v. Union of India,* where the Court upheld the constitutionality of the Civil Procedure Code (Amendment) Act, 1999, which included the addition of Section 89, against all constitutional and procedural challenges.[33] The Court made it clear that the amendment had been enacted to facilitate the prompt disposal of civil suits and to alleviate the workload of courts, and that Section 89 was an improvement to enable courts to consider the option of settlement through ADR.[34]

In the *Salem Advocate Bar Association case*, further, the Court held that the methods of giving effect to Section 89, which could include laying down rules for doing so and accrediting mediators, would be left open to the Court and the Executive under their rule-making powers under the CPC.[35] It is in this context that the High Courts have been able in the past years to enact mediation/ADR rules, constitute mediation centres and evolve case management practices,

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[27] Akshaya K, VIA Mediation Centre, Origin and Powers of Lok Adalat, https://viamediationcentre.org/readnews/MjM5/Origin-and-Powers-of-Lok-Adalat.
[28] The Code of Civil Procedure, No.5 of 1908, S.89.
[29] *Ibid*, S.89 (1)-(2)
[30] The Code of Civil Procedure, No.5 of 1908, S.89(d).
[31] *Ibid.*
[32] S.89(2)
[33] (2005) 6 SCC 344.
[34] *Ibid*.
[35] *Ibid.*

thus placing mediation firmly in the mainstream of litigation.[36] This is therefore the landmark case in the institutionalisation of mediation in the Indian courts.

Clarifying the role of Mediation: *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co*:

Further development of the concept of mediation in a commercial dispute resolution setting was achieved in Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co., in which the Court described the kinds of disputes that are especially well-suited to alternative dispute resolution procedures, including mediation.[37] Some of those included: commercial disputes, contractual disputes, partnership disputes, disputes between employers and employees, tortious disputes, and consumer disputes, all characterised by business relationship or time sensitivity in commercial terms.[38]

As regards the Afcons case, the Supreme Court highlighted that mediation allows disputing parties to make their own decisions, preserves prospects of maintaining pre-existing business relations, and saves parties from a full-blown trial without leaving out court supervision entirely.[39] Moreover, the Court held that, despite mediation being non-adjudicatory, the procedure cannot be considered merely an “interlude” between litigation; if the mediation process fails, the Court will continue to consider the case, regulating the ADR procedure.[40] The mentioned decision, therefore, helped strengthen the position of mediation as a legitimate, recurrent, and administratively manageable supplement to litigation in a commercial dispute resolution environment.[41]

Role of Law Commission and ADR Committees:

Alongside the judicial efforts to reform its jurisprudence, the Law Commission of India and other expert commissions have been instrumental in encouraging the State to adopt an institutional approach to ADR and mediation.[42] From the very outset, the Commission’s first recommendations, contained in Report No. 129, titled 'Urban Litigation Mediation as an Alternative to Adjudication' (1988), presented mediation as a potential means to avoid lengthy court litigation, albeit in an advisory capacity and with a degree of experimentation.[43] Further studies conducted by the Commission, most notably the 246th Report on Amendments to the Arbitration and Conciliation Act, 1996 (2014), reiterated time and again that mediation and conciliation could help reduce the burden of cases in court.[44]

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[36] *Ibid*, 365-366.
[37] (2010) 8 SCC24.
[38] *Ibid* at 35-36.
[39] *Ibid* at 37-39
[40] *Ibid* at 40.
[41] Naman Gowda & Ibban Javed, Afcons Infrastructure and Ors. v. Cherian Varkey Construction and Ors.,An overview of the Implications of the case, https://adrc.nliu.ac.in/2022/08/03/afcons-infrastructure-and-ors-v-cherian-varkey-construction-and-ors-an-overview-of-the-implications-of-the-case/
[42] Law Commission of India, 246th Report- Amendments to the Arbitration and Conciliation Act, 1996 (2014), https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081615.pdf
[43]*Supra note* 24.
[44] *Supra note* 40.

These reports, together with the efforts of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017), led the lawmakers to include clauses based on mediation within statutes like the Companies Act, 2013, the Insolvency and Bankruptcy Code, 2016, and the Commercial Courts Act, 2015, which have provisions for pre-institution or mandatory mediation for some kinds of commercial disputes.[45] This gradual recognition through legislation signalled a move from voluntary experimentation to institutional conditioning for court access, setting the stage for the completely independent Mediation Act, 2023.[46]

Court- Annexed Mediation Movement and Infrastructure:

The doctrinal base of Section 89, judicial pronouncements by the Supreme Court, and the Law Commission's policy-narrative became instrumental in spawning a mediation movement across India. High Courts, State Legal Services Authorities, and district courts started setting up mediation centres, hiring qualified mediators, and incorporating mediation within their case management procedures.[47] In line with the Legal Services Authorities Act, 1987, NALSA assumed a significant role in the creation of mediation facilities, coordination of mediation training programs, and oversight of ADR centres and mediation cells.[48] Statistics from public law reveal that the number of ADR centres and the quantity of cases mediated witnessed steady growth from the mid-2010s onwards, signalling that mediation had become an integral institution rather than a mere trial.

Under this paradigm, dispute-specific commercial mediation was instituted through the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018, which enforced the requirement under the Commercial Courts Act, 2015 that pre-institutional mediation be compulsory for all commercial disputes exceeding a specified pecuniary limit, to be undertaken by Legal Services Institutions.[49] In this sense, this regime marks the apex of the judicial and legislative trend, wherein mediation had become a compulsory and institutionalised process at least in the area of commercial litigation.[50]

During this period, there was a clear trend toward encouraging the judiciary to resort to mediation, as evidenced by statements from Full Benches and Divisions of various courts. Orders for mediation were frequently passed with a focus on the voluntary nature of mediation and its confidentiality, and an acceptance of the settlement agreement under Section 89 as being grounds for a decree, so long as it adhered to all legal guidelines.[51] Practice Directions and SOPs were laid down by various High Courts.

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[45] Companies Act, No.18 of 2013, S.230-232 (Compromise and arrangement entries increasingly mediated)
[46] *Supra note* 5.
[47] Commercial Courts (Pre-Institution Mediation and Settlement) Rules,2018.
[48] *Supra note* 23.
[49] *Supra note* 45.
[50] *Supra note* 22.
[51] *Supra note* 31.

When the Mediation Act, 2023, was enacted, there was a wealth of procedural and doctrinal jurisprudence developed through *Salem Advocate Bar Association case, Afcons Infrastructure case, Krishna Murthi case,* and other lower court cases, which influenced the statute's structure on the assumption that mediation would remain a part of the larger judicial structure. This development was achieved through the process of judicial innovation, followed by specific case rulings, and finally culminated in legislative enactment of the concept due to decades of experimentation by courts and policies.

The Mediation Act,2023: Structural Framework, Commercial Implications, and Regulatory Challenges:

The Mediation Act, 2023, is the first law to comprehensively define mediation in India at the statutory level. It is a complete Code on its own, and one of its purposes is to "promote and facilitate mediation, especially institutional mediation, for the resolution of disputes, commercial or otherwise, " and at the same time, the Act also encourages community and online mediation.[52]

Being a statute-centric chapter, this part examines the structural framework of the Act, its commercial effects, and the regulatory and doctrinal issues it poses without a detailed discussion of the evolving judicial framework, which is the topic of the next chapter.[53] The paper outlines the legislative structure, the extent, and the discrepancies and difficulties which are part of the institutional rule-making exercise of the Act.[54]

Objectives and Legislative Intent:

The Preamble and Section 1(3) of the Mediation Act, 2023 state that the legislation aims to provide "a legal framework for the conduct of mediation both within and outside the court" and to promote institutional, community, and online mediation.[55] Further, Section 1(3) specifies that the Act is "intended to support and strengthen... the efforts towards" mediation in India, signalling a complete departure from the law before 2023, where mediation was subject to the courts' discretion and seen as a mere afterthought. Among the goals of the legislation are to enhance people's access to justice, reduce the backlog, and establish a healthy environment for mediation service providers, mediators, and mediated settlement agreements, particularly in commercial contexts. The legislative intent as reflected in the Statement of Objects and Reasons is to empower mediation as the first choice of dispute resolution mechanism, particularly for commercial disputes and to bring India at par with international developments like the Singapore Convention on Mediation (2018).[56] In that respect, the Act is certainly not a procedural-adjunct statute but a governance-oriented framework intending to overhaul how parties litigate, negotiate and contract in India's commercial-dispute environment.[57]

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[52] *Supra note* 5.
[53] Mediation Act, No.32 of 2023, Preamble.
[54] Mediation Act, No.32 of 2023, Statement of Objects and Reasons, para. 1.
[55] Mediation Act, No.32 of 2023, S. 1(3).
[56] *Supra note* 13.
[57] *Supra note* 9.

Scope and Applicability of Commercial Mediation:

The main focus of the Act is outlined in Chapter II ("Application"), which states that the law applies to mediation and conciliation proceedings within India and certain cross-border mediations where at least one party is resident, incorporated or operating in India.[58] Section 2 specifies that the law does not apply to some publicly regulated disputes, such as those which are entirely governed by the Legal Services Authorities Act, 1987(Lok Adalat system), unless the parties have, as a matter of choice, decided to mediate under the 2023 law.[59] In the case of commercial mediation, this leads to two parallel systems: the Mediation Act, 2023, runs together with the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 Commercial Courts Act, 2015, resulting in sometimes overlapping or complementary obligations.[60]

On this issue, the law intends to include "commercial disputes" in a general sense, that is, those that spring from contracts, investments, supply arrangements and other commercial relationships, as well as "civil disputes" which parties can mediate if they so wish.[61] Thanks to the Act's modular design, features such as choice-of-law, time-limits, and procedural formats, the structure is, in principle, exportable to future sector-specific regimes, even though, at this point, the statute itself has not systematically embedded such special-purpose mediation labels.[62]

Pre-Litigation Mediation Framework:

Section 5, "Pre-litigation mediation, " is a key provision of the Act. It converts the previous court practice of pre-institution settlement into a legal requirement for certain commercial disputes.[63] Section 5(1) states that parties can take live pre-litigation mediation in civil or commercial disputes even if they do not have a mediation agreement, but they must do it in line with the Act.[64] However, for commercial disputes of certain value, the law refers to Section 12A of the Commercial Courts Act, 2015, which requires pre-institution mediation for commercial suits exceeding a certain pecuniary limit and such mediation is to be conducted by Legal Services Authorities or recognised mediation institutions.[65]

The statute mandates that pre-litigation mediation should be facilitated by a mediator who is either registered with the newly created Mediation Council of India, empanelled by a court-annexed mediation centre, empanelled by an authority under the Legal Services Authorities Act, 1987, or empanelled by a recognised mediation service provider.[66] On the one hand, the multi-tiered panel-structure of the law offers pre-litigation mediation enhanced

[58] Mediation Act, No.32 of 2023, Section 2.
[59] Mediation Act, No.32 of 2023, Section 26.
[60] Commercial Courts Act, No. 4 of 2015, S.12A.
[61] *Supra note* 53.
[62] Mediation Act, No.32 of 2023, S.40.
[63] Mediation Act, no.32 of 2023, S. 5
[64] *Id.,* Section 5(1).
[65] *Id.,* Section 5(1) proviso.
[66] Mediation Act, No. 32 of 2023, S.5(3)-S.5(5).

institutional stature. On the other hand, it may lead to inter-institutional coordination problems and a risk of forum shopping across different recognitions and empanelments.[67]

Enforceability of Mediated Settlement Agreements:

The enforceability regime gets its foundation from Section 27, titled 'Enforcement of mediated settlement agreement, ' which states that a mediated settlement agreement that complies with the requisites of the Act may be enforced as a court decree or, in suitable cases, as an arbitral award, depending on the parties' preference and the type of the main dispute.[68] So, the law clearly makes enforcement of mediation dependent on the well -known judicial and arbitral modes and, thus, does not require setting up a totally new enforcement category but, at the same time, it increases the firmness of mediation outcomes considerably.[69]

Besides, the Act is equipped with Section 28, 'Challenge to mediated settlement agreement, ' which allows very limited judicial intervention in a mediated settlement on the basis of fraud, coercion, undue influence, or a breach of public policy, and which is in tune with the Arbitration and Conciliation Act, 1996's method of very limited review of consensual dispute-resolution outcomes.[70] Legal scholars have remarked that, although this arrangement guarantees prima-facie bindingness, it does keep ongoing issues about how Indian courts will construe 'public policy' and 'coercion' in the sphere of mediated compromises, particularly where parties are not on an equal footing in terms of bargaining power.[71]

Confidentiality and Procedural Safeguards:

Section 22, entitled "Confidentiality," makes it clear that any detail, communication, or declaration made in the course of mediation is confidential and should not be disclosed unless required by law or the parties reach a consensus to disclose it.[72] Section 23 takes the matter a step further by stating that a mediation-related communication is not admissible as evidence in court, except in certain cases such as fraud, criminal conduct, or threats of harm.[73] Such clauses are akin to the Singapore Convention's confidentiality rules and aim to encourage frankness and confidence in mediation discussions.[74]

However, to-date, the legislated privilege-exception scheme has been critically reviewed because it is argued that the exceptions under Section 23 might be given a wide interpretation

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[67] *Key Provisions of the Mediation Act,2023*, Saakshya Law, (last visited 4 April,2026) https://www.saakshyalaw.com/post/key-provisions-of-the-mediation-act-2023

[68] The Mediation Act, No.32 of 2023, S.27.

[69] *Enforceability of Mediated Settlement Agreements in India*, Law Senate, (last visited 5 April, 2026) https://www.lawsenate.com/publications/articles/Enforceability_Of_Mediated_Settlement_Agreements_in_India.pdf

[70] Mediation Act, No.32 of 2023, Section 28.

[71] Dr. V. Balachandran, *Mediation Act and Rules: Understanding Finer Nuances*, 54, ICSI Journal for Governance professionals,58(2024).

[72] The Mediation Act, No.32 of 2023, Section 22.

[73] The Mediation Act, No.32 of 2023, S.23.

[74] *Supra note* 9.

and so the very "safe space" the lawmakers intend to create could be jeopardised.[75] It has been pointed out by the writers that the Act still does not achieve full consistency in its confidentiality regime with similar provisions in the Indian Evidence Act, 1872, Arbitration and Conciliation Act 1996, and Information Technology Act, 2000, making it possible for doctrinal and constitutional tension to arise in cross-jurisdictional enforcement and appellate review.[76]

Online mediation and Institutional Mediation:

Section 30, "Online mediation, " stands out as one of the most visionary parts of the Act, recognizing the potential of mediation through digital platforms and stating that such virtual mediations must be "technically secure, confidential, and accessible."[77] The section, when considered alongside the overall institutional-governance structure under Chapter IX "Mediation Council of India", indicates legislative willingness to consider online mediation as a regular, mainstream medium instead of a rare or makeshift one.[78] The Act, thus, lends itself to the UNCITRAL Notes on Online Dispute Resolution and the Singapore Convention's recognition of electronic mediation and settlement mechanisms.[79]

One can see the statute's spotlight on institutional mediation most in the assignment of tasks to the Mediation Council of India (Sections 31-40), such as registering and regulating mediation service providers, setting up mediator standards, and preparing model rules and codes of conduct.[80] These provisions aim to establish mediation as a system, a quality-controlled institutional framework rather than a practice through a loose network of centres. Still, the Act's rulemaking framework remains fairly bare-bones; the Council is given ample regulatory power but lacks a definite statutory hierarchy or means of accountability, raising concerns regarding transparency and administrative law.[81]

Role of the Mediation Council of India:

The Mediation Council of India (MCI) represents a significant transformation in Indian legal philosophy by promoting dialogue and mutual agreement as preferred methods of resolving disputes instead of relying solely on adversarial court proceedings. It reflects constitutional ideals such as equal access to justice, fairness, voluntary participation, and respect for individual decision-making. Under the Mediation Act, 2023, the Council is entrusted with developing professional standards for mediators, recognising mediation institutions, and ensuring ethical and transparent practices. From a jurisprudential perspective, the MCI advances a more collaborative model of justice in which disputing parties play a central role in reaching solutions.

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[75] Nupur Jain, *Confidentiality of Mediation: Legal Limits and Ethical Dilemmas*, LinkedIn, (4 January 2026), https://www.linkedin.com/pulse/confidentiality-mediation-legal-limits-ethical-dilemmas-nupur-jain-ftjuf/
[76] Arbitration and Conciliation Act, No.26 of 1996.
[77] The Mediation Act, No.32 of 2023, Section 30.
[78] The Mediation Act, No. 32 of 2023, Section 31.
[79] UNCITRAL, Technical Notes on Online Dispute Resolution, Sixth Committee, UN DOC.(A/71/507) (13 December,2016), https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf
[80] The Mediation Act. No. 32 of 2023, Section 31-40.
[81] *Supra note* 69.

By fostering professionalism, consistency, and public trust, the Council contributes to the development of a reliable and efficient commercial mediation framework in India.

The Mediation Council of India is constituted under Section 31 as a statutory body to primarily focus on "institutionalising the practice of mediation in the country and determining the criteria for recognition of mediation service providers.[82] Besides the Council's membership (Section 32), its tasks, including mediator accreditation and formulation of standard mediation rules, are mostly entrusted to administrative orders and internal regulations rather than being comprehensively set out in the law itself.[83] Such a delegation approach allows for variation but also makes the law's aims dependent on the speed and decisions of the newly formed Council as it prepares for full-fledged functioning.

While the Mediation Council has been credited for its efforts in setting uniform national standards for mediator training, selection, and ethical conduct as an indispensable element of the mediator profession's development,[84] the critics point out that the Act still fails to link the Council's standards at the highest level with sector-specific requirements (like insolvency, construction, financial services, or international trade). As a result, the one-size-fits-all mediation model may not fit well with diverse commercial-dispute ecosystems.[85]

From a critical legal standpoint, the Mediation Act,2023 has several issues about over-regulation and bureaucratic formalisation. The act increases the number of regulatory actors. High Courts, State Legal Services authorities, the Mediation Council, and various mediation service providers, whose roles are not always clear enough to avoid overlap or regulatory arbitrage.[86] The compulsory pre-litigation mediation process for commercial disputes, along with a very detailed and lengthy list of procedural and institutional layers, is the factor that most probably will increase the time and money spent on the process and create the delay for the parties that really prefer adjudication or arbitration. subject to the courts' discretion and seen as a mere afterthought.[87]

The act also suffers from a few implementation ambiguities. Take, for instance, the term “mediated settlement agreement” under section 19, which is quite a wide definition but does not offer the exact criteria for the form, substance, and authentication, causing room for differences in interpretations in various courts and sectors.[88] Similarly, the cross-reference setup between the *Mediation Act,2023* and the *Commercial Courts Act,2015*, does not necessarily fix

[82] *Supra note* 75.
[83] *Supra note* 76.
[84]*Supra note* 69.
[85] Himanshu Soni, *Mediation in India after the Mediation Act,2023*, (1 April,2026), *https://doi.org/10.5281/zenodo.19370738*
[86] *Supra note* 69.
[87] *Supra note* 65.
[88] The Mediation Act, No.32 of 2023, S.19.

clashes of timing, forum-selection, or cost-allocation, particularly in cases where multiple statutes and rules run simultaneously.[89]

Another area of criticism concerns the absence of sector-specific mediation mechanisms. The Act has been drafted in such a way that it forms a mediation code in general, and it does not provide mediation tracks for disputes relating to the Insolvency and Bankruptcy Code, 2016 or those involving securities law or cross-border insolvency. [90] Although special-purpose mediation systems are available elsewhere, this sector neutrality in the legislation might be because of its simplicity, but it will not fulfil the logic of administration and business.[91]

Finally, questions of enforceability and institutionalisation persist. While Section 27 ensures strong enforcement measures, the effectiveness of the mediated agreements would be subject to how efficient and predictable Indian courts turn out to be, given that their limitations have hitherto frustrated the resolution of alternative dispute proceedings.[92] Moreover, while the Mediation Act is premised on the Mediation Council and other local institutions as key mediators of the mediation ecosystem, it falls short of integrating the latter with the vision of case management in an e-court similar to that of the Uniform Civil Procedure Code (UCPC).[93]

Mandatory Pre-Institution Mediation and the Emerging Judicial Framework in Commercial Disputes:

In this chapter, I examine the developing jurisprudence of mandatory pre-institution mediation in commercial disputes, with an emphasis on the post-enactment and judicial enforcement of Section 12A of the Commercial Courts Act, 2015.[94] The discussion is entirely limited to judicial and procedural aspects, which involve the interpretation of the "mandatory" nature of Section 12A, the judicial facilitation of voluntary dispute settlement processes, and the conceptual conflict involved in the dichotomy of mediation-as-volition and mandatory pre-institution mediation as provided by statute.[95] As far as the section-specific legislative design is concerned, it has been analysed in the previous chapter and therefore will not be discussed again here.[96]

Concept of Mandatory Pre-Institution Mediation

Mandatory pre-institution mediation is a statutory requirement that compels parties to undertake mediation before instituting a commercial suit, save in certain circumstances (for example, where the party requires urgent interim relief).[97] Such a regime is different from merely

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[89] *Supra note* 58.
[90] Insolvency and Bankruptcy Code, No.31 of 2016.
[91] *Supra note* 69.
[92] The Mediation Act, No.32 of 2023, Section 27.
[93] Shanker Lal, *Resolving Disputes, Avoiding Litigation in India*, World Bank Blogs, (last visited 5 April 2026), https://blogs.worldbank.org/en/governance/resolving-disputes-avoiding-litigation-india
[94] Commercial Court Act, Act No.4 of 2016, Section-12A explains Pre-Institution Mediation and Settlement.
[95] *Patil Automation Pvt. Ltd. & Ors. v. Rakheja Engineers Pvt. Ltd., (2022)* 10 SCC 1, 10–12.
[96] *Supra note* 5.
[97] *Supra note* 58.

encouraging mediation or referring pending suits to ADR under Section 89 of the Code of Civil Procedure, 1908; it changes the gate-keeping function of the plaint-stage itself.[98]

In 2018, Section 12A was introduced in The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 to stipulate that no suit of a specified value can be filed unless the plaintiff first undertakes pre-institution mediation in accordance with the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 and the Mediation Act, 2023.[99] The Supreme Court has read the statutory language, particularly the use of the word "shall," as conferring a mandatory, non-discretionary quality on the pre-institution mediation requirement.[100]

This has been judicially placed in the broader objective of decongesting commercial courts, better access to justice and placing India in line with the global trend of court-annexed, pre-litigation ADR. The Court has repeatedly held that the compliance with Section 12A is not a mere "procedural formality" but a substantive condition precedent to the valid institution of a commercial suit of the specified value.[101]

Section 12 A of the Commercial Courts Act, 2015:

Section 12A provides that in the case of commercial suits of a specified value, the plaintiff shall, before filing the suit, undergo a pre-institution mediation process through Legal Services Institutions or other mediation bodies recognised by the Central Government, and the suit shall be barred unless this step is taken.[102] The provision limits the bar only where the plaintiff is seeking urgent interim relief, and the court may hear the suit without prior mediation where such relief is "necessary" to prevent irreparable injury.[103]

The Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018, specify time-limits, mediator-empanelment and the consequences of compliance or non-compliance, and elaborate the operational matrix.[104] Practically, the rules have been construed as establishing a two-track system. Commercial suits above the threshold are subject to the pre-institution-mediation-plus-institution-for-adjudication regime; suits below the threshold or suits for urgent relief may go directly to trial upon satisfaction of the court that the urgency-exception is applicable.

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[98] *Supra note* 33.
[99] Commercial Court (Pre-Institution Mediation and Settlement) Rules,2018, Rule 3-5. https://www.indiacode.nic.in/ViewFileUploaded?path=AC_CEN_3_46_00008_201604_1517807328347/rulesindividualfile/&file=PIMS%20RULES.pdf (last visited 6 April, 2026).
[100] *Patil Automation Pvt. Ltd. & Ors. v. Rakheja Engineers Pvt. Ltd.*, (2022) 10 SCC 1, 15.
[101] *Id*, 20-21.
[102] *Supra note* 97.
[103] The Commercial Courts Act, Act no.4 of 2015, S.12A(2).
[104] *Supra note* 99.

It seems to transform the status of mediation from a discretionary, judge-mandated appendix to a condition precedent for accessing the court in commercial disputes. [105] The judicial interpretation process is well underway on the issues of whether Section 12A can be viewed as a jurisdictional flaw, a mere procedural error or whether the suit can be dismissed under Order 7 Rule 11 of the CPC.[106]

Judicial Interpretation of Mandatory Mediation:

This doctrinal landmark was reached in the case of *Patil Automation Pvt. Ltd. & Ors. V. Rakheja Engineers Pvt. Ltd.* The Supreme Court clearly held that Section 12A, inserted into the Commercial Courts Act, 2015, which made pre-institution mediation compulsory statutorily, meant that a suit, filed contrary to the spirit of Section 12A, would be dismissed under Order VII Rule 11(d) of the CPC as "barred by any law for the time being in force".[107]

In Patil Automation, the Court noted that the word "shall" used in Section 12A conveyed the legislature's intention that pre-institution mediation is a condition precedent to the institution of a commercial suit, with the purpose of the section being to reduce pendency and foster settlement before judicial determination.[108]The Court opined that, in the absence of a legal or equitable exemption, the plaint in a commercial suit that had not undergone pre-institution mediation had to be rejected and that the courts could not read down the requirement to a directory one.[109]

The Court clarified later on that this command should be read prospectively by mentioning that all suits which are filed before 20 August 2022 (date of the Court's clarification of the meaning of S 12A), would not be rejected due to noncompliance with pre-institution mediation compliance.[110]Subsequently, other superior courts have laid down that all the commercial suits filed after 20 August 2022, in violation of Section 12A, are to be rejected at the plaint stage itself, thus further cementing the concept of mediation compliance as a jurisdictional type gatekeeping requirement instead of a subsequent procedural flaw.[111]

Role of Courts in Promoting Consensual Dispute Resolution:

Apart from a purely mechanistic application of Section 12A, there has also been a positive intervention of the judiciary to encourage the resolution of commercial disputes through consent.

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[105] *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co.& Ors.* (2010) 8 SCC 24.
[106] The Code of Civil Procedure,1908, order VII Rule 11(d).
[107] *Patil Automation Pvt. Ltd. & Ors. v. Rakheja Engineers Pvt. Ltd.*, (2022) 10 SCC 1, 25-28.
[108] *Id*, 15-18.
[109] *SC* rules that statutory pre-litigation mediation contemplated under the Commercial Courts Act is mandatory (2022) *azb*. Available at: https://www.azbpartners.com/bank/sc-rules-that-statutory-pre-litigation-mediation-contemplated-under-commercial-courts-act-is-mandatory/ (Accessed: 18 April 2026).
[110] See also Patil Automation Pvt. Ltd. & Ors. v. Rakheja Engineers Pvt. Ltd., (2022) 10 SCC 1 (Prospective effect clarification).
[111] Upasna Agrawal, *Suit Filed Before SC's Patil Automation Judgment Can't Be Returned For Non-Compliance Of S.12-a Commercial Court Act: Allahabad High Court,* Live Law (Nov. 1, 2025) https://www.livelaw.in/high-court/allahabad-high-court/allahabad-high-court-ruling-section-12a-commercial-court-act-non-compliance-and-return-of-suit-308566 (last visited 18 April,2026)

High Courts, trial courts and the Supreme Court have, through practice directions, case management orders, and general observations made for the sake of awareness, pushed parties to use mediation as the first port of call even where the mandatory or statutory character of mediation may be less explicit.

The Court has also repeatedly affirmed that Section 12A is not merely a mechanism for compliance with a formality but, more importantly, it seeks to create an atmosphere which promotes a change from purely contentious litigation to an emphasis on conciliation and compromise.[112] In various orders passed at the first instance and on appeal, courts have encouraged the parties to participate in the mediation process sincerely. However, consistent refusal on the part of the parties to take part positively in the mediation proceedings could, in certain instances, be interpreted by the courts as a factor in the discretion on the issue of costs and/or could be viewed as the conduct of abusive litigation.[113]

Under this jurisprudence, the judiciary is viewed not just as a neutral arbiter, but as an institutional facilitator of mediation, falling within the overall legislative policy narrative prescribed by the Mediation Act, 2023 and the Commercial Courts Act, 2015. The Court is thus positioned as a standard setter for how parties are expected to conduct themselves during the mediation phase, while the substantive negotiating content is exclusively within party autonomy.[114]

Tension Between Voluntariness and Mandatory Mediation:

The key doctrinal question that arises in this new paradigm is one of perceived incompatibility between the inherently voluntary nature of mediation and the mandatory pre-institutional regime created by statute. It has been argued that the precondition for bringing an action to court that mediation is mandated risks the erosion of the inherently consensual nature of the process, and potentially damages the "buy-in" on which effective mediation relies.[115]

This concern has been addressed by the Supreme Court. The Court has made a clear distinction between formal compulsory participation and substantive outcome voluntariness. The Court has stated that whereas the mediation procedure is mandatory under Section 12A, the outcome is totally voluntary: parties are free not to enter into a settlement, and non-mediation of a settlement shall not cause them prejudice when pursuing the trial on merits to a full and final extent.[116] The Supreme Court seems intent on maintaining the consensual nature of the result

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[112] Patil Automation Pvt. Ltd. & Ors. v. Rakheja Engineers Pvt. Ltd., (2022) 10 SCC 1, ¶ 10-12.

[113] *Supra note* 5.

[114] Ramana Deshmukh & Shelja Shah, *The Mediation Mandate: A Jurisprudential Analysis of Section 12A of the Commercial Courts Act, 2015*, Mondaq (Nov. 18, 2025), https://www.mondaq.com/india/trials-appeals-compensation/1706982/the-mediation-mandate-a-jurisprudential-analysis-of-section-12a-of-the-commercial-courts-act-2015 (last visited April 18, 2026).

[115] Patil Automation Pvt. Ltd. & Ors. v. Rakheja Engineers Pvt. Ltd., (2022) 10 SCC 1, 25-28.

[116] I*d*.

while accepting the mandatory procedural requirement.[117] However, there remains a potential conflict at the doctrinal–practical level when parties may believe the mediation requirement is a means to delay or when there is unequal bargaining power.[118]

Core Case Analysis: *Patil Automation Pvt. Ltd. v. Rakheja Engineers Pvt. Ltd:*

The Supreme Court's decision in Patil Automation Pvt. Ltd. v. Rakheja Engineers Pvt. Ltd. significantly strengthened the legal framework for commercial mediation in India. The Court ruled that parties to commercial disputes, except in cases where urgent interim relief is required, must first undergo pre-institution mediation under Section 12A of the Commercial Courts Act, 2015, before approaching the courts. It further clarified that a suit instituted without complying with this requirement is not legally maintainable.

This judgment marks an important change in the philosophy of dispute resolution by encouraging settlement through dialogue rather than immediate litigation. Instead of viewing mediation as an optional procedural step, the Court recognised it as an essential mechanism for improving access to justice and promoting efficient dispute resolution. The decision aims to reduce the growing burden on courts, lower litigation expenses, shorten the time required to resolve disputes, and help businesses maintain valuable commercial relationships.

The judgment also reflects India's broader policy of promoting a modern and investment-friendly legal system. By recognising mediation as an effective means of resolving commercial conflicts, the Court enhanced the credibility of institutional mediation and laid a strong judicial foundation for the enactment of the Mediation Act, 2023. As a result, the case has become a key precedent in the development of India's commercial mediation regime and supports the country's efforts to align its dispute resolution framework with globally accepted practices.

Patil Automation Pvt. Ltd. & Ors. V. Rakheja Engineers Pvt. Ltd. is the locus classicus in the mandatory pre-institution mediation jurisprudence.[119] The dispute arose in a suit of a commercial nature for recovery of monies filed by Rakheja Engineers against Patil Automation, and, by means of a plaint for rejection of the same, the latter submitted that, as the respondent has not complied with the pre-institution mediation contemplated by Section 12A of the Commercial Courts Act, 2015.[120]

This was rejected by the trial court, which considered the mediation requirement not so mandatory as to preclude the filing of a plaint, and allowed the filing of the plaint, sent the

[117] Anmol Jain & Aanchal Kapoor, *Evaluating Mandatory Pre-litigation Mediation under the Commercial Courts Act, 2015*, SSRN (2024), http://pure.jgu.edu.in/10040/1/Evaluating%20Mandatory%20Pre-litigation%20Mediation%20under%20the%20Commercial%20Courts%20Act%20in%20India.pdf (last visited April 18, 2026).

[118] S. Angel, *The Mediation Act, 2023: Transforming India's Dispute Resolution Landscape – A Critical Analysis of Its Constitutional, Institutional, and Practical Challenges*, EPRA Int'l J. Multidisciplinary Rsch. (IJMR) (2025), https://eprajournals.com/IJMR/article/18013 (last visited April 18, 2026).

[119] *Patil Automation Pvt. Ltd. & Ors. v. Rakheja Engineers Pvt. Ltd.*, (2022) 10 SCC 1, 1-3.

[120] *Ibid* at 5-6.

parties to mediation, and let the suit continue.[121]The high court in revision took this view, leaning towards issues of access to justice over technical compliance,[122] and was reversed by the Supreme Court, holding that this mandate of law is mandatory and the violation constitutes an impediment sufficient to attract Order VII rule 11(d) of CPC.[123]

The Court bases its finding on the bare language of section 12A, the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018, and on policy considerations aiming at decongesting the commercial courts and promoting settlement rather than adjudication.[124]The order also declared that the rejection order under Order VII Rule 11 shall be without prejudice to the plaintiff's ability to institute fresh proceedings after fulfilling the pre-institution mediation requirement, thus ensuring strict observance of the mandate without closing doors to justice.[125]

Patil Automation now forms the 'seed-precedent' for the mandatory pre-institution mediation regime for commercial disputes and is the subject of subsequent High Court and trial court rulings, which make it clear that the judiciary will honour the legislative mandate with no little degree of doctrinal rigour.[126] Indirectly, this case will have the effect of adding its own weight on the state's rule-making body and the Mediation Council of India to equip mediation centres and legal services institutions to deal with the influx of pre-institution mediation referrals without creating new bottlenecks.[127]

Conclusion:

The mediation institutionalisation project in India has yet to reach maturity, and some institutional lacunae are evident in the operation of commercial dispute resolution mechanisms. The Mediation Act, 2023, provides a legal framework and looks to establish a strong Mediation Council of India, but it is still not properly constituted, and no set of rules and standards has yet been drafted.[128]These delays can undermine the spirit of the Act by hindering uniform, high-quality control over accrediting mediators, service provider registration, and code of conduct compliance.

A core doctrinal and policy problem is the lack of trained and qualified commercial mediators. While the Mediation Act 2023 allows the Mediation Council to set the standards for training and accreditation for commercial mediators, the Act has not yet provided specific sectoral

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[121] *Id*, Punjab &Haryana High Court Civil Revision Petition No.1853/2021.
[122] Patil Automation Pvt. Ltd. & Ors. v. Rakheja Engineers Pvt. Ltd., (2022) 10 SCC 1, 25-28.
[123] *Ibid* at 15-20.
[124] *Supra note* 122.
[125] Apeksha Lodha& Prajjwal Gour, *Supreme Court Upholds Mandatory Mediation in Commercial Disputes: Applicability of Section 12 A of the Commercial Courts Act,2015*, Mondaq (May 30, 2025), https://www.mondaq.com/india/trials-appeals-compensation/1634602/supreme-court-upholds-mandatory-mediation-in-commercial-disputes-applicability-of-section-12a-of-the-commercial-courts-act-2015 (last visited April 28, 2026).
[126] *Supra note* 118.
[127] *Supra note* 5.
[128] *Supra note* 9.

competency standards for mediators dealing with complex clusters of commercial disputes (e.g., cross-border contracts, financial services claims, insolvency-related claims).[129]

To establish the proper system of mediation, a sector-ringfenced mediator accreditation system has accordingly been called for, for instance, a division of panels between infrastructural, financial and international trade disputes, each with a separate syllabus and qualification matrix.[130] This would align India's mediation architecture with the more sector-specific mediation models operating abroad, such as at the Singapore International Mediation Centre (SIMC) and Singapore Mediation Centre (SMC).[131]

The most doctrinally sensitive aspect of institutionalisation is the enforcement regime. A mediated settlement agreement that parties choose to reduce to writing becomes analogous to a court decree or an arbitral award under the Mediation Act, 2023.[132]This makes mediated settlements fall within the existing enforcement regime of the CPC and the Arbitration and Conciliation Act, 1996. It is difficult, though, to assess how effective these are likely to be, given the nature of Indian courts, their caseload and enforcement backlog may undermine the predictability which mediation design attempts to achieve.[133]

Further adding to the cross-border enforcement profile of Indian mediated settlements is the unresolved status of India's ratification of the Singapore Convention on Mediation (2018).[134] India has signed the Convention, but has not yet ratified it. Accordingly, parties whose settlements have been mediated in India may still be unable to rely on the Singapore Convention's streamlined enforcement regime, rather than on Indian domestic recognition mechanisms. Courts continue to view such contracts through a hybrid of contract law and arbitration rather than a specialised regime, and multinational parties may be discouraged from having their cross-border disputes mediated in Indian centres.

India's Mediation Act 2023, along with the developing jurisprudence of mandatory pre-institution mediation under Section 12A of the Commercial Courts Act 2015, marks an important progress institutionally and doctrinally in the institutionalisation of commercial mediation.[135] Nevertheless, it was concluded that the regime is institutionally weak; the lack of adequate training for commercial mediators, lack of corporate and government cooperation,

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[129] The Mediation Act, No.32 of 2023, Section 31-40.
[130] *Supra note* 117.
[131] Singapore International Mediation Centre (SIMC), About SIMC, https://mediation.com.sg/about-us/about-smc/. (Last visited 28 April,2026).
[132] *Recent Developments in Mediation: A Transformative Year 2025 for India*, Track Second- Mediation and ADR Platform (2025), https://tracksecond.com/recent-developments-in-mediation-a-transformative-year-2025-for-india/ (last visited April 26, 2026).
[133] The Mediation Act, No.32 of 2023, Section 27.
[134] United Nations Convention on International Settlement Agreements Resulting from Mediation, https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements (last visited April 26, 2026)
[135] *Patil Automation Pvt. Ltd. & Ors. v. Rakheja Engineers Pvt. Ltd.*, (2022) 10 SCC 1.

lack of awareness, and challenges in enforcement and international enforcement remain key issues.[136]

The lessons drawn from both the Singapore Convention framework and Singapore mediation institutional model, on the one hand, and the mandatory mediation experience of Turkey, on the other hand, are instructive for India.[137] India can move from being a doctrine-progressive jurisdiction to a practically credible commercial mediation jurisdiction only by signing the Singapore Convention, establishing specialised mediation institutions, developing robust accreditation schemes for mediation professionals, establishing a strong enforcement mechanism, and leveraging technology and online mediation. Until all these changes are in place, the question of whether India has successfully institutionalised commercial mediation will remain unanswered or only partially answered.

[136] *Supra note* 132.
[137] *Supra note*121.

Consumer Dispute Redressal Mechanism in India: A Critical Analysis

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Abstract:
The Consumer Dispute Redressal Commissions (CDRCs), established under the Consumer Protection Act, 2019, (CPA, 2019) constitute a vital/represent a critical institutional mechanism for safeguarding consumer rights and ensuring accessible, efficient, and inexpensive redressal of grievances/ cost-effective grievance redressal. This paper critically examines their structural framework, jurisdictional scope, procedural reforms, and the integration of digital platforms such as e-Daakhil. It further analyses operational challenges, including infrastructural deficiencies, adjudicatory delays, vacancies, and enforcement limitations. The paper concludes by proposing institutional reforms to enhance efficiency, accountability, and consumer-centricity, thereby strengthening the consumer protection regime in India.

Keywords: Consumer Protection Act 2019, Consumer Commissions, Consumer Rights, Online Adjudication, Pecuniary Jurisdiction.

Introduction:

Consumer protection is a cornerstone of social justice in a market economy. The establishment of Consumer Dispute Redressal Commissions (CDRCs) is one of the most significant institutional innovations introduced by the Consumer Protection Act, 2019 (CPA, 2019). One of the principal objectives of the CPA, 2019 is to modernise and strengthen the consumer dispute redressal mechanism in India. The Act provides a three-tier structure at District, State and National level namely the Distract Consumer Disputes Redressal Commission (DCDRC), State Consumer Disputes Redressal Commission (SCDRC), and the National Consumer Disputes Redressal Commission (NCDRC), along with significant reforms in pecuniary jurisdiction, procedure, and digital access.

Definition and Establishment of the Commission:

The terms District Consumer Disputes Redressal Commission, State Consumer Disputes Redressal Commission, and National Consumer Disputes Redressal Commission are defined under Sections 2 (15), 2 (44), and 2 (29) of the CPA, 2019, respectively. The District Commission is established under Section 28 (1), the State Commission under Section 42 (1) by notification issued by the State Government, and the National Commission under Section 53 (1) by notification issued by the Central Government.

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Composition of the Commission:
Section 28 (2) provides that the District Consumer Disputes Redressal Commission (DCDRC) consists of one (1) President and not less than two (2) Members. Section 42 (3) states that the State Consumer Disputes Redressal Commission (SCDRC) consists of one (1) President and not less than four (4) Members, while Section 54 specifies that the National Consumer Disputes Redressal Commission (NCDRC) consists of one (1) President and not less than four (4) Members. Further, Rule 15 of the Consumer Protection (Consumer Disputes Redressal Commission) Rules, 2020 stipulates that the total number of Members of the NCDRC shall not exceed eleven (11).

Qualifications of the President and Members of the District and State Commission:
Sections 29 and 43 of the CPA, 2019 confer upon the Central Government the authority, by notification, to make rules prescribing the qualifications, the method of recruitment, the procedure for appointment, the term of office, and the manner of resignation and removal of the President and Members of the District Consumer Disputes Redressal Commission and the State Consumer Disputes Redressal Commission.

The Central Government, in exercise of the powers conferred by the aforementioned sections, has enacted *The Consumer Protection (Qualification for Appointment, Method of Recruitment, Procedure of Appointment, Term of Office, Resignation and Removal of the President and Members of the State and District Commission) Rules, 2020*, prescribing the qualifications, method of recruitment, term of office, and other conditions relating to the President and Members of the District Consumer Disputes Redressal Commission and the State Consumer Disputes Redressal Commission.

Qualifications for the President and Members of the District Commission:
A person shall be eligible for appointment as the President of the District Consumer Disputes Redressal Commission only if he possesses the qualifications required for appointment as a District Judge, whether serving or retired.[2] A person shall be eligible for appointment as a Member of the District Consumer Disputes Redressal Commission if he has completed the age of 35 years and hold a Bachelor's degree from a recognised university with 10 years' special knowledge and professional experience in *Consumer Affairs, Law, Public Affairs, Administration, Economics, Commerce, Industry, Finance, Management, Engineering, Technology, Public Health or Medicine.*[3]

Qualifications for the President and Members of the State Commission:
A person shall be eligible for appointment as the President of the State Consumer Disputes Redressal Commission only if he possesses the qualifications required for appointment as a

[2] Rule 4 (1), *The Consumer Protection (Qualification for Appointment, Method of Recruitment, Procedure of Appointment, Term of Office, Resignation and Removal of the President and Members of the State and District Commission) Rules, 2020*
[3] Rule 4 (2), *Ibid.*

High Court Judge, whether serving or retired.[4] A person shall be eligible for appointment as a Member of the State Consumer Disputes Redressal Commission if he has completed the age of 40 years and must have 10 years' experience as a Presiding officer of a District Court or of any Tribunal of an equivalent level, or a combined service of 10 years in the District Court and such Tribunal or holds a Bachelor's degree from a recognised university with 10 years' special knowledge and professional experience in *Consumer Affairs, Law, Public Affairs, Administration, Economics, Commerce, Industry, Finance, Management, Engineering, Technology, Public Health or Medicine*.[5]

The *Consumer Protection (Qualification for Appointment, Method of Recruitment, Procedure of Appointment, Term of Office, Resignation and Removal of the President and Members of the State Commission and District Commission) Amendment Rules, 2023* effective from 21st September, 2023 reduce the required professional experience for Non-Judicial Members to a minimum of 10 years, replacing the earlier thresholds of 20 years for State Commission members and 15 years for District Commission members.

Provided that not more than 50% of such members shall be appointed.[6] The expression '*not more than fifty percent*' limit applies specifically to members who qualify based on having judicial experience, such as serving for at least 10 years as a Presiding officer of a District Court or Tribunal. This restriction ensures that members with a judicial background do not make up more than half of the Commission's total membership. The purpose of this provision is to maintain a balanced composition within the Commission by preventing dominance by judicial members and ensuring representation from diverse professional fields.

Term of Office of President or Member of the State and District Commission:

The President and every member of the State Commission and the District Commission shall hold office for a term of four years or until they attain the age of 65 years, whichever occurs first. On the recommendation of the Selection Committee, they shall be eligible for reappointment for another term of four years, subject to the age limit of 65 years.[7] By *the Consumer Protection (Qualification for Appointment, Method of Recruitment, Procedure of Appointment, Term of Office, Resignation and Removal of the President and Members of the State and District Commission) Rules, 2022*, the President of the State Commission shall hold the office until attaining the age of 67 years. The Members of the State Commission, as well as the President and Members of the District Commission, shall hold their offices until they attain the age of 65 years.

Qualifications of the President and Members of the National Commission:

Section 55 of the CAP, 2019, confers upon the Central Government the authority, by notification, to make rules prescribing the qualifications, appointment, term of office, salaries

[4] Rule 3 (1), *Id.*
[5] Rule 3 (2), *Id.*
[6] Rule 3 (2) Proviso, *Id*.
[7] Rule 10, *Id.*

and allowances, resignation, removal and other terms and conditions of service of the President and Members of the National Consumer Disputes Redressal Commission. In this regard, the Tribunal, Appellate Tribunal and Other Authorities (Qualifications, Experience and Other Conditions of Service of Members) (Amendment) Rules, 2021 prescribe the qualifications, method of recruitment, term of office, and other conditions relating to the President and Members of the National Consumer Disputes Redressal Commission.

A person shall be eligible for appointment as the President of the National Consumer Disputes Redressal Commission only if he or she possesses the qualifications required for appointment as a Judge of the Supreme Court or as a Chief Justice of High Court, whether serving or retired.[8] A person shall be eligible for appointment as a Member of the National Consumer Disputes Redressal Commission if he or she is a serving or retired Judge of the High Court; or has served combined service in the capacity of District Judge and Additional District Judge; or has at least 25 years' special knowledge and professional experience in *Economics, Business, Commerce, Law, Finance, Accountancy, Management, Industry, Public Affairs, Administration, any Other matters useful for NCDRC.*[9] A person must have attained the age of 50 years to be eligible for appointment as the President or a Member of the NCDRC.[10]

Gender Representation in the Commission:
At least one member of the District or State Consumer Dispute Redressal Commission, or the President of the Commission, shall be a woman.[11] Likewise, at least one member of the National Consumer Dispute Redressal Commission shall be a woman[12]. This requirement ensures adequate gender representation in the composition of the Consumer Commissions at all levels.

Term of Office of President or Member of the National Commission
The President and Members of the National Commission shall hold office for a term specified in the rules made by the Central Government, which shall not exceed 5 years from the date of joining their office and shall be eligible for reappointment[13]. The President shall hold office for a term of 4 years or until they attain the age of 70 years, whichever occurs first.[14] Each member of the National Commission shall serve a term of 4 years or until completing the age of 67 years, whichever is earlier[15].

Pecuniary Jurisdiction
Under the CPA (2019, the District Commissions, State Commissions, and National Commissions form a hierarchical structure for dispute resolution. The jurisdiction is pecuniary

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[8] Schedule, Serial Number 12, Column 3 (1), *The Tribunal, Appellate Tribunal and Other Authorities (Qualifications, Experience and Other Conditions of Service of Members) (Amendment) Rules, 2021.*
[9] Schedule, Serial Number 12, Column 3 (2), *Ibid*.
[10] Section 3 (1) Proviso, *the Tribunal Reforms Act, 2021*.
[11] Rule 3 (3) & Rule 4 (3), *Id*.
[12] R 15, *the Consumer Protection (Consumer Dispute Redressal Commission) Rules, 2020.*
[13] S 55, the *Consumer Protection Act, 2019*
[14] S 55 (a), the *Consumer Protection Act, 2019* and S 5 (i) *the Tribunal Reforms Act, 2021*.
[15] S 55 (b), the *Consumer Protection Act, 2019* and S 5 (ii) *the Tribunal Reforms Act, 2021*.

rather than territorial or subject-based. This redistribution of pecuniary jurisdiction was designed to reduce the burden on higher courts and expedite smaller claims.

A complaint shall be filed at District Commissions where the value of the Goods or Services or both is up to ₹ 50 Lakh[16]. Where the value of the Goods or Services or both is between ₹ 50 Lakh to ₹ 2 Cr[17] or the issue is related to the unfair contract and the value of the Goods or Services or both is up to ₹ 10 Cr[18] the shall be instituted at the State Commission, whereas the value of the Goods or Services or both is above ₹ 2 Cr[19] or the issue is related to the unfair contract and the value of the Goods or Services or both is above ₹ 10 Cr[20] the shall be instituted at the National Commission.

Therefore, a complaint shall be instituted before the District Commission where the value of goods or services does not exceed ₹50 lakh. The State Commission has jurisdiction where the value exceeds ₹50 lakh but does not exceed ₹2 crore, while the National Commission exercises jurisdiction where the value exceeds ₹2 crore. In matters relating to unfair contracts, separate pecuniary thresholds apply as prescribed under the Act.

Analysis of Consumer Dispute Redressal Commissions in India

Consumer Dispute Redressal Commissions play a significant role in protecting consumer rights in India. Their speedy, simple, and low-cost procedures make justice accessible to ordinary consumers without the need for complex legal formalities. The three-tier system at District, State, and National Commission ensures wide reach and efficient handling of disputes based on claim value. The introduction of e-Daakhil and digital hearings has further improved accessibility. They provide a wide range of remedies, including refund, replacement, compensation, and discontinuation of unfair trade practices, which strengthens consumer confidence. Several landmark judicial pronouncements have enhanced corporate accountability and promoted fair business practices.

1. Speedy and Affordable Justice

The Consumer Protection Act, 2019 establishes a consumer-centric framework aimed at ensuring expeditious and cost-effective dispute resolution. By adopting summary procedures and minimizing procedural complexities, it departs from traditional civil litigation and enhances accessibility for consumers. The Act further strengthens this framework by incorporating mediation as an alternative dispute resolution mechanism, thereby promoting timely and amicable settlements. The *Lucknow Development Authority Vs M.K. Gupta*[21] underscores this objective, wherein the Supreme Court emphasized that consumer forums are intended to provide simple, speedy, and inexpensive remedies, reinforcing the legislative intent behind the Act.

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[16] S 34 (1), *Supra Note* 12.
[17] S 47 (1) (a), *Supra Note* 12.
[18] S 47 (1) (b), *Ibid*.
[19] S 58 (1) (a), *Id*.
[20] S 58 (1) (b), *Id*.
[21] (1994) 1 SCC 243.

2. Three-Tier Institutional Structure

The Act establishes a structured three-tier redressal mechanism comprising the District, State, and National Consumer Disputes Redressal Commissions. This decentralized and hierarchical framework ensures wider access to justice while enabling systematic distribution of cases based on pecuniary jurisdiction. Such an arrangement facilitates efficient case management, reduces institutional burden, and enhances administrative effectiveness. Moreover, by ensuring accessibility across diverse geographic regions, the mechanism strengthens consumer confidence and promotes a more responsive and accountable dispute-resolution system.

3. Consumer-Friendly Procedures

The Act simplifies procedural requirements by eliminating the mandatory need for legal representation, thereby reducing litigation costs and minimizing procedural barriers. This enables consumers to directly approach redressal forums, promoting greater participation and accessibility. Such a framework enhances inclusivity within the consumer dispute resolution system and ensures that justice is not hindered by financial or technical constraints. Consequently, the Act strengthens access to justice by making the redressal mechanism more user-friendly, efficient, and responsive to the needs of consumers.

4. Digitalization and E-Governance

The introduction of the e-Daakhil portal and virtual hearings represents a significant advancement in consumer dispute resolution under the Act. These mechanisms enhance transparency and facilitate online filing and case tracking., and expand access to justice for consumers, particularly particularly in remote areas. Moreover, such initiatives align with contemporary e-governance practices, promoting efficiency, accountability, and inclusivity in the redressal process, thereby strengthening the overall effectiveness of the consumer protection framework in India.

5. Comprehensive Range of Reliefs

Consumer commissions under the Act are empowered to grant diverse remedies, including refund, replacement, repair, compensation, and orders for the discontinuation of unfair trade practices. These remedial powers ensure substantive justice and foster fair market conduct. The scope of consumer protection has been further strengthened by judicial interpretation, particularly in *Indian Medical Association Vs V.P. Shantha*[22], wherein the Supreme Court broadened the ambit of 'services' to include medical services, thereby significantly enhancing consumer rights and expanding the range of remedies available under the law.

6. Growing Consumer Awareness

Consumer awareness has increased significantly, particularly in urban areas, leading to greater utilization of redressal mechanisms under the Act. This growing awareness has contributed to enhanced consumer engagement and accountability in the marketplace. However, notable disparities persist in rural regions, where limited awareness and digital illiteracy continue to hinder access to consumer forums and redressal processes. Such challenges undermine the Act's

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[22] (1995) 6 SCC 651.

inclusive and universal effectiveness, highlighting the need for targeted outreach initiatives, legal literacy programs, and digital capacity-building measures to bridge the urban–rural divide and ensure equitable consumer protection.

7. Heavy Caseload and Procedural Delays

Despite its progressive framework, consumer commissions continue to face substantial backlogs stemming from rising case volumes, unfilled vacancies, and infrastructure deficiencies. These systemic challenges significantly undermine the objective of ensuring timely and effective justice delivery. The persistence of such constraints highlights the need for comprehensive administrative and institutional strengthening, including capacity enhancement and improved resource allocation, to ensure that the consumer protection mechanism functions efficiently and fulfills its intended purpose in safeguarding consumer rights.

8. Quality and Consistency of Adjudication

Consumer forums have played a pivotal role in the development of consumer jurisprudence through well-reasoned and progressive decisions. However, inconsistencies in rulings across different jurisdictions have led to legal uncertainty, underscoring the need for greater uniformity and coherence in adjudicatory standards. In *Kishore Lal Vs Chairman, ESI Corporation*[23], the Supreme Court emphasized a liberal and consumer-centric interpretation of welfare legislation, thereby reinforcing the pro-consumer approach and contributing significantly to the evolution of consumer protection jurisprudence.

9. Enforcement Limitations

The enforcement of consumer forum orders remains a critical concern under the Act, primarily due to procedural delays, limited compliance mechanisms, and resistance from defaulting parties. Although the establishment of the Central Consumer Protection Authority has strengthened regulatory oversight, significant enforcement gaps continue to persist. These inefficiencies undermine the practical effectiveness of consumer dispute redressal and weaken consumer confidence in the system. Therefore, there is an urgent need to streamline execution procedures, enhance compliance frameworks, and ensure stricter enforcement to achieve the intended objectives of consumer protection law.

10. Need for Institutional Reforms

The sustained effectiveness of the consumer protection framework depends on targeted reforms, including the timely appointment of members, infrastructural development, technological integration, and stronger enforcement strategies. These measures are essential to reduce pendency, enhance procedural efficiency, ensure compliance with decisions, and reinforce consumer confidence in the redressal system. Collectively, such reforms contribute to a more responsive, accessible, and accountable mechanism, thereby strengthening the overall implementation of the Consumer Protection Act, 2019.

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[23] (2007) 4 SCC 579.

Conclusion with Suggestions:

The Consumer Protection Act, 2019 establishes a consumer-centric redressal framework to ensure speedy, affordable, and accessible justice through simplified procedures and alternative dispute resolution mechanisms, including mediation. Its three-tier institutional structure promotes decentralized and efficient dispute resolution, while the removal of mandatory legal representation enhances inclusivity by reducing costs and procedural barriers. Additionally, digital initiatives such as the e-Daakhil portal and virtual hearings have strengthened transparency and accessibility, particularly for consumers in remote areas.

Although increasing consumer awareness, especially in urban regions, has improved engagement with redressal mechanisms, persistent rural disparities continue to limit its universal effectiveness. However, challenges such as heavy caseloads, infrastructural deficiencies, delays in appointments, inconsistencies in adjudication, and weak enforcement mechanism continue to impede the effective and timely delivery of justice. These concerns underscore the need for comprehensive institutional reforms aimed at enhancing efficiency, ensuring uniformity, and strengthening enforcement. Accordingly, the efficacy of the consumer dispute redressal framework ultimately depends on improved infrastructure, timely administrative measures, and robust compliance mechanisms. A balanced approach that combines legislative strength with effective implementation is essential to ensure an efficient, consistent, and equitable consumer justice system.

Suggestions:

To improve effectiveness, it is essential to:

- ensure timely filling of vacancies to reduce case pendency.
- Strengthen infrastructure and administrative support, particularly at the district level.
- expand digital literacy and outreach in rural areas.
- institutionalise e-Daakhil and advanced digital case management systems.
- promote uniformity in adjudication through specialised training and capacity-building programs.
- Strengthen effective enforcement mechanisms for compliance.
- introduce periodic performance audits and transparency measures, including publication of disposal statistics.

These measures are essential to realise the full potential of the Act and strengthen a transparent, efficient, and consumer-oriented dispute redressal system in India.

'Obscenity' – An indecisive judicial precedent in India

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Abstract:
The concept of obscenity has been a very controversial issue within Indian jurisprudence, leading to inconsistent judicial precedents. This paper, titled "Obscenity – An Indecisive Judicial Precedent in India," critically scrutinises the varying interpretations of obscenity laws by the Indian judiciary. The law governing obscenity in India is rooted in Section 292 of the IPC, which criminalises the distribution of materials deemed obscene. However, the definition of what constitutes obscenity has evolved over time, influenced by changing societal norms. The paper uncovers the historical development of obscenity laws in India, initially the adoption of the Hicklin test from English law, which defines obscenity based on its potential possibility to corrupt susceptible individuals. This test was applied in cases such as Ranjit D. Udeshi v. State of Maharashtra (1965), where D.H. Lawrence's "Lady Chatterley's Lover" was deemed obscene. The limitations of the Hicklin test, was to consider the context and overall message of the material as obscene, led to widespread criticism.

In recent decades, Indian courts have gradually moved towards more liberal interpretations of obscenity. Such as Aveek Sarkar v. State of West Bengal (2014), marked a significant shift by adopting the community standards test, which assess obscenity based on contemporary societal norms and the material's impact on an average person. Despite this progressive trend, judicial decisions on obscenity remain inconsistent, reflecting ongoing struggle between protecting public morality and upholding freedom of expression. This paper argues that the indecisiveness in judicial precedents on obscenity stems from the subjective nature of the term and the lack of a clear, uniform standard. By analyzing key cases and their implications, the paper highlights the need for a more coherent, uniform and balanced approach to obscenity laws in India. It calls for reforms that align with contemporary values and ensure that legal judgments protect individual rights while maintaining societal decency.

Keywords: *Obscenity, Public Morality, Freedom of Speech and Expression.*

"Law and aesthetics seem to be situated as polar oppositions as law claims to be rooted in rationalistic thinking, whereas art by definition transcends the rational to be artistic"

Introduction:
Freedom of speech and expression is an integral mode to promote democracy in any country. This right has been regarded as a Fundamental Right under the Indian Constitution Article 19(1)(a). Though it is a fundamental right but not an absolute right it has been restricted by certain reasonable restrictions. Speech and the ability to express are bestowed upon human beings by the Almighty. Speech enables us to express our emotions, feelings, ideas and opinions to others.

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Right to speech is our natural right, acquired by birth and its acknowledgement is desirable by the government which proclaims itself to be democratic and founded on the principles of justice, liberty and equality. “Everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek and receive and impart information and ideas through any media and regardless of frontiers”[3] proclaims the Universal Declaration of Human Rights (1948).

Freedom of speech and expression is also subject to certain restrictions, which are sovereignty and integrity of India, security of the state, friendly relations with foreign states, public order, decency or morality, in relation to contempt of court, defamation or incitement to an offence. As per the title, the researcher shall confine the study only to decency and morality.

There are few expressions which can’t be restricted within the framework of uniformity and universality one of such expressions is obscenity. Since individuals and media (print, electronic and social) are restricted from exercising their freedom of speech and expression by maintaining the standards of decency and morality, but what will be the standards of morality and decency will always be a matter of question. It is because of the reason as the morality and decency is subject to differ person to person and place to place. What may be obscene in India may be not be in America. What was obscene in 1970’s in India may not be in 2022.

The recent controversy arose over freedom of speech and expression vis-à-vis artistic work versus the standards of morality and decency in the recent photo shoot by famous actor Ranveer Singh. The actor did a nude photo shoot. After his nude pictures went viral on social media, Ranveer faced police complaints and FIR against him. An NGO filed an FIR in Mumbai alleging that he had “hurt the sentiments of women in general and insulted their modesty through his photographs”[4]. The FIR also added that India has a ‘good culture’ but due to such photos circulated on the internet, everyone's sentiments are hurt. Now this has become a country wide discussion over nude photography and its legal repercussions in India. For establishing any content as obscene, it has to be declared against the standard of morality and decency, for which the legal system doesn’t have any clear-cut guidelines.

We can’t afford to discuss this issue without digging into the past. As far as Indian society is concerned it is a conservative society with rich cultural values. Where discourses like ‘sex’, ‘showing of body’, ‘intimate scenes’ are still taboo in the public domain. Indian society has never been welcoming towards ‘showing of body’ on the name of ‘artistic liberty’. However, the scriptures in Khajuraho and Konark depicting intense and intimate sexual behavior can be

[3] Article 19 of Universal Declaration of Human Rights, 1948

[4] Available at https://www.timesnownews.com/entertainment-news/ranveer-singh-nude-photo-shoot-swati-maliwal-says-society-is-fed-nude-photos-of-women-on-a-daily-basis-and-bollywood-news-entertainment-news-article-93202403#:~:text=After%20his%20nude%20pictures%20went,their%20modesty%20through%20his%20photographs%22. Accessed on 30th July, 2022.

regarded as an exception to it[5]. Khajuraho models depicting sexual poses accumulate a wide variety of reactions. There are two types of sexual sculptures in Khajuraho – recreational sex sculptures and Tantric sex sculptures. It is easy to identify them based on facial expressions. Lust is clearly evident on the recreational sex sculptures.

However admiration on the Tantric sex sculptures. Tantric sex is the sacred spiritual practice that expands consciousness and unites the polarities of masculine and feminine energy into one. Energy can neither be created nor destroyed, it can only be transformed from one form to another. Tantric sex is a practice of transforming sexual energy into spiritual energy. In Tantric sex sculptures, one will identify expressions of calm and Gyan Mudra (Gesture of Wisdom), a hand gesture with the thumb and index figure pressing against each other[6]. Hence, those scriptures are devoid of lust, depravity and a perverted mindset.

Laws on Obscenity in India:
Many laws exist to tackle the controversy of obscenity in India. However, many of them are from the old Victorian era, which still exist. The laws are :

Indian Penal Code 1860- Section 292 and 293 of IPC prohibit publication and sale of obscene books, pamphlets, inter alia representation which shall be deemed to be 'lascivious or appeals to the prurient interests', which can include obscene advertisements. Section 294 doesn't permit obscene acts and songs. Whoever, to the annoyance of others:

- Does any obscene act in any public premises, or
- Signs, recites or utters any obscene song, vulgar words, in or near any public place. shall be penalized with the confinement of either description for a term which may extend to three months, or with fine, or with both.

In *Ranjit D. Udeshi*[7] Section 292 of the Indian Penal Code was challenged. The Supreme Court outrightly upheld the constitutionality of the said section. Court further observed that the section constitutes reasonable restriction under Article 19(2).

The Indecent Representation of Women (Prohibition Act), 1986- The act punishes the vulgar representation of women, which means "the depiction in any manner of the physique of women; in any indecent way, or outrageous to women, or is likely to deprive, corrupt or injure the public morals.

Information Technology (Amendment) Act, 2008 – Section 67(A) demonstrates that posting sexual content on a social media will be punishable. It is termed as online obscenity. Under the Act, storage or private viewing of obscene material is legal as it does not specifically restrict it. However, transmitting or publishing the obscene material is illegal. Before 2008, section 67

[5] Vishnu D. Sharma and F. Wooldridge ,The Law Relating to Obscene Publications in India, The International and Comparative Law Quarterly , Oct., 1973, Vol. 22, No. 4 (Oct., 1973), pp. 632-647, Cambridge University Press on behalf of the British Institute of International and Comparative Law.
[6] Available at https://windsoftravel.com/culture/khajuraho-sculptures-explained/ accessed on 25th July, 2022
[7] *Ranjit D. Udeshi v. State of Maharashtra* AIR 1965 SC 881.

was the single provision of the Information Technology Act which prohibited the publication of obscene information including child pornography and obscenity. Section 67A of the IT Act, 2000 specifically restricts the publication of sexually explicit or obscene material and section 67B of the Act specifically prohibits child pornography. This provision only criminalizes the publication and transmission of sexually explicit or obscene material in an electronic form but viewing, downloading, possession etc. is not an offence.

Punishment

- First time offender: Five years with a fine of rupees ten lakh.
- Repeated Offender: Seven years with a fine of rupees ten lakh.

Section 67(B) is against child pornography this law makes it clear that not only publication, viewing but also possession of such pornographic content is punishable.

Young Person's (Harmful Publications) Acts, 1956- If any person advertises or makes known by any means whatsoever that harmful publications can be procured from or through any person, shall be punishable.

Punishment

Imprisonment, which may extend to 6 months, or a fine, or both.

The National Human Rights Commission

The NHRC, along with the State Human Rights Commission, is empowered to protect the dignity of women appearing in advertisements. According to Section 2(d) of the NHRC Act, human rights include those relating to life, liberty, equality, and individual dignity as guaranteed by the Constitution or embodied in international covenants and applied by Indian courts.

The Post Office Act of 1898 prohibits the postal transmission of any material deemed indecent or immoral.

The Cable Television Network (Regulation) Act of 1955 bans the broadcast of programs on cable television that are considered indecent or immoral. It restricts the carriage of programs unsuitable for unrestricted public exhibition.

The Cinematograph Act of 1952 prohibits the certification of films by the censor board for public exhibition if any part of the film is against morality and decency. This Act establishes a rigorous certification process for commercial films shown in cinemas and other public settings, overseen by the Central Board of Film Certification (CBFC). The Union government has guidelines for film certifications and edits by the CBFC, with four classification categories: Unrestricted viewing (U); Unrestricted with parental guidance for children under 12 (U/A); restricted to adults (A); and restricted to a particular class or profession (S).

The Ministry of Information and Broadcasting has proposed amendments to the Cinematograph Act of 1952. The draft Cinematograph (Amendment) Bill 2021, open for public comments, includes a provision allowing the government to order re-certification of films already certified by the CBFC. This change would potentially increase the Union government's control over film certifications, reducing the CBFC's autonomy. This proposal contrasts with judgment of Supreme Court ruling, which limited the Union government's power in media censorship by stating the government cannot intervene in cases already reviewed and classified by the CBFC. **The Protection of Children from Sexual Offences Act, 2012-** The Protection of Children from Sexual Offences Act (POCSO Act) 2012 was established for protecting the children against offences like sexual harassment, sexual abuse, and pornography. The POCSO Act 2012 also makes it the legal duty of a person to report the sexual abuse. Hence laws are there to regulate over obscenity in India but there is still no uniform rule to determine the standards and parameters of morality.

Obscenity under The Bharatiya Nyaya Sanhita (BNS) 2023

The new BNS, 2023, under sections 294 and 296, punishes obscenity. It punishes the sale or transmission of obscene books or content, including e-content, too. Section 296 punishes obscene acts and songs too. Both the sections are non-compoundable, non-bailable, and cognizable offences.

Test of 'obscenity'

Obscenity refers to a category of pornography that violates contemporary community standards/morals. It has no serious literary, artistic, political or scientific value. Hence falls in the category of pervert. For adults at least, most pornography — material of a sexual nature that arouses many readers and viewers — receives constitutional protection. To regulate obscenity, it is very important to understand the rationale of these three cases discussed and the tests that they laid down: (a) Hicklin Test, (b) Roth Test, (c) **Miller Test.** All are not the brain child of Indian judiciary. But all three of them have been acknowledged and applied by Indian courts.

Hicklin test

The Hicklin test originated from the 1868 English case Regina v. Hicklin, which set a precedent for assessing obscenity in legal contexts. Regina v. Hicklin[8] was an English case dealt with the interpretation of the term '*obscenity*'. In this case Henry Scott, who resold copies of anti-catholic pamphlets titled as "The Confessional Unmasked", demonstrating the defilement of the Romish Priesthood, the wickedness of the confessional and the questions put to females confession. When the pamphlets were ordered destroyed as obscene, Benjamin Hicklin, the bureaucrat in charge of such orders as recorder, revoked the order of extermination. Hicklin held that Scott's purpose had not been to corrupt public morality but the expose the major issues related to the Catholic Church; so Scott's intention was innocent[9].

Lord Chief Alexadar Cockburn, writing for the court of Queen's bench, a broad definition of obscenity, based on ascertaining "whether the tendency of the matter is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall". This test defined obscenity as material that tends "to deprave and corrupt

[8] [1868] LR 3 QB 360.
[9] Gaur, K. D., Constitutional Rights and Freedom of Media In India. Journal of the Indian Law Institute, 36(4), 429–454 (1994). http://www.jstor.org/stable/43952367.

those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall." Essentially, if a piece of content could negatively influence a particularly susceptible person, it was deemed obscene.
One of the primary critiques of the Hicklin test is its focus on the potential impact on the most vulnerable members of society, such as children, rather than considering the broader context or intent of the material. This narrow scope often led to the suppression of works that might have significant social, artistic, or literary value. Moreover, the test's emphasis on isolating specific passages rather than evaluating the material as a whole further restricted freedom of expression. This stands as a very liberal approach which gives more opportunity of curtailing expressions and speeches on the name of 'whose minds are open to such immoral influences'.

Roth Test
USA also jumped into a deep end by applying the Hicklin test for so long until the Roth v. United States of America[10] came to open the blindfold on the eyes of the legal system there. The case upheld that material is obscene if, in view of contemporary community standards, its dominant theme appeals to the average person's "prurient interest." Accordingly, courts were to judge content by its tendency, when viewed as a whole, to arouse sexual desire[11].

Miller Test
Miller[12] went a step ahead in defining obscenity. In this case 3 principles were laid down :
a) The average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest (Roth Test);
b) The work depicts, in a patently offensive way, sexual conduct specifically defined by the applicable state law;
c) The work, taken as a whole, lacks serious literary, artistic, political or scientific value (LAPS Test).

Indian Judiciary on 'obscenity'
In 1965 verdict of Ranjit D. Udeshi v. State of Maharashtra[13]The SC had adopted the Hicklin test, which had raised a few complications. The requirement of Section 292 of the IPC is that any material is to be taken in totality, whereas the Hicklin test requires the material content to be determined in seclusion. This stands as a conflict of interest. Apart from this there were other drawbacks too because of which the judiciary started undermining the Hicklin test. The conditions of the Hicklin test were revalued and applied until the case of Aveek Sarkar.

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[10] 354 U.S. 476 (1957).
[11]Latika Vashishth, Law and the Obscene Image: Reading Aveek Sarkar v. State of West Bengal, Available at http://docs.manupatra.in/newsline/articles/Upload/303F3641-0F3D-4604-91CF-7B15660AA720.pdf accessed on 29th July, 2024.
[12] *Miller v. California*, 413 U.S. 15.
[13] 1965 AIR 881.

In 2006, the Apex Court in the case of *Ajay Goswami v. UOI*[14] introduced a new test called the responsible reader test, wherein the burden lies on the reader to be cautious in this era of technology. Online obscenity has been regulated by the cases like Avnish Bajaj v. State[15], where the significant question was whether the website can be held responsible for the publication of the MMS or not. The website was held liable which was an intermediary held liable in this case. In another case, *M. Saravanan & Dr. L. Prakash v. State*[16], a doctor was punished under Section 67 of the IT Act for e-distribution of objectionable photos and videos of a woman just for extracting money.

In the case of *Aveek Sarkar v. State of West Bengal*[17], the Supreme Court said nudity can't be considered obscene per se under the meaning of Sec. 292 unless it arouses a feeling of sexual impulse. In the landmark case *Aveek Sarkar v. State of West Bengal* (2014), the Supreme Court of India addressed the issue of obscenity in the context of a semi-nude photograph published in a German magazine and later reproduced in the Indian publications "Sports World" and "Anandabazar Patrika." The image depicted tennis player Boris Becker and his fiancée Barbara Feltus posing nude to make a statement against apartheid.

The legal controversy began when a complaint was filed, asserting that the photograph was obscene and could corrupt the minds of young readers. Initially, both the Sub-Divisional Magistrate and the High Court upheld the complaint. However, the Supreme Court overruled these decisions, introducing a significant shift in the legal test for obscenity. Moving away from the traditional Hicklin test, which assessed obscenity based on its potential to corrupt susceptible individuals, the Court adopted the community standards test.

This test evaluates material against contemporary societal standards and its impact on the average person. The Supreme Court acquitted Aveek Sarkar and others involved, ruling that the photograph was not obscene. It highlighted that the image had a legitimate purpose and did not intend to deprave or corrupt viewers. This ruling marked a progressive step in the interpretation of obscenity, aligning with modern societal values and emphasising the importance of context.

In 2015, the AIB group was also in the headlines for its roast show, AIB Knockout, in which multiple instances occurred in which *a celebrity was made fun of*, allegedly in a very rude and offensive manner. In view of this incident, several complaints were filed.

Conclusion:

However, despite this progressive shift, there have been conflicting judgments. The *Prashant Bhushan v. Union of India* (2020) case highlighted the struggle with defining obscenity in the digital age. The Supreme Court of India found advocate Prashant Bhushan guilty of contempt

[14] WP384 of 2005.
[15] (2008) 105 DRJ 721: (2008) 150 DLT 769.
[16] Cri. A. No. 770 of 2011.
[17] (2014) 4 SCC 257.

of court for tweets criticising the judiciary, particularly the Chief Justice of India. The court concluded that his remarks tended to undermine the institution's authority and dignity. Emphasising the need for responsible criticism, the court imposed a token fine of ₹1,000 on Bhushan. This case underscores the balance between free speech and the maintenance of the judiciary’s respect and authority in India.

The judicial precedent on obscenity in India reflects a complex interplay between evolving societal norms, individual freedoms, and legal principles. While there have been progressive rulings that recognise the importance of context and contemporary standards, inconsistencies persist. A clear, consistent, and objective framework is essential to balance the protection of societal morality with the safeguarding of freedom of expression.

Moving forward, the Indian judiciary must strive for greater clarity and uniformity in its interpretation of obscenity. This can be achieved by developing guidelines that account for the context, purpose, and potential impact of the material in question. By doing so, the judiciary can provide a more predictable legal environment while upholding the constitutional values of freedom and dignity.

Professors Lockhart and McClure grumbled, “No one seems to know what obscenity is. Many writers have discussed the obscene, but few can agree upon its essential nature”.

Community Service as Punishment in India: A Critical and Comparative Socio-Legal Analysis

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&
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Abstract:
Community service described as a statutory punishment under Bharatiya Nyaya Sanhita (BNS), 2023, and Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023, is a paradigm shift in the criminal justice system of India as a retributive approach to incarceration. This article examines as to what extent can the incorporation of community service as an alternative punishment in the Indian Criminal Justice System effectively address the objectives of rehabilitation, societal reintegration and deterrence, while considering the legal, cultural and practical challenges inherent in its implementation and also to conduct a comprehensive comparative analysis of the utilization, efficacy and challenges of community service sentencing as an alternative to imprisonment, including an analysis of community service sentencing in the USA, UK, Australia, South Africa, etc.

Keywords: *Community Service, Bharatiya Nyaya Sanhita, restorative justice, alternative punishment, recidivism reduction, criminal justice reform, rehabilitation, BNS, BNSS.*

Introduction:

"*Community service is a powerful tool for rehabilitation, allowing offenders to directly give back to the communities they have harmed.*"

– Judge Jane Doe. (Rai, 2021)

The Sentencing policy shapes a nation's criminal justice system by reflecting the societal values, legal principles, and punishment philosophies. Traditionally, India has relied on imprisonment and fines under the colonial Indian Penal Code, 1860[3]. However, overcrowded prisons, poor correctional conditions, high costs and limited rehabilitation have raised concerns about purely custodial sentences.[4] According to the National Crime Records Bureau, over two-thirds of Indian prisoners are under-trials, highlighting systemic inefficiencies, delays, stigma, and recidivism.[5] In response, judicial pronouncements, committees including the Justice V.S. Malimath Committee (2003), Law Commission Reports, and the National Human Rights

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[3] The Indian Penal Code, 1860 (Act No. 45 of 1860).
[4] Law Commission of India, "277th Report on Wrongful Prosecution (Miscarriage of Justice): Legal Remedies" (August, 2018).
[5] National Crime Records Bureau, "Prison Statistics India, 2022" (Ministry of Home Affairs, 2023)

Commission have advocated the non-custodial and reformative sentencing mechanisms to address these persistent concerns.[6]

Despite legislative setbacks, the judiciary has occasionally exercised discretionary powers to impose the community service sentence. For example, a New Delhi court recently opted for a community service sentence for a first-time offender, highlighting the potential for reformation over traditional imprisonment. This decision aligns with the Supreme Court's stances in cases like *Pappu Khan v. State of Rajasthan*[7] and *Babu Singh v. State of U.P.*[8], which emphasised the need for rehabilitation over punitive measures.

This statutory recognition marks a shift from retribution to reformation, aligning the Indian penal philosophy with the global restorative justice trends.[9] Community service engages offenders in meaningful work, fosters responsibility, reduces stigma, and preserves social and employment ties benefits lacking in traditional imprisonment. The statutory introduction of community service raises concerns about implementation, judicial discretion, standardisation, and offender rights.[10] Conceptual clarity, procedural design, and administrative infrastructure remain underdeveloped. Courts lack guidelines on the duration, nature, supervision, monitoring, and consequences of non-compliance, while coordination among the judiciary, probation services, local authorities, and civil society is limited, risking inconsistent application.[11] This article examines whether these reforms can translate into effective penal policy aligned with international standards.[12] Safeguards are also needed to uphold Article 21[13] (dignity), Article 23[14] (prohibition of forced labour), and principles of proportionality[15], ensuring community service remains reformative, non-exploitative, and equitable.

Despite its potential, community service in India lacks sufficient empirical research. Pilot projects in Delhi and Tamil Nadu show positive outcomes but reveal gaps in probation staffing, monitoring, funding, liability measures, and public awareness.[16] International evidence shows that offender dignity and fairness are crucial for compliance.[17] For community service to

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[6] Government of India, "Report of the Committee on Reforms of Criminal Justice System" (Ministry of Home Affairs, 2003), 14.9.1–14.9.4.
[7] 2005 SCC OnLine Raj 348
[8] (1978) 1 SCC 579
[9] H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* 45 (Oxford University Press, 1968).
[10] M.K. Guru Prasath & T. Charumathi, "A Critical Study on Community Service Sentencing and its Significance in the Indian Criminal Justice System," 6 International Journal of Legal Science and Innovation 505 (2024).
[11] *Ibid.*
[12] Ritu Raj and Ananya Sen, "The New Criminal Laws and Restorative Justice," 12 *Indian Law Review* 101 (2024).
[13] The Constitution of India, 1950.
[14] *Ibid.*
[15] United Nations, *Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules)* (1990).
[16] 'Delhi notifies community service guidelines for minor offences', *Times of India* (24 Jun 2025); 'TN Government introduces 16 community services as punishment', *Times of India* (20 Jul 2025).
[17] UK Ministry of Justice, *Community Payback Annual Report (2022)*.

function as an effective alternative, it must match offender skills with community needs, ensure proportionality, and avoid punitive or degrading tasks. [18]

Against this backdrop, this article examines the introduction of community service as a formal sentencing option in India, assessing its feasibility, practical and constitutional implications, and place in global practice. It examines whether community service can become a credible, humane, and rehabilitative alternative to imprisonment.[19] This article addresses existing research gaps by conducting a comparative socio-legal analysis across jurisdictions and assessing the operational, legislative, and philosophical dimensions of community service sentencing. It investigates whether community service, as introduced in BNS/BNSS, can reduce recidivism, promote accountability, ensure societal reintegration, and enhance the rehabilitative orientation of Indian criminal justice administration. Ultimately, this article aspires to contribute to ongoing reform dialogues by providing critical insights for policymaking, judicial interpretation, and administrative design, and by advocating a shift toward restorative, equitable, and community-focused justice in India.

Theoretical and Jurisprudential Foundations of Community Service

Theories of Punishment and Sentencing Philosophy

Classical theories of punishment grounded sentencing in retribution and deterrence, while modern penology increasingly emphasises rehabilitation and restoration. Classical Theorists like Immanuel Kant and H.L.A. Hart grounded punishment in retribution, while Bentham's utilitarianism stressed deterrence.[20] Later criminology shifted toward rehabilitation, and scholars such as John Braithwaite and Howard Zehr advanced restorative justice centred on offender victim community participation.[21] Community service reflects this restorative approach by combining accountability with constructive social work, and studies show lower recidivism when it includes counselling or skill-building.[22] However, ethical concerns caution that unpaid labour must not be degrading or replace meaningful rehabilitation.[23]

Restorative Justice and Community-Centric Sentencing

Legal scholarship recognises community service as a form of reformative and restorative sentencing, which emphasises reintegration over isolation, and community benefit over mere punishment. This is reflected in contemporary narrative and jurisprudential understanding that offenders can undergo moral transformation through structured engagement with society, a principle increasingly endorsed within Indian discourse on community service sentencing.
Restorative justice is a criminal justice approach that emphasises on reparations of the damages that crime imposes instead of just punishing the offender. It is focused on dialogue,

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[18] Finnish Criminal Sanctions Agency, *Annual Review* (2021).
[19] John Braithwaite, *Restorative Justice and Responsive Regulation* 33 (Oxford University Press, 2002).
[20] Id. at 10.
[21] John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press 2002); Howard Zehr, *The Little Book of Restorative Justice* (Good Books, 2002).
[22] Michael Tonry, "Community Sanctions and Restorative Approaches" 34 *Crime and Justice* 1 (2006).
[23] Andrew Ashworth, "Sentencing and Criminal Justice Ethics" 20 *Oxford Journal of Legal Studies* 232 (2000).

responsibility, and reconciliation of victims, offenders, and community. This is usually done through mediation, victim-offender conferences, and community-based programs that help to build understanding and rehabilitation.[24]

Historical Evolution of Community Service in Indian Criminal Jurisprudence"
The idea of community service sentencing is not completely new in the Indian Justice system as Section 18(1)(c) of the Juvenile Justice (Care and Protection of Children) Act, 2015 offers the same. But now it has been incorporated in the BNS, 2023, expanding its ope. On several earlier occasions High courts across the country have sentenced offenders to perform community service using its inherent power under 482 CrPC, 1973.

Historical proposals to introduce community service into Indian penal policy date back to the IPC (Amendment) Bill, 1978, which sought to insert Section 74A to recognise community service, though this lapsed with the dissolution of the Lok Sabha. Subsequent support for the idea came in the Law Commission's 156th Report and the Malimath Committee Report, both emphasising reformative justice and reduction of prison overcrowding, though they flagged concerns about administrative feasibility and monitoring.

According to Rule 2(vi) of the Juvenile Justice Rules[25], 2016, "Community Service" refers to services performed by juveniles in conflict with the law as a substitute for other judicial remedies and penalties, provided that such services are not degrading or dehumanizing. The Probation of Offenders Act, 1958 permitted conditional release but did not recognize mandatory unpaid work. Courts sometimes ordered tasks like tree planting or road cleaning, but these were ad hoc. In *State of Gujarat v. High Court of Gujarat*[26], the Supreme Court endorsed reformative justice, though the lack of a statutory framework prevented consistent application.

Judicial Recognition and Application of Community Service Prior to BNS in the Absence of Legislation

In the past, due to the lack of statutory provisions in the IPC and CrPC, some High Courts directed the accused to perform community sentence. For example, the Bombay High Court mandated community service at a hospital as a condition for quashing an FIR under sections 354, 506, and 342 of the IPC, also after a settlement between the parties.[27]
Indian courts have repeatedly experimented with community-oriented sanctions even in the absence of express statutory authority, particularly while exercising inherent and bail-related powers. In *Sunita Gandharva v. State of M.P.*,[28] Madhya Pradesh HC suggested community service sentence for accused post-bail to ensure compliance with the Criminal Justice System. Another aspect dealt with by the court was whether or not the scope of bail conditions in section 437(3) the CrPC could encompass community service sentence. This was upheld in the court, which said that the term any other conditions in the interest of justice in Section 437(3)

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[24] Dr Asifa Parveen, "Restorative Justice in the Indian Criminal System: A Shift from Punitive to Reformative Approaches," 2 (2025).
[25] The Juvenile Justice (Care and Protection of Children) Model Rules, 2016.
[26] (1998) 7 SCC 392.
[27] WP (Crl) 116/2022
[28] Id. at 24.

permitted the directing of the accused to complete community service or any other reformatory measures. However, these conditions must be voluntarily offered by the accused, considering their capacity and willingness.[29] Similarly, in another case, the Delhi HC ordered CS for offenders above eighteen, despite acknowledging harm to the complainant, while quashing the FIR under Section 482 of CrPC.[30]

In *Giljar Singh v. State of Madhya Pradesh*[31], the Madhya Pradesh HC ordered regular bail on the provisions of section 188 of the IPC on the condition of installing a water harvesting or recharge system. In *Shiv Kumar v. State of M.P.*,[32] a direction of planting saplings was ordered and regular bail under section 307 of the IPC had been granted.[33]

In the case of *Solemen SK v. State of West Bengal*[34], the Supreme Court ordered release of a prisoner who turned out to have been a minor during the commission of the crime. The Court ordered him to plant 100 trees in a year as a community service instead of sending him to the Juvenile Justice Board.

In *Vishal Awtani v. State of Gujarat*[35] the Gujarat High Court ordered the State Government to prepare a policy that will require all residents found without mask wearing during the COVID-19 pandemic to engage in mandatory community service at specific COVID-19 care facilities. On the same note, the Delhi high court in *Mohd. Umair @ Umer v. State (Govt. of NCT of Delhi) & Anr.*[36] quashed the FIR on the ground that the parties had settled the dispute amicably by giving one month community service in Gurudwara Bangla Sahib to a 21-year-old accused. Delhi High Court in *Manoj Kumar v. State (Govt. of NCT of Delhi) & Anr.*[37] instructed, to render community service, at Lok Nayak Jai Prakash Narayan Hospital on Saturdays and Sundays, to an accused, who had kissed a woman without her permission and thus outraged her modesty.

Similarly the Madhya Pradesh High Court, in *Narendra Upadhyay v. Narendra Singh & Ors.*,[38] on finding that litigants are not supposed to suffer at the expense of default of their counsel, ordered the default counsel to do one hour community service at a Mercy Home, and reinstated a criminal case filed in 2013.

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[29] Community Service' Under the BNS - An Incomplete Yet Promising Penologocial Advancement, available at: https://www.livelaw.in/articles/community-service-under-bhartiya-nyaya-sanhita-262322 (Last Visited on December 01, 2025)
[30] Mahender Singh Alias Sunny vs The State, Crl.M.C. 852/2021.
[31] M.Cr.C. No.29827/2019.
[32] Shiv Kumar v. State of MP, 2005(3) MPHT 466.
[33] Vivek Krishnamurari Shrivastav v. State of Maharashtra and Ors., 2024 LiveLaw (Bom) 348.
[34] SLP (Crl.) No. 709/2019, order dated 12.07.2019.
[35] W.P. (Crl.) 116/2022
[36] Crl. M.C. 674/2021, decided on 21.03.2021.
[37] W.P. (Crl.) 116/2022.
[38] Misc. Criminal Case No. 43706 of 2023.

In Dr. Ekta Singh Case[39] which was presented in the Karnataka High Court, contempt actions against a doctor, who had issued an unconditional apology and even offered to do a day of community service in one of the government hospitals in Bengaluru were withdrawn.
On the same note, the Madhya Pradesh High Court in *SB v. The State of Madhya Pradesh*[40] directed the accused to serve seven days of community service in the university library, after he had compounded a case of ragging after the accused, a senior student, had shown remorse over his actions.

In a recent case that gained great publicity in the media in Pune, a minor who was driving a Porsche car, also popularly known as Pune Porsche Case, caused a fatal accident in which two people died. He was first sentenced by the Juvenile Justice Board to community service of 15 days, by making him serve the traffic police, and also write an essay on road accidents. This ruling prompted mass public denunciation on the grounds that it was unduly lenient, the Board later overturned his order to remain on bail.

Statutory Incorporation of Community Service under the Meaning and Definition of Community Service:

Community service is a kind of non-custodial punishment in which the court directs the offender to do some unpaid labour for the community. It is applied instead of imprisonment in most non serious crimes and first time offences. This is to not only punish the offender but also encourage rehabilitation and social reintegration.

Community service is defined by the United Nations Standard Minimum Rules to Non-custodial Measures (Tokyo Rules, 1990) as work which is rendered during a certain duration to the community by the offender without compensation.

The explanation to section 23 BNSS defines the term Community Service. According to the explanation, the term Community service shall mean the work which the Court may order to a convict to perform as a form of punishment that benefits the community, and for which he shall not be entitled to any remuneration.

In section 4, BNSS has made a first-time introduction of community service as a penalty. Community Service can also be understood to refer to a noble service that the order of court can prescribe to the accused to be given without compensation in the interest of the society and any section thereof. Community service is also much higher in another purpose, inculcating a sense of responsibility, of paying back to the society in the offenders.

Scope and Legislative Recognition of Community Service:
With the introduction of the Bharatiya Nagarik Suraksha Sanhita, 2023, and the Bharatiya Nyaya Sanhita, 2023, there was a revolutionary change: community service was finally

[39]Criminal Contempt Petition No. 8 of 2023; 2023 LiveLaw (Kar) 378.
[40]Misc. Criminal Case No. 48759 of 2023; 2024 LiveLaw (MP) 29.

introduced as a formal sentence in India under certain provisions of the BNS, giving judges the freedom to impose such penalties in appropriate cases. Section 4(f) of the BNS[41] recognizesit as an alternative sentencing option, moving from colonial punitive models toward rehabilitative, participative, and community-based justice.

Section 23 of the BNSS[42] defines community service as "the work which the Court may order a convict to perform as a form of punishment that benefits the community, for which he shall not be entitled to any remuneration."

benefit, it is notable on its own as lacking in detail. It leaves some crucial words such as work that benefits the community purely open to the judicial interpretation. The law is also silent on the nature of activities that should be considered to qualify, how the length of service is to be determined or how the supervision and verification can be done or how to match offenders with appropriate placements. This lack of clarity in legislation poses a serious challenge in implementation. Although it provides very useful flexibility to the judiciary, it also gives it the possibility of inconsistency, disparity, and even legal challenges as the nature and the punishment burden might differ radically across the courtrooms. Judges may interpret community service differently based on personal discretion.

This could result in unequal sentencing, which compromises uniformity and equality before the law. [43] The lack of consistency in the sentence of community service gives the perception of injustice and inequality in the justice system. Another major criticism is the absence of proper supervision and enforcement of community service orders.[44]

The introduction of the community service in the BNS was not a fresh and new idea but the one, which has been long-term development in Indian jurisprudence. This idea has long been on the fringes of the criminal justice system, manifested in two main ways: statutory application in relation to juveniles and judicial interpretation in cases concerning adults.[45]

Offences Covered and Sentencing Discretion

Community service, as specified in Section 4(f) of the BNS[46] is considered a separate form of punishment to other forms of punishment i.e. death, life-imprisonment, simple or rigorous imprisonment, Forfeiture of property and fine. It may be fined in regard to six offences identified under BNS:

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[41] The Bharatiya Nyaya Sanhita, 2023 (Act 45 of 2023) s. 4.
[42] Major Changes Introduced by the Bharatiya Nyaya Sanhita, available at: https://www.livelaw.in/top-stories/major changes-introduced-by-bharatiya-nyaya-second-sanhita-245558 (last visited on November 11, 2025)
[43] Md. Imran Wahab, "Analysing Community Service as a Mode of Punishment in Bharatiya Nyaya Sanhita (BNS), 2023" *Legal Service India.com available at*: http://www.legalserviceindia.com/legal/article-17100-analysing-community-service-as-a-mode-of-punishment-in-bharatiya-nyaya-sanhita-bns-2023.html (last visited January 29, 2026).
[44] *Ibid.*
[45] Dr Anjay Kumar and Kaushik Katyayan, "Community Service in Indian Criminal Law: An Examination of Legal and Practical Dimensions."
[46] The Bharatiya Nyaya Sanhita, 2023 (Act 45 of 2023).

i. Public servant trading unlawfully (Section 202);
ii. Failure to attend court in responding to a proclamation made under the Section 84(1) of BNSS (Section 209);
iii. Attempt to commit suicide, to induce or restrain the exercising of legal power (Section 226);
iv. Theft under which the amount or value of the stolen property is less than the sum of Rs.5000 and a person is first-time offender convicted and returns or restores value of property [Section 303 (2)];
v. Public misconduct of a drunken individual (Section 355);
vi. Defamation [Section 356(2)].

The fact that community service sentencing is a substitute penalty to offences under Sections 202, 209, 226, 355 and 356(2) of the BNS is relevant since these sections are connected with the conjunction or. Interestingly, under Section 303(2) of the BNS, community service is not merely an option for punishing theft but rather the only punishment which the court is required to administer for the same offence. [47]

Legal Implications of the default in the rendering of Community Service.

The relevant question in this respect is the question of what to be done in the event of a convicted individual failing to carry out the community service to be performed as ordered by court or performing unsatisfactorily or partially. Section 8 of the BNS provides the procedure of the liability of an individual convicted of default of community service.

Such a provision is vague when it comes to community service. It is an indicator of the vagueness or omissions in the drafting of Section 8 concerning the default of community service. Though the default of community service is mentioned in Section 8(4) it does not specify the period of imprisonment like it does in all cases to the defaults in terms of fine. The termination of imprisonment through the payment of fine is given by the BNS, yet it is not clear directly how the termination of imprisonment happens when the imprisonment has been imposed in default of the community service when the service is later undertaken or in any other case when the imprisonment has been remedied. There is much need of legislative or judicial explanation on the same. [48]

Unless there is a legislative amendment to clear up the ambiguities, or a clear pronouncement by a court of law to correct the current ambiguity, the legal perspective that prevails suggests that the sentencing court should pre-emptively and expressly indicate in the order of conviction itself the alternative term of imprisonment which is to be imposed should default occur in the discharge of community service.

Requirement to expand the Applicability and the Scope of Community Service

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[47] Amir Suhail, "Community Service As Sentencing Alternative: Towards A Reformative And Restorative Criminal Justice System In India," 2026 *available at*: https://www.livelaw.in/articles/reformative-dimension-of-community-service-bharatiya-nyaya-sanhita-analysis-516964 (last visited January 22, 2026).

[48] *Ibid.*

Despite the formal introduction of the concept of community service as an alternative to incarceration by the legislature, the practical usefulness of its application remains exceptionally low. In the reality, it is hardly possible to find issues in trial court or magistrate court where the community service can be ordered to be implemented, mostly limited to the theft offence where stolen property is not worth more than Rs. 5,000. In the modern world, the price of stolen assets usually surpasses this mark and, therefore, such incidents have become even more uncommon. In order to introduce any meaningful sense to this philosophy behind community service, it is required that the scope of the philosophy must thus be expanded. It can be suitably applied to the offences that are punishable by imprisonment to a term of up to two years, or the offences whose law prescribes an alternative sentence of fine. Even some crimes with maximum punishment up to seven years in case they are not serious in nature can be also considered. The first-time offenders, young people under 21 years of age, the elderly, infirm persons and to women may be accorded priority in such categories of cases. But it may not be possible to develop an exhaustive list of the particular offences which can be the subject of such sentencing.[49]

Comparative Global Practices in Community Service Sentencing

The experience of other countries indicates that community sentence is effective only when it is backed by good statutory directives, probation facilities, trained supervisors, social confidence, and community involvement. The Community Payback model of the United Kingdom, which is managed by the ministry of Justice[50] relies on a well-defined set of guidelines, probation officers, monitoring machinery, and the distribution of tasks according to their skills.[51] In other jurisdictions such as Finland and other Nordic countries, community sentencing is a part of a larger welfare structure which dedicates itself to human rights, reintegration, dignity, and rehabilitative justice. New Zealand and Australia have a focus on cultural adjustment, integration of education and engagement with the communities, which proves that community service sentencing is a powerful alternative when supported by institutional transparency and social approval.[52] These contrasting models have a good learning aspect towards the developing community service model in India.

Anglo-American and Nordic Models:

United Kingdom**-** Community service orders were established by the *Criminal Justice Act of 1972* following the successful Scottish pilots. Later amalgamation under the *Powers of Criminal Courts Act, 1973* gives the guideline by which community service orders are issued and executed in the UK. The UK Ministry of Justice assessments demonstrate completion rates of over 75 per cent and small and steady declines in re-offending.[53]

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[49] *Ibid.*
[50] Government of United Kingdom, Community Payback, available at https://www.gov.uk/community-sentences (Last Visited on December 3, 2025)
[51] Ministry of Justice (UK), *Community Orders and Unpaid Work: Research Summary* (2021).
[52] Id. at 3.
[53] Id. at 21.

United States- Adopted unequally among states, community service tends to be included in probation. According to the studies by the American Bar Association, it is a cost-effective measure but cautions against inequalities because of the social-economic bias and absence of supervision standards.[54]

Finland and Nordic Countries:
In this case, community sanctions are in line with the spirit of welfare state. Community service in Finland is administered by the Finnish Criminal Sanctions Agency that focuses on social support and reintegration and the re-offending rates in the country are significantly low.[55] Similar to other Scandinavian nations, Finland is one of the first countries to implement community service and non-custodial reforms. In 1995, it added community service to its Criminal Code with a 14 to 240-hour service range. It is applied in cases where the sentence is not more than eight months of imprisonment; in case the court exercises discretion to impose it more than that, at least 90 hours are to be ordered. Finland also has a conversion rule: every single day in prison means an hour of community service.[56]

Asia, Europe and the Global South:
Spain- It was nearly 13 years before Spain transformed community service into a ground reality out of practically nothing more than a statutory provision. The Spanish community service programme is not the one directly regulated by the state but it is the one, which is regulated by the government of Spain through the agency that is developed by the government of Spain, the agency functions under the contractual agreement that is signed between the government and the agency. It was added to the 1995 Criminal Code (Art. 49) and imposes a maximum of eight hours per day and 31-180 days on the offender to engage in public-welfare work.[57] There is also a conversion rule in Spain, one day of imprisonment is one day of community service.
Singapore- Singapore community service is regulated by the section 344 of the Criminal

Procedure Code of Singapore, which is directly managed by the government using a panel with judges, police and prosecutors. It is applied to offenders who are 16 years old and above and is imposed at the discretion of the court where it is found to be reformative.[58] There is no set statutory range, but the order is usually between 40 and 240 hours.[59] In Section 346(2)(a), the health eligibility must be determined by the courts. It is applicable in cases where there is imprisonment of not more than 3 years and the convict must learn how to get employment and the moral values acquired and must undergo sensitisation training.[60]

South Africa- In South Africa, the community corrections system offers an option to incarceration where offenders serve their sentences in the community under the supervision of

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[54] American Bar Association, *Standards for Criminal Justice: Sentencing Alternatives* (3rd edn., 2019).
[55] Id. at 22.
[56] The Criminal Code of Finland, 1894, Chapter 6.
[57] The Criminal Code of Spain, 1995, art. 33(3)(k)
[58] The Criminal Procedure Code, 1955, s. 344.
[59] Id. 74
[60] Ibid.

correctional authorities. According to Bruyns[61], this system ensures that offenders remain part of their families, employment, and neighbourhoods.

Australia and New Zealand- Both of these countries include community service as a part of the wider menu of community-based orders. The Australian Law Reform Commissions report that successful offender reintegration occurs where orders contain elements of education and community consultation.[62] New Zealand is the only country that incorporates Maori restorative practices, which connects community work to cultural restoration.[63] This comparative research therefore shows that statutory clarity, sufficient supervision infrastructure and community involvement are determinants of success.[64] These insights shape the evaluative framework of the new regime of India.

Effectiveness and Implementational Challenges

The legislative gap in the very core is the most direct challenge to the successful implementation of community service in India. At present, India does not have a specialised national or state-based agency that resembles a special probation service and is capable of fulfilling these functions.

Already the current probation system is already overburdened and under-resourced and ill-equipped to absorb those huge logistical issues such as the massive community service sentences. Such an institutional lack produces an implementation paradox since the newly implemented BNS has brought forth a reformative and modern punishment, but it has not given an administrative infrastructure that is moderately modernised in order to render it functional. In the absence of a definite answer to such a question as Who will supervise, community service is in danger of becoming a sham provision, and a penalty ordered by the courts, but incapable of execution, supervision or checks, and therefore making it no more than a formality. There is also lack of a national digitalized system of keeping the records of the offenders that are to undergo community service which monitors their progress and keeps record of compliance, which is ineffective to the administration and also at risk of being manipulated or even duplicated.[65]

Without a clear statutory provision, it would be inconsistent on what recourse a court would have. Would the offender be held in contempt of court as well? Would the court have the power to sentence to original custodial sentence which has been substituted by community service? Or would it just be a matter of increasing the service hours? All these options have varying legal consequences and leaving this choice in the hands of the judicial discretion will lead to inconsistencies even more. In case community service is to be considered as a serious penal

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[61]HJ Bruyns, N Jacobs-du Preez, et al., Community Corrections: Fundamentals and Philosophy (TSA Publishing, South Africa, 2002).
[62]Australian Law Reform Commission, "Sentencing of Federal Offenders, Report No. 103" (2020) para 5.2.
[63] New Zealand Ministry of Justice, *Community Work Sentences Evaluation* (2018).
[64] Id. at 42.
[65] Vivek Kumar Gupta, "Alternative sentencing in India: The legal dimensions of community service under the Bharatiya Nyaya Sanhita, 2023," 5 *International Journal of Criminal, Common and Statutory Law* 65–73 (2025).

sanction, then an explicit and codified or else clause must be present. Clear procedure regarding breach of a community service order is quite critical so as to make sure that the sentence has some legal force and offenders would not view it as something as an obligation to be avoided without any penalty.

There are both challenges and opportunities in the implementation of community service as a punishment in India. The main issues are to make sure that community service is applied consistently and appropriately in various cases. Since India is a federal nation, states can have a different community service approach. In the absence of a standard policy framework, the differences in the implementation can result in unequal justice delivery throughout the nation.[66] These demand clear instructions on the type of service and length of time, and also the mechanisms on how to monitor and assess compliance.

The application of community service sentencing has its obstacles in the context of resource distribution and coordination of the agencies. Quite frequently, community service may be perceived as an insufficient punishment by the general population and, moreover, it may make them less trusting of the justice system. The ethical issues of community service include issues of involuntary servitude and especially when the job allocated is not directly related to the harm that is committed by the crime.[67]

Prevention of misuse of community service is another challenge. Without stringent policies and supervision, it is possible that community service is abused or taken as a soft option to serious crimes. As a solution to this problem, the BNS should incorporate certain clauses to the rigorous checks and responsibility, so that violators will be made to serve their community service as dictated and that the service should be both fruitful and helpful to the community. The other ethical issues that arise out of community service are the issues of the involuntary servitude especially when the duties that are being set are not directly directed to the harms that the crime inflicts.[68]

Conclusion:

Community service sentencing is a reformative, progressive, and rehabilitative change in the criminal justice administration of India and has also found its way into other jurisdictions around the world as an alternative to the traditional custodial sentences. Restorative justice, which focuses on rehabilitation, social reintegration, and offender accountability, offers a substantial alternative to imprisonment. This policy serves to reform the individual as well as the broader community needs by enabling convicts to contribute positively to society.

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[66] *Ibid.*

[67] Md. Imran Wahab, "Analysing Community Service as a Mode of Punishment in Bharatiya Nyaya Sanhita (BNS), 2023" *Legal Service India.com available at*: http://www.legalserviceindia.com/legal/article-17100-analysing-community-service-as-a-mode-of-punishment-in-bharatiya-nyaya-sanhita-bns-2023.html (last visited January 29, 2026).

[68] Shivani Johri "Concept of Community Service as Punishment under BNS, 2023- a boon or bane? – The Lawway with Lawyers Journal, "*available at*: https://thelawwaywithlawyers.com/concept-of-community-service-as-punishment-under-bns-2023-a-boon-or-bane/ (last visited January 27, 2026).

Community service sentencing may also be cost-saving, foster a culture of empathy and civic action, and alleviate the systemic issues associated with jail overcrowding. The possibilities for its use are enormous, though effective execution will require strong oversight, clear guidelines, and mechanisms to evaluate its impact. Community service in India is a major step towards a more human-focused judicial system, one that prioritises reform over retribution and is more socially conscious in its approach to criminal law.

Objectification of Women in Media

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&
***Dr. Sthiti Dasgupta*[2]**

Abstract:
This article discusses the Kerala High Court's judgment on the issue of objectification of women in the media. The verdict itself is progressive while negating any objectification in the dispute at hand. However, it leaves an important issue, that is, the impact of objectification of women in media by fragmentation of women's bodies and dehumanising them to promote and reinforce the patriarchal standards by the sexual gaze of women.

Keywords: Indecent Representation of Women, Male Gaze, Media, Objectification of Women, Obscenity, Public Morality.

Introduction:
Arguments about the depiction of women's body parts often form part of a broader dispute between those who are in favour of the expansion of a woman's right to express herself through her body but seek freedom from the male gaze and those who would like to see a woman's liberty to represent herself curtailed in the name of public morality and health. Against this backdrop, the article analyses the recent judgment of the Kerala High Court in *Felix M A v P V Gangadharan and Others* and its impact on the issue of the objectification of women in the media.

The Controversy:
The recent controversy started challenging patriarchal and social norms when a man posted a picture on Facebook of his wife breastfeeding to start a conversation about letting mothers feed in public spaces. However, it only invited criticism from both men and women. The public outrage subsequently prompted the magazine Grihalakshmi to take up this issue. The cover page of Grihalakshmi (1-15 March, 2018) depicted model Gilu Joseph staring straight into the camera and breastfeeding a baby, exposing her bosom, with a caption which reads, "Don't stare; we have to breastfeed." The public perception that is attributed to the sexualisation of breasts went against the magazine, which termed it obscene, vulgar and somehow an indecent representation of a woman. On the other hand, those who see breastfeeding for biological purposes term it to be beneficial for the cause of free and open breastfeeding.

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The debate turned into a legal battle when a Writ Petition was filed in the Kerala High Court (*Felix M A v P V Gangadharan and Others* 2018) submitting that the cover page of magazine offends Section 3(c) and 5(j)(iii) of the Protection of Children from Sexual Offences Act, 2012 and Section 45 of the Juvenile Justice (Care and Protection of Children) Act, 2015. The petitioner also challenged the action by invoking Sections 3 and 4 of the Indecent Representation of Women (Prohibition) Act, 1986, and Articles 39(e) and 39 (f) of the Constitution of India.

While dismissing the Writ Petition, the high court held that the picture's particular posture and its background setting (mother breastfeeding the baby), as depicted in the magazine, is not prurient or obscene; nor even suggestive of it. While rejecting any obscenity in the image, the court said that it does not affect society's moral fabric and sensibilities, as shocking one's morals is an elusive, amorphous, and protean concept, not free from subjectivity.

Jurisprudence of Obscenity:

The rationale behind the obscenity or vulgarity issue under the veil of public morality came in the British case which held that any publication is obscene if it tends to "deprave and corrupt those whose minds are open to such immoral influences" (*Regina v Hicklin* 1868). However, United States (US) Supreme Court has moved to a much-modified approach when it declares that "State statutes designed to regulate obscene materials must be carefully limited" (*Miller v California* 1973). Moreover, not everything was considered obscene (*Roth v United States* 1957). For example, Playboy magazine is pornographic but not obscene. Some feminist writers have proposed to redefine pornography as that which necessarily involves the subordination of women and thus to be contrasted with "erotica", which is not subordinating—but this usage is idiosyncratic (Koppelman 2005:1639).

Supreme Court of India has also progressively relaxed the rigours of the standards concerning obscenity and immorality in Ranjit Udeshi v State of Maharashtra (1965), *Chandrakant Kalyandas Kakodkar v State of Maharashtra* (1970), *Samaresh Bose v Amal Mitra* (1986) *and Khushboo v Kanniammal* (2010). Further, the Kerala High Court said that what may be obscene to some may be artistic to other; one man's vulgarity is another man's lyric. As the beauty lies in the beholder's eye, so does obscenity. Interestingly, whether these types of images objectifies a woman or not is left with the people to understand and decide because the court observed that the matter is not free from subjectivity.

Harry Clor advocates against obscenity while recognising the harm any such publication could have had. He termed such projection objectification and described it as more or less dehumanising (Clor 1996: 192). While declaring the Kerala High Court's judgment as progressive, the opinion of Clor can be brought when he argues that some feminists try to salvage certain erotic materials that supposedly do not degrade women. 'They condemn "objectification" while apparently validating representations of a sort that inevitably objectify' (Koppelman 2005:1648).

Some may argue that breastfeeding is absolutely a basic human motherly act which undeniably is beyond the prurient interests of human beings. Moreover, the image of the young model on the cover of a magazine actually makes only a tiny dent in the deeply entrenched, if entirely modern, taboo. It certainly marks the woman very clearly as married, respectable, elite, and therefore ‘eligible’ to demand exception from the sexual gaze. It is seen to be maternal-distinguished from the sexual (Devika 2018).

Even the Kerala High Court rejects the connotation that the cover page is sexual. The court has cited representational traditions of Indian art, and it also holds the view that the particular image does not blatantly trigger the lustful thoughts. Court also passively supports the idea that as the image is of a traditional mother with vermillion on her forehead and parallelly she is nurturing her baby; thus accepting the traditional mores of the society; so in no way can it be called obscene or triggering prurient interests. However, the decision opens a way for the media industry which can defend any representation it gives to women.

Media industry, either electronic or print, somewhere down the line has always justified the vulgar tastes which pushed up its sales and helped it reach out to the masses very quickly. Although sex itself was never a problem rather anything which may create an awful norm or promote an idea which may have the ill effect on the subject is a problem. Catherine Mackinnon had argued that “because pornography is sexual, it is not like the literatures of other inequalities. It is a specific and compelling behavioral stimulus, conditioner and reinforcer” (1987: 200). However, it cannot be taken as true rather obscenity in any form induces consumers to entertain morally awful fixed norms. This thought can be taken as a common one between conservative thinkers like Harry Clor and feminist Catherine Mackinnon (Koppelman 2005:1652).

While the matter which remains exceptionally blatant is that moral policing cannot be done when we are talking about the health of mother and child in our society through breastfeeding. Those questioning the cover page of the magazine were shaming a fundamental human trait and a mother feeding a baby cannot be seen by any such lens. It is something about which we have to be very cautious. However, the issue of obscenity jurisprudence revolves around the harms which may be caused to children due to exposure to any kind of nakedness. It has to be kept in mind that harm to children is something which is very central to the idea of obscenity law. The objectification of women creates severe damage to the mindset of children, growing teenagers along with adults. It has to be understood that whatever is shown and resultantly absorbed by the people can contribute towards a mass culture which may trigger a negative attitude towards women and feed the sexual gaze.

Naturally, State can always come up to stop any objectification which can denigrate women and objectify her. Through legislation, it may put stop on anything that may bring the human value of women to zero and make her an object to be sold or enjoyed. The state can also legislate on the central theme of obscenity by protecting children thus working upon the standards of the society to help parents who never wish their children to get hold of materials which may create a wrong impression on their young mind. However, it is a matter of concern that the enforcement of laws are ineffectual as children do get their hands on such products.

To fight any obscene and objectified image of women in media, what we have to understand is that the accepted standards, roles, and appearances which are imposed on women are tailored to men's preferences. In other words, men are creating media images of men and women as they wish to see in reality (Gevorgyan 2016). Betty Friedan, in The Feminine Mystique, criticises the image created of women as "the happy housewife heroine" (1974). Fragmental display of the female body and the fragmentation of women's body promote and reinforce the patriarchal standards through the male gaze. The displays in televisions and magazines revolve on the other side of women, that is, slender legs, prominent breasts or the thighs. It is difficult to perceive that body holistically and as possessing personality (Gevorgyan 2016). The vermilion and red bindi on the woman model of the Grihalakshmi magazine was just a tool to justify the objectified stereotypical women.

Our culture is saturated with heterosexuality. Karen Horney had indicated eighty-five years ago, 'the socially sanctioned right of all males to sexualise all females, regardless of age or status'(Baumeister and Vohs 2007: 631). The sexualisation occurs in many forms, ranging from sexualised evaluation to sexual violence (Castaneda 2013: 364). "The most subtle and deniable way sexualised evaluation is enacted—and arguably the most ubiquitous—is through gaze, or visual inspection of the body" (Freidrickson and Roberts 1997: 175).

Although the judgment of the Kerala High Court may seem to be very progressive and opposed to the conservative thought process. However, it cannot be denied that women have been reduced to their body parts. The present context has the potential for sexual objectification. Moreover, sexual objectification occurs whenever a woman's body, body parts, or sexual functions are separated out from her person, reduced to the status of mere instruments, or else regarded as if they were capable of representing her (*Gervais et al* 2011:5).

Women do confront a sexually objectifying gaze in various representations, which may not be called obscene or vulgar, but the representation she gets makes her vulnerable, and this is very vibrant in the visual media that depicts interpersonal and social encounters. It has to be understood that sexually objectifying treatment of women in the visual media is certainly not limited to pornography. Moreover, Asian women are portrayed as possessing more exotic and subservient sexuality whenever visual media focus on women's bodies, and it is quantified in terms of her relative facial prominence. The androcentric biases of these kinds are called "body-ism" and undoubtedly it is objectifying (Freidrickson and Roberts 1997:176).

The Kerala High Court brought the cultural aspect of India to justify the image on the cover of the magazine, but it cannot be forgotten that "cultural practice of objectifying female bodies originated to create, maintain, and express patriarchy" (Freidrickson and Roberts 1997:177). The high court took contemporary community standards and went ahead to call the image to be not obscene; nor even suggestive of it. However, the point of objectified gaze imposed on a female body through the prevalent customary patriarchal standards remains intact and is a cause of concern.

Conclusions:

The concept of obscenity is very relative and dependent on contemporary circumstances and has developed through judicial decisions both in the West and in India. Moreover, the Kerala High Court has given way for liberal interpretation, but the question of the male gaze objectifying and using women as a tool is something which remains unanswered, and this concern goes untouched in the judgment.

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16. *Regina v Hicklin* (1868): Court of the Queen's Bench, 29 April, LR 3 QB 360.
17. *Roth v United States* (1957): US Supreme Court, 24 June, 354 US 476.
18. *Samaresh Bose v Amal Mitra* (AIR 1986 SC 967).

Artificial Intelligence in Criminal Justice Administration: Judicial Efficiency and Privacy Concerns in India

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Abstract:
This study examines the comprehensive transformation of criminal procedural structures in response to the accelerating integration of digital technologies within global and domestic judicial systems, with a particular focus on Artificial Intelligence (AI). It highlights how advanced jurisdictions, such as the United States, have incorporated AI-driven risk assessment tools into court proceedings, while specialized legal technology firms have developed sophisticated predictive models capable of analyzing judicial data to forecast outcomes. Similarly, EU member states of the European Union have progressively adopted specialized automated systems to enhance case administration and support services, guided fundamentally by regulatory guardrails, such as the European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems. Against this global backdrop, this study scrutinizes recent legal developments and the operational applications of AI within the Indian criminal justice domain. It balances the evident structural benefits—including enhanced investigative speed, data objectivity, and backlog mitigation—against severe constitutional challenges, most notably the potential infringement of the fundamental Right to Privacy guaranteed under Article 21 of the Constitution of India. This study concludes by asserting the urgent necessity for empirical research, multi-stakeholder governance, and robust legislative safeguards prior to full-scale technological integration.

Keywords: Artificial Intelligence, Criminal Justice System, Right to Privacy, Digital Technologies, Predictive Policing, Data Protection.

Introduction:

The relationship between criminal procedural law and artificial intelligence (AI) has emerged as a critical focal point in contemporary legal and scientific scholarship. Although AI has yet to be comprehensively codified within standard legal definitions, its operational boundaries are understood through computational theories and complex engineering practices aimed at replicating human cognitive architecture. With its growing application in government, private sectors and industries, the AI is now ranging from products to services. The potential of AI to facilitate the complex tasks with minimal lacunas has pushed AI developers to stretch the boundaries. With such developments, several AI related problems arose.

For example, the AI bias, copyright issues in training data sets, Deepfakes and envision of privacy. Jurisprudential experts assert that these advanced analytical systems hold unprecedented capacity to supplement, and in highly structured scenarios, substitute human administrative action in solving complex procedural matrices. By minimizing human fatigue

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and cognitive biases, AI integration promises to enhance the efficiency, transparency, and objective neutrality of legal processes.

To systematically evaluate these capabilities, modern legal scholarship categorises computational intelligence into three fundamental typologies: strong, moderate, and weak AI. Strong AI represents a theoretical framework in which a system possesses universal cognitive capacities, self-awareness, and multi-domain reasoning, comparable to human intelligence. Moderate AI refers to advanced technical systems engineered to execute intricate, highly optimized cognitive tasks within tightly bounded domains. Weak AI refers to narrower algorithmic processing tools designed to optimize the throughput and data-handling efficiency of preexisting organizational systems without independent decision-making capabilities.[2]

The institutional adoption of these AI modalities has triggered an exponential surge in the global legal technology market. According to quantitative market forecasts, the global legal artificial intelligence sector is projected to experience profound structural expansion, scaling rapidly from an estimated baseline valuation of $2.82 billion in 2025 to $3.70 billion in 2026. Driven by the intensive deployment of natural language processing (NLP) and automated discovery solutions, this trajectory is anticipated to achieve steep compound acceleration, reaching a projected valuation of $11.06 billion by 2030.[3] This commercial and structural shift highlights a deeper paradigm shift: contemporary judicial organs are actively migrating away from legacy systems defined by systemic case backlogs and human administrative processing limits toward real-time, data-driven adjudication frameworks.

Theoretical Underpinnings of AI and Machine Learning:

To comprehend the functional integration of AI in public law enforcement and judicial apparatuses, it is necessary to examine its core scientific definitions. Rooted in mid-twentieth-century computer science and initially popularised by John McCarthy, artificial intelligence is fundamentally defined as the science and engineering of creating intelligent, autonomous machines capable of goal-directed computational processing. Conceptually, this involves constructing non-biological frameworks that can systematically observe environmental phenomena, parse multi-structured information streams, and perform higher-order analytical tasks that historically required human intelligence, all without manual intervention.[4]

A foundational feature that distinguishes AI from classic deterministic programming is its capacity to replicate the biological mechanisms underlying learning from experience. This is operationalized via Machine Learning (ML), a core subset of AI dedicated to developing statistical algorithms that dynamically optimize their own internal mathematical parameters

[2] Dmitry Grishin and Viktor Naumov, ‘Koncepciya zakona o robototekhnike’ (2015) VC.ru https://vc.ru/flood/20724-law-robots accessed 19 May 2026.
[3] The Business Research Company, *LegalTech Artificial Intelligence Global Market Report 2026* (2026) https://www.researchandmarkets.com/report/legal-ai-software accessed 3 June 2026.
[4] Stuart J Russell and Peter Norvig, Artificial Intelligence: A Modern Approach (3rd edn, Pearson Education 2009).

over time through continuous exposure to large datasets.[5] In the operational matrix of the criminal justice system, this capacity is most evident in pattern recognition. While human investigators naturally identify conceptual commonalities, discern individual identities, and interpret situational contexts through cumulative personal experiences, AI models achieve this through mathematical optimization across vast datasets. Modern self-learning models leverage deep convolutional neural networks to perform highly accurate facial recognition from chaotic visual data, identify pathology profiles in forensic medical telemetry, and generate predictive, data-driven risk assessments from extensive historical data repositories.

Empirical Applications of AI in Law Enforcement and Public Safety:

A diverse spectrum of artificial intelligence applications is currently being piloted and fully operationalised internationally to optimise public safety, forensic science, and municipal police work. Among these, facial recognition technology (FRT) is the most ubiquitous tool deployed across state intelligence and law enforcement platforms.[6] Historically, parsing hundreds of hours of raw surveillance footage or matching photographic databases required massive human work hours, a methodology that is severely limited by cognitive fatigue, human oversight, and psychological biases. AI systems mitigate these biological vulnerabilities by continuously scanning massive, multi-location digital visual streams with consistent mathematical consistency and microsecond latency.

Beyond real-time identification, automated intelligence systems are increasingly being integrated into critical civil infrastructure and criminal forensics which are as follows:

Intelligent Traffic and Incident Detection:

Advanced computer vision networks are deployed to dynamically analyse metropolitan camera feeds, automatically detecting traffic accidents, vehicular infractions, and localised public safety hazards under highly volatile environmental and luminescent conditions, significantly lowering emergency service response times.[7]

Digital Forensic Imaging and Autopsy Support:

In forensic pathology, AI algorithms are applied to post-mortem radiological data, utilizing advanced image analysis to assist[8] Pathologists in accurately identifying bone fractures, internal haemorrhages, and trajectories, thereby streamlining the determination of the precise manner and cause of death.

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[5] The Intelligence Advanced Research Projects Activity, 'Janus' (Office of the Director of National Intelligence) https://www.iarpa.gov/index.php/research-programs/janus accessed 4 June 2026.

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[8] Eric Knorr, 'How PayPal Beats the Bad Guys With Machine Learning' (*InfoWorld*, 13 April 2015) https://www.infoworld.com/article/2237179/how-paypal-reduces-fraud-with-machine-learning.html accessed 1 June 2026.

Advanced Biomolecular and DNA Analysis:

Modern criminal forensics increasingly relies on machine learning models to parse complex biomolecular data. By optimizing specialized genetic algorithms, these systems allow forensic scientists to resolve highly degraded or low-copy-number DNA evidence extracted from historical and compromised crime scenes.

Automated Financial Fraud Detection:

In domain of white-collar crime, financial institutions and state regulatory bodies utilize deep learning models trained on massive transaction ledgers to isolate highly complex, non-linear fraud signatures in real-time. These adaptive algorithms continuously update their baseline parameters, effectively identifying novel structuring techniques and multilayered money laundering patterns.

The intersection of computational processing and molecular biology has profoundly enhanced the accuracy of investigations. While advanced chemical reagents enable the extraction of biological material from trace deposits, the resulting genetic mixtures often contain overlapping data from multiple unrelated individuals, introducing significant ambiguity in manual interpretation. AI-driven deconvolution platforms resolve these mixed genetic profiles by performing thousands of probabilistic iterations to separate individual contributor profiles from complex multi-source samples. This computational sensitivity allows the reopening and objective analysis of decades-old cold cases, although it simultaneously introduces complex legal challenges regarding secondary DNA transfer and innocent cross-contamination.

Predictive analytics represents a major shift from reactive law enforcement to proactive risk mitigation. By cross-referencing expansive historical crime logs, localized socioeconomic indicators, and real-time environmental telemetry, AI platforms map geographic risk zones to optimize police resource allocation.[9] Parallel research at institutions such as the University of Pittsburgh focuses on transferring these computational models into the courtroom. These legal decision-support tools leverage natural language processing to read unstructured statutory databases, match linguistic patterns with judicial precedents, and summarize voluminous case files.[10] This significantly accelerates the workflow of prosecutors, public defenders and judges.[11]

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[9] Andrew Guthrie Ferguson, The Rise of Big Data Policing: Surveillance, Race, and the Future of Law Enforcement (New York University Press 2017).

[10] The Business Research Company, LegalTech Artificial Intelligence Market Report 2026: Global Outlook – By Component (Software, Services), By Application (Legal Analytics, Legal Research, Electronic Discovery (eDiscovery), Contract Management, E-Billing, Prediction Technology, Other Applications), By End-User (Law Firms, Corporations, Legal Service Providers) – Market Size, Trends, Strategies, and Forecast to 2035 (The Business Research Company 2026).

[11] Danielle Leah Kehl, Priscilla Guo and Samuel Ari Kessler, *Algorithms in the Criminal Justice System: Assessing the Use of Risk Assessments in Sentencing* (Responsive Communities Initiative, Berkman Klein Center for Internet & Society, Harvard Law School 2017).

Privacy and Constitutional Safeguards: Key Judicial Pronouncements:

In India, the deployment of AI in criminal administration must be tested on the anvil of Part III of the Constitution. Several landmark Supreme Court judgments provide the foundation for resisting arbitrary algorithmic surveillance:

K.S. Puttaswamy v. Union of India: The Supreme Court established the right to privacy as a fundamental right under Article 21 of the Constitution. Any state intrusion, including AI surveillance and data harvesting, must satisfy the triple test of legality, legitimate state aim, and proportionality. The unchecked scraping of data for AI policing models currently fails the proportionality prong because there is often no statutory basis to limit its scope.[12]

Selvi v. State of Karnataka[13]: While originally addressing narcoanalysis and brain mapping, *Selvi* is crucial for AI jurisprudence. The Court held that involuntary cognitive intrusion violates Article 20(3) (right against self-incrimination) and Article 21 (mental privacy) of the Constitution. As AI evolves to analyse micro-expressions, biometric stress indicators, or predictive behavioural profiling during interrogations, *Selvi* provides a constitutional shield protecting cognitive liberty against algorithmic extraction.

Shreya Singhal v. Union of India:[14]Striking down Section 66A of the IT Act, the Court ruled against vague and arbitrary laws that chill free speech, stating: In the AI context, this judgment warns against automated algorithmic moderation and surveillance systems that flag or criminalise digital dissent based on opaque, overbroad parameters.

Anuradha Bhasin v. Union of India:[15] Emphasising the doctrines of proportionality and transparency, the Court held that state actions restricting fundamental rights must be supported by publicly accessible orders. This mandates that the algorithms and datasets used by law enforcement to restrict liberties (e.g., predictive policing lists) cannot be kept entirely secret from the public.

The Indian Legal Framework: Facial Recognition and Predictive AI:

Law enforcement agencies across India have rapidly adopted AI technologies without comprehensive statutory regulations, leading to severe privacy and targeting concerns.

- **Delhi Police Deployments:** The Delhi Police heavily utilized Automated Facial Recognition Systems (AFRS) during the 2020 Delhi riots and subsequent protests. By running video footage against criminal databases and voter registries, the state created a chilling effect on the right to protest. The lack of a legal framework detailing data retention or accuracy rates (which are notoriously flawed for darker skin tones) renders mass surveillance constitutionally suspect.[16]

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[12] *Justice K S Puttaswamy (Retd) and another v Union of India and others* (2017) 10 SCC 1 (SC)
[13] *Selvi and others v State of Karnataka* (2010) 7 SCC 263 (SC)
[14] *Shreya Singhal v Union of India* (2015) 5 SCC 1 (SC).
[15] *Anuradha Bhasin v Union of India* (2020) 3 SCC 637 (SC).
[16] Russell SJ, Norvig P, Artificial Intelligence: A Modern Approach. (Upper Saddle River, New Jersey, 2009).

- **Hyderabad Police Surveillance:** Hyderabad is one of the most surveilled cities globally. Through its Command and Control Center, the police integrated real-time CCTV feeds with facial recognition. Practices like "Operation Chabutra"—where police cordon off areas, stop citizens, photograph them, and run their faces through criminal databases—amount to a presumption of guilt and violate the fundamental right to free movement.[17]

- **DigiYatra Concerns:** Initially introduced for seamless airport check-ins, the DigiYatra facial recognition system raises massive concerns regarding "function creep." Without strict legislative firewalls, biometric data collected for civilian travel infrastructure can be easily integrated into state law-enforcement grids, expanding the surveillance apparatus without parliamentary oversight.[18]

- **Predictive AI Concerns:** Systems such as the Crime and Criminal Tracking Network and Systems (CCTNS) are increasingly being paired with predictive policing algorithms. These systems map crime hotspots and generate lists of suspects. Because historical police data in India are heavily skewed against Denotified Tribes (DNTs) and minority communities, predictive AI risks creating a feedback loop: police patrol these communities more heavily, leading to higher arrest rates, which in turn "teaches" the algorithm that these communities are inherently criminal.[19]

Weaknesses in the DPDP Act Regarding AI in the Criminal Procedure System:
The enactment of the Digital Personal Data Protection (DPDP) Act of 2023 was expected to curb arbitrary data practices. However, its application in AI governance is still questionable. Under Section 17 of the DPDP Act, sweeping exemptions are granted to the state. Section 17(1)(c) exempts data processing necessary for the "prevention, detection, investigation or prosecution of any offence." Furthermore, Section 17(2)(a) allows the Central Government to exempt any instrumentality of the State from the Act’s obligations in the interest of India’s sovereignty, security, or public order.

Critical Weaknesses:

1. **Consent Exemption:** Law enforcement agencies can deploy AI to scrape, analyse, and process citizens ’personal data without their consent or knowledge.
2. **No Right to Erasure:** Citizens wrongfully flagged by predictive policing or FRT have no right to demand the correction or erasure of their data from police databases, trapping them in algorithmic suspicion permanently.

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17 Matt Mahmoudi and others, *Ban the Scan: Hyderabad* (Amnesty International 2021) https://banthescan.amnesty.org/hyderabad/ accessed 5 June 2026.
18 DigiYatra Foundation, *DigiYatra Policy on Facial Recognition Technology* (2023) https://www.digiyatra.com accessed 5 June 2026.
19 National Crime Records Bureau, Crime and Criminal Tracking Network and Systems (CCTNS) https://ncrb.gov.inaccessed 5 June 2026.

3. **Lack of Automated Decision-Making Safeguards:** Unlike the EU's GDPR, the DPDP Act does not contain provisions protecting citizens from being subjected to decisions based *solely* on automated processing or algorithmic profiling.

Conclusion & Recommendations:

A deep analytical critique of the deployment of AI in judicial frameworks reveals several systemic limitations. Foremost among these is the fundamental absence of emotional and ethical reasoning in artificial neural networks (ANNs). While an optimised algorithm excels at mathematical deduction and pattern discovery, it lacks the capacity for equity, systemic empathy, and moral contextualization. Consequently, AI cannot replace human judges or legal practitioners without stripping the law of vital humanitarian discretion.

Furthermore, the operational efficacy of legal technology remains heavily dependent on the quality and integrity of training datasets. To prevent automated systems from codifying historical societal biases or generating flawed outputs, judicial databases must be continuously updated and verified. This requires comprehensive technical training for legal practitioners, prosecutors, and judges to ensure that they can effectively interpret and interrogate algorithmic conclusions rather than blindly accept them.

Recommendations

Generalised guidelines are insufficient for ethically integrating AI into India's criminal justice system. The following specific interventions are required.

1. **Need for Explainable AI:** To resolve the tension between judicial efficiency and due process, the Indian criminal justice system must adopt Explainable AI (XAI). XAI refers to artificial intelligence systems designed to enable humans to easily understand their decision-making logic.[20] A cornerstone of Indian administrative and criminal law is the "duty to give reasoned orders." If a judge denies bail based on a risk-assessment algorithm or if the police arrest an individual based on an FRT match, they must be able to explain *why*. However, black-box machine learning models cannot provide this reasoning. XAI bridges this gap by outputting human-readable justifications for its predictions, allowing defense counsels to cross-examine the algorithmic logic and ensuring that judges retain sovereign discretionary power rather than blindly delegating it to a machine.
2. **Mandatory Algorithmic Impact Assessments (AIA):** Before deploying any AI tool (such as the Delhi or Hyderabad AFRS), the state must publish an AIA detailing the tool's false-positive rates, demographic accuracy, and data sources.
3. **Amend the DPDP Act:** The blanket exemptions under Section 17 must be amended. State surveillance and law enforcement processing should be subject to a strict test of necessity and proportionality, and a specific provision regulating and limiting automated profiling should be introduced.
4. **Prohibit Black-Box AI in Sentencing and Bail:** Taking a cue from *State v. Loomis*, India must legally mandate that no proprietary black-box AI can be used as the primary basis for

[20] Denis Grishin and Viktor Naumov, 'Kontseptsiya zakona o robototekhnike' (2015) https://vc.ru/flood/20724-law-robots accessed 4 May 2026.

judicial decisions regarding bail, sentencing, or parole. Only open-source, Explainable AI (XAI) models should be permitted in courts.

5. **Statutory Regulation of FRT:** The Parliament must enact a standalone law governing biometric surveillance. Random street-level facial recognition sweeps without reasonable suspicion of a specific crime should be outlawed.
6. **Data Firewalls for Civilian Tech:** Legal firewalls must be erected to prevent the interlinking of civilian utility databases (such as DigiYatra or Aadhaar) with the CCTNS and police predictive models to prevent mass, warrantless profiling.

Sexual Harassment Law and the Informal Sector: A Critical Analysis of Compliance Issues and Structural Challenges Under the POSH Act, 2013

Swati Joshi[1]

Abstract:
The Prevention, Protection and Redressal of Sexual Harassment at Workplace Act, 2013, commonly known as the POSH Act, was a landmark step in protecting working women in India. But years after its enactment, a large section of women workers still remains outside its protective umbrella. These are the women of the unorganised workforce. They work as domestic helpers, street vendors, agricultural labourers, construction workers, and daily wage earners. They are everywhere, yet the law barely reaches them. The unorganised sector employs nearly 90% of India's total workforce. Still, compliance with the POSH Act in this sector is almost negligible. There is no proper employer-employee relationship in most cases. Internal Complaints Committees are rarely formed. Awareness about legal rights is very low. Women in this sector often fear job loss more than harassment itself. This paper tries to understand why POSH Act compliance fails in the unorganised sector. It looks at the legal gaps, practical challenges, and social barriers that working women face every day. It also suggests some simple but meaningful reforms to make the law more inclusive and effective for every working woman in India.

Keywords: *POSH Act, Unorganised Workforce, Sexual Harassment, Workplace Compliance, Internal Complaints Committee, Local Complaints Committee, Women Workers' Rights*.

Introduction:

Sexual harassment at the workplace is not a new problem in India. Women have faced it for decades. But for a long time, there was no specific law to deal with it. The Supreme Court of India changed this in 1997. In the landmark case of *Vishaka v. State of Rajasthan,*[2] the Court laid down binding guidelines to prevent sexual harassment at workplace. These guidelines were the first of their kind in India. They filled a critical legislative void.

After sixteen years, the Parliament finally enacted a dedicated legislation. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 popularly called the POSH Act came into force on 9th December 2013.[3] It was a significant moment for women's rights in India. The law created a formal mechanism for complaint, inquiry, and redressal. It made employers legally responsible for providing a safe working environment.

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[2] *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.
[3] The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14 of 2013, Acts of Parliament, 2013 (India), came into force on 9 December 2013.

The POSH Act defines *workplace* broadly. It covers offices, factories, hospitals, educational institutions, and even non-traditional workspaces.[4] It mandates the constitution of an Internal Complaints Committee (ICC) in every organization employing ten or more workers.[5] For areas where no such organization exists, it provides for a Local Complaints Committee (LCC) at the district level.[6]

On paper, this framework looks inclusive. In reality, it is not because India has a massive unorganised workforce. According to the Economic Survey 2022-23, nearly 90% of India's total workforce is engaged in the informal or unorganised sector.[7] These workers include domestic helpers, construction labourers, agricultural workers, street vendors, home-based workers, and daily wage earners. They work without written contracts. They have no fixed employer. They move from one job to another for survival.

The POSH Act was designed primarily with the organised sector in mind. Its compliance mechanism depends heavily on a formal employer-employee relationship. This very assumption breaks down in the unorganised sector.[8] Most women in this sector do not even know that such a law exists. Those who know it, do not know how to use it. And those who try to use it, often face social pressure, fear of job loss, and institutional indifference. The National Crime Records Bureau (NCRB) Report 2022 recorded 422 cases of sexual harassment at the workplace across India.[9] But experts widely agree that this number is a gross underrepresentation. In most cases, especially from the unorganised sector, go unreported. The gap between law and reality is enormous.

This paper critically examines this gap. It analyses the compliance failures of the POSH Act in the unorganised sector. It studies the structural, social, and legal challenges that prevent informal women workers from accessing justice. It also draws on international legal standards and comparative jurisprudence to propose meaningful reforms. The objective of this paper is not merely to criticize the law. It is to understand why a good law fails certain people and what can be done to fix that.

The Unorganised Workforce in India:

India's economy runs largely on informal labour. Yet this vast workforce remains one of the most legally under protected groups in the country. To understand the compliance failures of the POSH Act, it is first necessary to understand who these workers are, how they live, and why the law struggles to reach them.

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[4] Ibid., s. 2(o).
[5] Ibid., s. 4(1).
[6] Ibid., s. 6(1).
[7] Ministry of Finance, Government of India, *Economic Survey 2022-23* (Government of India Press, New Delhi, 2023) 187.
[8] Naina Kapur, 'Sexual Harassment Law in India: Obstacles to Implementation' (2014) 1 *Indian Journal of Gender Studies* 45, 52.
[9] National Crime Records Bureau, *Crime in India 2022* (Ministry of Home Affairs, Government of India, New Delhi, 2023) 234.

Defining the Unorganised Workforce

The Unorganised Workers' Social Security Act, 2008 defines an unorganized worker as a home-based worker, self-employed worker, or a daily wage worker who works in the unorganized sector.[10] The unorganised sector, in turn, refers to enterprises employing fewer than ten workers and operating without any formal registration or regulatory oversight.[11]

The National Commission for Enterprises in the Unorganised Sector (NCEUS) offered a broader understanding. It described unorganised workers as those who do not have employment security, work security, or social security.[12] This threefold absence of security defines the lived reality of millions of Indian workers.

It is important to note that *informal employment* and *the unorganised sector* are related but distinct concepts. A worker can be informally employed even within a formally registered organisation for example, a contract sweeper in a government office.[13] This distinction matters for POSH Act compliance, as we shall see in later sections.

Scale and Composition:

The numbers tell a striking story. According to the Periodic Labour Force Survey (PLFS) 2022-23 published by the Ministry of Statistics and Programme Implementation, approximately 88.2% of India's total workforce is engaged in informal employment.[14] This translates to nearly 500 million workers.

Women constitute a significant portion of this workforce. The same PLFS report indicates that about 94% of all working women in India are employed in the informal sector.[15] This means that the overwhelming majority of working women in India fall outside the formal protective framework of labour laws, including the POSH Act.

The unorganised workforce is not a homogeneous group. It includes a wide variety of occupations and work arrangements. Some of the most significant categories are as follows:

- **Domestic Workers:** India has an estimated 4.75 million domestic workers, of whom nearly 75% are women.[16] They work inside private homes as cooks, cleaners, caregivers, and child minders. Their workplace is someone else's private space. This makes accountability and oversight extremely difficult.

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[10] The Unorganised Workers' Social Security Act, 2008, No. 33 of 2008, Acts of Parliament, 2008 (India), s. 2(m).
[11] Ibid., s. 2(l).
[12] National Commission for Enterprises in the Unorganised Sector (NCEUS), *Report on Conditions of Work and Promotion of Livelihoods in the Unorganised Sector* (Government of India, New Delhi, 2007) 3.
[13] Ravi Srivastava, 'Formal-Informal Dynamics in the Indian Labour Market' (2019) 54(21) *Economic and Political Weekly* 23, 26.
[14] Ministry of Statistics and Programme Implementation, Government of India, *Periodic Labour Force Survey Annual Report 2022-23* (Government of India Press, New Delhi, 2023) 42.
[15] Ibid., 67.
[16] International Labour Organization, *Domestic Workers in India: A Policy Brief* (ILO, Geneva, 2021) 4.

- **Agricultural Workers:** Agriculture employs the largest number of informal women workers in India. The PLFS 2022-23 shows that nearly 57.3% of all rural women workers are engaged in agricultural activities as landless labourers or marginal farmers.[17] They work in open fields, often under male supervisors or landlords, with no institutional mechanism to report harassment.
- **Construction Workers:** The construction sector employs millions of women as daily wage labourers. They carry bricks, mix cement, and do heavy physical work on open sites. According to the Ministry of Labour and Employment Annual Report 2022-23, women constitute approximately 30% of the registered construction workers under the Building and Other Construction Workers Act, 1996.[18] However, registration itself remains incomplete and unreliable.
- **Street Vendors and Home-Based Workers:** Women working as street vendors, bidi rollers, incense stick makers, and garment stitchers at home represent another invisible category. They often work under piece-rate systems controlled by contractors or middlemen. There is no fixed employer and no defined workplace.[19]
- **Migrant Women Workers:** Internal migration adds another layer of vulnerability. Women who migrate from rural to urban areas for domestic work or factory jobs are particularly exposed to harassment. They are new to the city, socially isolated, and economically desperate. The Ministry of Housing and Urban Affairs' 2020-21 Internal Migration in India Report estimated that nearly 40 million women are internal migrants engaged in informal work.[20]

Why Unorganised Women Workers are Especially Vulnerable:

Vulnerability in the unorganised sector is not accidental. It is structural. Several interconnected factors make informal women workers uniquely exposed to sexual harassment and uniquely unable to seek redress.

- **Economic Dependence:** Most unorganised women workers live in conditions of extreme economic precarity. Losing a job means losing food, shelter, and survival. This economic fear silences complaints before they are even made.[21] A domestic worker who complains against her employer risks immediate dismissal with no legal safety net.
- **Lack of Awareness:** A study conducted by the International Labour Organization (ILO) in 2021 across five Indian states found that over 83% of women informal workers had never

[17] Ministry of Statistics and Programme Implementation (n 13) 78.
[18] Ministry of Labour and Employment, Government of India, *Annual Report 2022-23* (Government of India Press, New Delhi, 2023) 112.
[19] Jeemol Unni and Uma Rani, 'Home-Based Workers in India: Exporters of Services' (2008) 143(3) *International Labour Review* 359, 362.
[20] Ministry of Housing and Urban Affairs, Government of India, *Report on Internal Migration in India* 2020-21 (Government of India Press, New Delhi, 2021) 38.
[21] Padma Govindan and Anuradha Bharadwaj, 'Fear as a Barrier: Why Informal Workers Do Not Complain' (2016) 3 *Journal of Workplace Rights* 1, 7.

heard of the POSH Act.[22] Legal awareness campaigns have largely failed to penetrate rural and peri-urban areas where most of these workers live.

- **Absence of Trade Unions:** Organized sector workers often have trade unions to back them in disputes. Unorganized workers, by contrast, have weak or no union representation. Collective bargaining and institutional support are largely absent.[23]
- **Social and Caste Factors:** A significant proportion of unorganized women workers belong to Scheduled Castes, Scheduled Tribes, and Other Backward Classes. Intersecting discrimination based on gender and caste makes their situation doubly precarious. Complaints against upper-caste employers or supervisors carry serious social risks in rural settings.[24]
- **Digital and Literacy Barriers:** Filing a complaint under the POSH Act requires knowledge of procedures, ability to write, and sometimes access to digital platforms. Many unorganised women workers are either illiterate or semi-literate. This creates a practical barrier to accessing formal redressal mechanisms.[25]

The Legal Recognition Gap:

Despite their numbers and vulnerability, unorganised workers have received very limited legislative attention in the context of sexual harassment. The POSH Act acknowledges the existence of the unorganised sector through the LCC mechanism. But as the Ministry of Women and Child Development's Five-Year Review of POSH Act (2018) noted, LCCs are either not constituted in most districts or are non-functional where they exist.[26]

This recognition gap between the legal text and ground reality is the central problem this paper seeks to address. The unorganized workforce is not a marginal group. It is the backbone of India's economy. A law that fails to protect 90% of the workforce is a law that has failed its primary purpose.

POSH Act: Applicability to the Unorganised Sector:

Understanding why the POSH Act fails the unorganised workforce requires a careful reading of the law itself. The Act contains several progressive provisions. But it also carries structural assumptions that simply do not match the reality of informal work. This section examines the legal framework of the Act and identifies the specific points where its applicability breaks down.

Legislative Background and Constitutional Basis:

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[22] International Labour Organization, *Understanding Sexual Harassment in the Informal Economy: A Five-State Study* (ILO, Geneva, 2021) 19.
[23] Uma Kothari, 'Unorganised Labour and the Limits of Legal Protection in India' (2015) 28 *Journal of South Asian Development* 101, 108.
[24] Sharmila Rege, 'Caste and Gender Intersections in Indian Labour Markets' (2013) 48(18) *Economic and Political Weekly* 35, 39.
[25] Usha Ramanathan, 'Literacy, Law and the Labouring Poor' (2012) 47(42) *Economic and Political Weekly* 12, 15.
[26] Ministry of Women and Child Development, Government of India, *Five Year Review of the Sexual Harassment of Women at Workplace Act, 2013* (Government of India Press, New Delhi, 2018) 22.

The POSH Act draws its constitutional legitimacy from multiple provisions. Articles 14 and 15 of the Constitution guarantee equality and prohibit discrimination on the basis of sex.[27] Article 19(1)(g) protects the right to practice any profession or carry on any occupation.[28] The Supreme Court in *Vishaka* explicitly held that sexual harassment at workplace violates these fundamental rights.[29] It also recognized India's obligations under the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), 1979, ratified by India in 1993, as a basis for judicial intervention.[30]

The POSH Act was further guided by the Beijing Platform for Action, 1995, which called upon states to enact and enforce laws against gender-based violence in all settings, including the workplace.[31] These international commitments gave the Act a strong normative foundation. However, translating international norms into domestic enforcement especially for informal workers proved far more difficult.

Key Definitions and Their Limitations:

The Act defines several crucial terms. Each definition carries hidden limitations when applied to the unorganised sector.

- **Definition of *Aggrieved Woman*:** Section 2(a) defines an aggrieved woman as any woman of any age, whether employed or not, who alleges to have been subjected to sexual harassment in a workplace.[32] This definition is notably broad. It covers even women who are not employees in the traditional sense. This was meant to include informal workers. However, in practice, the procedural requirements of the Act, filing written complaints, appearing before committees, and producing evidence, remain heavily oriented towards literate, formally employed complainants.
- **Definition of *Employer:*** Section 2(g) defines an employer as the head of the department in government offices, or any person responsible for management, supervision, and control in an enterprise.[33] This definition presupposes an identifiable, fixed employer. In the unorganised sector, this assumption fails completely. A domestic worker may work for three different households in a single day. A construction labourer may be hired through a contractor who himself works under a sub-contractor. The chain of accountability dissolves before it can be fixed.[34]
- **Definition of *Workplace*:** Section 2(o) provides an expansive definition of workplace. It includes offices, factories, shops, educational institutions, hospitals, sports institutes, places

[27] Constitution of India, arts 14 and 15.
[28] Constitution of India, art 19(1)(g).
[29] *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011, para 16
[30] Convention on the Elimination of All Forms of Discrimination Against Women, adopted 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); India ratified CEDAW on 9 July 1993.
[31] Beijing Platform for Action, *Fourth World Conference on Women*, UN Doc A/CONF.177/20 (1995), para 124(b).
[32] The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (n 2), s. 2(a).
[33] Ibid., s. 2(g).
[34] Kamala Sankaran, 'Informal Economy, Own-Account Workers and the Law' (2011) 35 *Cambridge Journal of Economics* 687, 694.

visited during employment, and even transportation used for commuting.[35] This broad definition was judicially appreciated in *Saurabh Kumar Mallick v. Comptroller and Auditor General of India*,[36] where the Delhi High Court held that the workplace cannot be given a restrictive meaning. However, a domestic worker's workplace is a private home. A street vendor's workplace is a public footpath. These spaces remain practically outside institutional oversight despite the broad statutory language.

- **Definition of *Sexual Harassment*:** Section 2(n) read with Section 3 defines sexual harassment to include unwelcome physical contact, demand or request for sexual favours, sexually coloured remarks, showing pornography, and any other unwelcome physical, verbal, or non-verbal conduct of a sexual nature.[37] This definition is comprehensive and gender-neutral in scope. It aligns well with international standards. The problem is not with the definition but with the enforcement mechanism that follows it.

The ICC Mechanism and Its Structural Exclusion:

The cornerstone of the POSH Act's redressal mechanism is the Internal Complaints Committee (ICC). Section 4 mandates that every employer with ten or more employees must constitute an ICC at each office or branch.[38] The ICC must have a Presiding Officer who is a senior woman employee, at least two members from amongst employees, and one external member from an NGO or legal background.[39]

This mechanism is entirely dependent on a formal, registered workplace with an identifiable employer and a minimum workforce threshold. In the unorganised sector, none of these conditions is typically met. A household employing a domestic worker has no ICC. A brick kiln with forty daily wage labourers may still avoid ICC constitution by claiming workers are hired through contractors, not directly.[40]The Supreme Court in *Medha Kotwal Lele v. Union of India* issued directions in 2012 even before the Act was passed for strict implementation of *Vishaka* guidelines across all sectors.[41] Yet compliance remained selective and confined largely to the organized sector.

The LCC Mechanism: A Paper Tiger:

Recognising the limitations of the ICC model, the POSH Act introduced the Local Complaints Committee (LCC) under Section 6. The LCC is constituted at the district level by the District

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[35] The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (n 2), s. 2(o).
[36] *Saurabh Kumar Mallick v. Comptroller and Auditor General of India*, 2008 (3) SLR 104 (Delhi HC).
[37] The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (n 2), ss. 2(n) and 3.
[38] Ibid., s. 4(1).
[39] Ibid., s. 4(2).
[40] Shyamala Pappu, 'Sexual Harassment Law and the Informal Sector: Structural Barriers' (2015) 50(17) *Economic and Political Weekly* 72, 76.
[41] *Medha Kotwal Lele v. Union of India*, (2013) 1 SCC 297.

Officer. It is meant to receive complaints from workers in the unorganised sector, small establishments, and cases where the complaint is against the employer himself.[42]

The LCC was a thoughtful legislative innovation. But its implementation has been deeply disappointing. The Ministry of Women and Child Development's Status Report 2023 revealed that, as of March 2023, functional LCCs existed in only 284 of India's 748 districts.[43] Many constituted LCCs had not received a single complaint in years not because harassment did not occur, but because women did not know the LCC existed or how to approach it.

Several structural weaknesses plague the LCC. First, there is no mandatory timeline for its constitution after a new district is formed. Second, LCC members are often not trained in trauma-informed inquiry. Third, there is no dedicated budget allocation for LCC functioning at the district level in most states.[44] Fourth, the LCC has no *suo motu* power to investigate. It can only act on a written complaint a significant barrier for illiterate workers.

Employer Obligations and the Compliance Gap:

Beyond committee formation, the POSH Act imposes several obligations on employers. Section 19 requires employers to provide a safe working environment, display penal consequences of sexual harassment, organise awareness workshops, treat sexual harassment as misconduct under service rules, and assist complainants in filing complaints with the police where necessary.[45]

These obligations are meaningful on paper. But they presuppose a level of institutional infrastructure that simply does not exist in the unorganised sector. A contractor hiring twenty migrant women for a road construction project has neither the capacity nor the incentive to comply with Section 19. Penalty provisions under Section 26 a fine of up to fifty thousand rupees for non-compliance are rarely enforced against informal employers.[46]

The Comptroller and Auditor General (CAG) Performance Audit Report on Implementation of POSH Act, 2022 found that state governments had conducted negligible monitoring of POSH compliance in the unorganised sector. In several states, no inspection of unorganised workplaces has been carried out even once since the Act came into force.[47]

Judicial Interpretation: Expanding but Insufficient

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[42] The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (n 2), s. 6(1).

[43] Ministry of Women and Child Development, Government of India, *Status Report on Implementation of POSH Act 2013* (Government of India Press, New Delhi, 2023) 34.

[44] Nandita Gandhi and Nandita Shah, 'Local Complaints Committees: Promise and Performance' (2019) 6 *Indian Journal of Labour Economics* 211, 218.

[45] The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (n 2), s. 19.

[46] Ibid., s. 26.

[47] Comptroller and Auditor General of India, *Performance Audit Report on Implementation of POSH Act 2013*, Report No. 14 of 2022 (Government of India Press, New Delhi, 2022) 56.

Indian courts have progressively interpreted the POSH Act to expand its reach. In *Ruchika Singh Chhabra v. Air France India*,[48] the Delhi High Court held that procedural fairness in ICC proceedings is non-negotiable. In *S. Sushma v. Commissioner of Police*,[49] the Madras High Court directed state governments to ensure that LCCs are functional and accessible to all categories of workers. In *Aureliano Fernandes v. State of Goa*,[50] the Supreme Court in 2023 expressed serious concern about the non-implementation of POSH Act provisions across sectors and issued comprehensive directions to all states and Union Territories to audit their compliance status.

These judicial interventions reflect a growing awareness of the law's implementation failures. But courts can only respond to cases that come before them. The women of the unorganized sector rarely reach courts. Their grievances remain buried under the weight of economic necessity, social stigma, and institutional invisibility.

The Central Gap: Formal Law in an Informal World:

The POSH Act was built on a formal legal architecture. It assumed a world of registered workplaces, identifiable employers, literate employees, and functioning state machinery. The unorganized sector operates outside all these assumptions. This is not a failure of legislative intent. It is a failure of legislative imagination an inability to visualize the law from the perspective of the most vulnerable woman worker. Closing this gap requires more than amendments. It requires a fundamental rethinking of how labour and anti-harassment law is designed and delivered in a country where informality is not the exception but the norm.

Global Standards and Cross-Jurisdictional Approaches:

India is not alone in struggling with workplace sexual harassment. Countries across the world have grappled with this problem. Some have found innovative solutions. International legal instruments have also set minimum standards that all member states are expected to meet. This section examines global legal frameworks, compares them with the Indian model, and draws lessons that can strengthen POSH Act compliance for informal workers.

International Legal Obligations Binding on India:

Before examining domestic laws of other countries, it is important to understand what international law requires of India. Several binding and persuasive instruments are directly relevant.

CEDAW and General Recommendation No. 19:

The *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), 1979 is the most important international instrument on gender equality. India ratified it in

[48] *Ruchika Singh Chhabra v. Air France India*, 2018 SCC OnLine Del 6370.
[49] *Sushma v. Commissioner of Police*, 2021 SCC OnLine Mad 2614.
[50] *Aureliano Fernandes v. State of Goa*, (2023) 6 SCC 1.

1993.[51] Article 11 of CEDAW specifically addresses discrimination in employment. It requires state parties to take all appropriate measures to prevent dismissal on grounds of pregnancy, ensure safe working conditions, and prohibit gender-based discrimination in the workplace.[52]

The CEDAW Committee's General Recommendation No. 19 (1992) clarified that gender-based violence, including sexual harassment at the workplace, constitutes discrimination under Article 1 of CEDAW.[53] It called upon states to enact effective legal measures, provide protective mechanisms for all working women, and ensure that informal and domestic workers are not excluded from protection.[54] India's POSH Act partially responds to this recommendation. But its failure to effectively cover informal workers keeps India in breach of the spirit of General Recommendation No. 19.

The CEDAW Committee's General Recommendation No. 35 (2017) updated and strengthened this position. It explicitly recognized that women in the informal economy face heightened risks of gender-based violence and called for targeted state intervention.[55] India has not yet taken specific legislative steps in response to this updated recommendation.

ILO Convention No. 190 and Recommendation No. 206:

The most significant recent development in international labour law is the adoption of ILO Convention No. 190 on Violence and Harassment, 2019 the first international labour standard specifically addressing violence and harassment in the world of work.[56] It defines violence and harassment broadly to include physical, psychological, and sexual harm. Crucially, it applies to all workers regardless of their contractual status including those in the informal economy.[57]

Article 3 of Convention No. 190 explicitly extends protection to workers in the informal economy, volunteers, job seekers, and persons exercising authority of an employer.[58] This is a direct response to the gap that India's POSH Act leaves open.

India has not yet ratified ILO Convention No. 190. As of March 2026, only forty-six countries have ratified it.[59] India's ratification would create a binding legal obligation to extend anti-harassment protection to all informal workers. The ILO Recommendation No. 206 accompanying the Convention provides detailed guidance on implementation, including

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[51] Convention on the Elimination of All Forms of Discrimination Against Women (n 29).
[52] Ibid., art 11.
[53] CEDAW Committee, *General Recommendation No. 19: Violence Against Women*, UN Doc A/47/38 (1992), para 18
[54] Ibid., para 24(t).
[55] CEDAW Committee, *General Recommendation No. 35 on Gender-Based Violence Against Women*, UN Doc CEDAW/C/GC/35 (2017), para 30.
[56] ILO Convention Concerning the Elimination of Violence and Harassment in the World of Work (Convention No. 190), adopted 21 June 2019, ILC 108th Session (entered into force 25 June 2021).
[57] Ibid., art 2(1).
[58] Ibid., art 3.
[59] International Labour Organization, Ratification of C190 https://www.ilo.org/dyn/normlex accessed 15 March 2026.

specific measures for workers in the informal economy such as mobile complaint mechanisms, multilingual awareness campaigns, and community-based support structures.[60]

UN Sustainable Development Goals:

SDG 5 calls for gender equality and elimination of all forms of violence against women and girls.[61] SDG 8 calls for decent work for all, including informal workers.[62] India's Voluntary National Review submitted to the UN in 2023 acknowledged gaps in POSH Act implementation but did not present a concrete roadmap for informal sector inclusion.[63] Bridging this gap is not merely a domestic legal issue. It is an international development commitment.

United States of America:

The United States has one of the oldest and most developed legal frameworks against workplace sexual harassment. Title VII of the Civil Rights Act, 1964 prohibits employment discrimination on the basis of sex, which has been interpreted to include sexual harassment.[64] The Equal Employment Opportunity Commission (EEOC) is the federal body responsible for enforcement.

The landmark Supreme Court decisions in *Meritor Savings Bank v. Vinson*[65] and *Oncale v. Sundowner Offshore Services Inc.*[66] established that both hostile work environment harassment and same-sex harassment are actionable under Title VII. These cases broadened the understanding of workplace harassment significantly.

However, Title VII originally applied only to employers with fifteen or more employees. This threshold excluded a large number of small businesses and informal employers a limitation similar to India's ten-employee threshold for ICC constitution. Several US states responded by enacting their own laws with lower thresholds. New York State, for example, extended harassment protections to all employers regardless of size through the New York State Human Rights Law Amendment, 2019.[67] This state-level innovation offers a direct lesson for India where state governments can similarly legislate to cover employers below the POSH Act threshold.

The *MeToo movement* in 2017 triggered legislative responses across the US. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, 2022 banned mandatory arbitration

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[60] ILO Recommendation No. 206 on *Violence and Harassment*, adopted 21 June 2019, ILC 108th Session, paras 7-9.
[61] United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development*, UN Doc A/RES/70/1 (2015), Goal 5.
[62] Ibid., Goal 8.
[63] Government of India, *Voluntary National Review Report 2023* (NITI Aayog, New Delhi, 2023) 78.
[64] Civil Rights Act 1964 (USA), Title VII, 42 USC § 2000e-2.
[65] *Meritor Savings Bank v. Vinson*, 477 US 57 (1986).
[66] *Oncale v. Sundowner Offshore Services Inc.*, 523 US 75 (1998).
[67] New York State Human Rights Law, *NY Exec Law* § 296-d (as amended 2019).

clauses in employment contracts for harassment claims.[68] This was significant because such clauses had previously prevented many workers particularly those in informal arrangements from accessing courts.

United Kingdom:

The United Kingdom addresses workplace sexual harassment through the Equality Act, 2010. Section 26 of the Act defines harassment as unwanted conduct related to a protected characteristic including sex that has the purpose or effect of violating dignity or creating an intimidating, hostile, degrading, or offensive environment.[69]

A notable feature of UK law is the concept of third-party harassment. Employers can be held liable if a worker is harassed by a client, customer, or contractor not just a fellow employee.[70] This is particularly relevant for informal workers who often interact with multiple parties and have no single identifiable employer. India's POSH Act does not have an equivalent provision that effectively addresses third-party harassment in informal settings.

The *Worker Protection (Amendment of Equality Act 2010) Act, 2023* introduced a new proactive duty on employers to take reasonable steps to prevent sexual harassment before it occurs.[71] This shifts the legal burden from reactive complaint-handling to preventive institutional action. This preventive orientation is largely absent from India's POSH Act framework, which is predominantly complaint-driven.

The UK's Advisory, Conciliation and Arbitration Service (ACAS) provides free, accessible guidance and conciliation services to workers in disputes.[72] A similar accessible, low-threshold dispute resolution mechanism is critically needed for informal workers in India.

European Union:

The European Union has addressed workplace harassment through a combination of directives and member state legislation. The EU Directive on Equal Treatment, 2006/54/EC requires all member states to prohibit sexual harassment as a form of sex discrimination and establish independent equality bodies with investigative and enforcement powers.[73]

More recently, the EU Pay Transparency Directive, 2023 and the broader EU Gender Equality Strategy 2020-2025 have called for comprehensive protection of workers in non-standard

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[68] Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act 2022 (USA), Pub L No 117-90, 136 Stat 26.

[69] Equality Act 2010 (UK), s 26.

[70] Ibid., s 40 (as originally enacted).

[71] Worker Protection (Amendment of Equality Act 2010) Act 2023 (UK), s 1.

[72] Advisory, Conciliation and Arbitration Service, *Sexual Harassment at Work: Guidance for Employers* (ACAS, London, 2023) 6.

[73] Council Directive 2006/54/EC of the European Parliament and of the Council on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation [2006] OJ L204/23, art 2(1)(c).

employment arrangements, including platform workers, domestic workers, and seasonal agricultural labourers.[74] The EU approach recognizes that modern work arrangements cannot be governed by laws designed for traditional employer-employee relationships alone.

The European Court of Human Rights in *Konstantin Markin v. Russia*[75] held that gender-based workplace discrimination violates Article 14 of the European Convention on Human Rights read with Article 8. While not directly binding on India, this judgment reinforces the principle that states have positive obligations to protect all workers from gender-based harm.

South Africa:

South Africa offers a particularly instructive model for developing countries. *The Employment Equity Act, 1998* and the *Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace, 2005* together create a comprehensive framework.[76] The Code explicitly applies to atypical workers including domestic workers, farm workers, and contract labourers.[77] South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA) provides a free, accessible dispute resolution service available to all workers regardless of employment status.[78] Workers do not need lawyers or written complaints to initiate proceedings. They can approach CCMA in person or by phone. This accessibility model is directly applicable to India's unorganized sector.

The *Domestic Violence Act, 1998* of South Africa also recognizes that harassment in domestic employment settings can overlap with domestic violence, and provides complementary protection for domestic workers.[79] India currently has no equivalent framework bridging the POSH Act and domestic violence law for domestic workers.

Bangladesh and Nepal: Regional Perspectives:

Regional comparisons are equally instructive. Bangladesh enacted the High Court Division Guidelines on Sexual Harassment, 2009 following a petition by civil society organizations. These guidelines, similar to India's *Vishaka*, apply to all workplaces including the garment sector which employs millions of informal women workers.[80] Bangladesh has also integrated sexual harassment awareness into its National Women Development Policy, 2011.[81]

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[74] European Commission, *Gender Equality Strategy 2020-2025* (European Commission, Brussels, 2020) 12.
[75] *Konstantin Markin v. Russia* App No 30078/06 (ECtHR, Grand Chamber, 22 March 2012).
[76] Employment Equity Act 55 of 1998 (South Africa); Department of Labour, Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (Government Gazette No 27865, Pretoria, 2005).
[77] Ibid., Code of Good Practice, para 3.2.
[78] Commission for Conciliation, Mediation and Arbitration, *Annual Report 2022-23* (CCMA, Johannesburg, 2023) 14.
[79] Domestic Violence Act 116 of 1998 (South Africa), s 1(viii).
[80] High Court Division of the Supreme Court of Bangladesh, Guidelines on Sexual Harassment, Writ Petition No 5916 of 2008 (14 May 2009).
[81] Government of Bangladesh, *National Women Development Policy 2011* (Ministry of Women and Children Affairs, Dhaka, 2011) 18.

Nepal enacted the Sexual Harassment at Workplace Prevention Act, 2015. Notably, Section 3 of this Act explicitly covers workers in agriculture, domestic service, and informal trade.[82] Nepal's law also mandates that awareness programmes be conducted in local languages a provision that directly addresses the literacy and language barriers faced by informal workers. India's POSH Act has no equivalent language accessibility mandate.

Key Lessons for India:

A comparative reading of these jurisdictions reveals several consistent patterns that India has yet to adopt. First, *threshold-free coverage* is increasingly becoming the global standard. New York, South Africa, and Nepal have moved away from employee-number thresholds. India's ten-employee threshold for ICC formation must be revisited. Second, *proactive employer duties* as seen in the UK's 2023 amendment represent a shift from complaint-driven to prevention-driven law. India's POSH Act is almost entirely reactive. Third, *accessible dispute resolution* exemplified by South Africa's CCMA and the UK's ACAS is essential for informal workers who cannot navigate formal legal processes.

India's LCC mechanism falls far short of this standard. Fourth, *ratification of ILO Convention No. 190* would create binding obligations to cover informal workers and provide a clear international benchmark for domestic reform. Fifth, *intersectional approaches* recognizing that informal women workers face compounded discrimination based on gender, caste, class, and migration status are embedded in South African and EU frameworks but remain absent from India's legal discourse on POSH compliance. These lessons do not require India to copy foreign models wholesale. They require India to learn from global experience and adapt it to its own complex social and economic reality.

Compliance Issues: The POSH Act creates a detailed compliance architecture. But this architecture collapses when tested against the realities of informal work. Compliance failures operate at three interconnected levels structural, procedural, and institutional.

- **Structural Failures**: The most fundamental compliance failure is structural. The Act's entire enforcement mechanism rests on the existence of a formal employer-employee relationship. In the unorganized sector, this relationship is absent, ambiguous, or deliberately obscured.[83] Contractors, middlemen, and labour brokers fragment the employment chain so effectively that no single person can be held legally responsible as an "employer" under Section 2(g). The ten-employee threshold for ICC formation further deepens exclusion. Most informal enterprises deliberately remain below this threshold to avoid regulatory obligations.[84] The Annual Survey of Industries 2021-22 found that nearly 67% of all manufacturing establishments in India employed fewer than ten workers.[85]These establishments fall entirely outside the ICC framework.

[82] Sexual Harassment at Workplace Prevention Act 2015 (Nepal), s 3.
[83] Kamala Sankaran (n 33) 697.
[84] Shyamala Pappu (n 39) 79.
[85] Ministry of Statistics and Programme Implementation, *Annual Survey of Industries 2021-22* (Government of India Press, New Delhi, 2022) 23.

- **Procedural Failures**: Even where complaint mechanisms technically exist, procedural barriers prevent informal workers from using them. The Act requires complaints to be submitted in writing within three months of the incident.[86]For illiterate or semi-literate workers, this written requirement is an insurmountable barrier. The LCC has discretionary power to extend this period but rarely exercises it proactively.[87] Inquiry procedures under Section 11 mirror civil court proceedings.[88]They require document production, witness examination, and formal hearings. These procedures are intimidating even for educated complainants. For a daily wage labourer who cannot afford to miss work, attending multiple hearings is practically impossible.
- **Institutional Failures:** Institutional failure is perhaps the most damaging compliance gap. The CAG Performance Audit Report 2022 found that twenty-three out of thirty-six states and Union Territories had not submitted mandatory annual reports on POSH Act implementation to the Ministry of Women and Child Development.[89] This reporting failure makes systemic accountability impossible. Labour inspectors who are theoretically empowered to check POSH compliance rarely inspect informal workplaces. The Ministry of Labour and Employment Report 2022-23 noted that inspection of unorganized sector establishments under various labour laws remained below 12% of targeted inspections nationally.[90] Penalties under Section 26 are weak and rarely invoked. A maximum fine of fifty thousand rupees is insufficient deterrence for repeat violators.[91] No criminal liability attaches to employers who simply fail to constitute an ICC or LCC making non-compliance a low-risk choice.

Together, these structural, procedural, and institutional failures create a legal vacuum precisely where protection is most urgently needed. The law exists. The machinery does not work. And the women who need it most are left entirely without recourse.

Challenges Faced by Women:

Compliance failures of the POSH Act do not exist in isolation. They are compounded by deep-rooted barriers that informal women workers face every day. These barriers operate simultaneously and reinforce each other.

- **Economic Vulnerability**: Economic dependence is the single biggest barrier to reporting harassment. Most informal women workers live without savings, social security, or alternative employment options. Complaining against an employer or supervisor means immediate risk of job loss.[92] A UN Women India Report 2022 found that 79% of surveyed informal women workers said fear of losing income was the primary reason for not

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[86] The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (n 2), s. 9(1).
[87] Ibid., s. 9(2).
[88] Ibid., s. 11.
[89] Comptroller and Auditor General of India (n 46) 61.
[90] Ministry of Labour and Employment (n 17) 134.
[91] The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (n 2), s. 26(1).
[92] Padma Govindan and Anuradha Bharadwaj (n 20) 9.

reporting harassment.[93] No legal protection currently compensates informal workers for income lost during complaint proceedings.

- **Social and Cultural Barriers**: In many communities, a woman who reports sexual harassment is blamed rather than supported. Family pressure to stay silent is enormous. Harassment is frequently normalised as an unavoidable part of working life for poor women.[94] Caste hierarchies add another dimension. Women from Dalit and Adivasi communities face compounded discrimination when they attempt to complain against upper-caste employers or supervisors. The National Dalit Movement for Justice Report 2021 documented that caste-based retaliation against Dalit women complainants was reported in 68% of cases studied across six states.[95]
- **Legal Illiteracy and Awareness Gap**: Most informal women workers have never heard of the POSH Act. Even among those aware of it, very few understand how to file a complaint or approach an LCC.[96] Legal aid services rarely reach rural or peri-urban informal workers. The National Legal Services Authority (NALSA) Annual Report 2022-23 acknowledged that outreach to unorganized sector workers remained a significant gap in legal aid delivery.[97]
- **Institutional Distrust**: Many informal women workers distrust police, government bodies, and formal institutions. Past experiences of dismissal, ridicule, or secondary victimization discourage engagement with official complaint mechanisms.[98] This distrust is not irrational. It is built on lived experience of institutional indifference.

Together, these barriers ensure that even when legal remedies theoretically exist, they remain practically inaccessible. Law without accessibility is not justice. It is merely a promise one that the unorganized women worker has learned, through bitter experience, not to trust.

Role of Government and NGOs:

Bridging the gap between law and reality requires active intervention from both the state and civil society. Government bodies and non-governmental organizations play complementary roles. However, their efforts so far have been scattered, underfunded, and insufficiently coordinated.

Government Initiatives:

The Ministry of Women and Child Development (MWCD) is the nodal ministry for POSH Act implementation. It launched the She-Box (Sexual Harassment electronic Box) portal in 2017 as

[93] UN Women India, *Voices from the Margins: Sexual Harassment and Informal Women Workers* (UN Women, New Delhi, 2022) 31.
[94] Sharmila Rege (n 23) 41.
[95] National Dalit Movement for Justice, *Caste, Gender and Workplace Harassment: A Six-State Study* (NDMJ, New Delhi, 2021) 44.
[96] International Labour Organization (n 21) 22.
[97] National Legal Services Authority, *Annual Report 2022-23* (NALSA, New Delhi, 2023) 67.
[98] Usha Ramanathan (n 24) 17.

an online complaint mechanism for women across sectors.[99] However, She-Box remains largely inaccessible to informal workers due to internet illiteracy and the absence of smartphone access in rural areas.

The National Rural Livelihood Mission (NRLM) and Deen Dayal Upadhyaya Grameen Kaushalya Yojana (DDU-GKY) have integrated gender sensitization components into their training modules.[100] These programmes reach large numbers of informal women workers. But POSH-specific legal awareness remains absent from their curriculum.

The Ministry of Labour and Employment launched the *e-Shram* portal in 2021 to register unorganized workers nationally.[101] As of January 2024, over 294 million unorganized workers had registered on e-Shram.[102] This database presents an enormous opportunity. POSH awareness material could be directly delivered to registered workers through SMS and regional language notifications. This opportunity remains unexploited.

State governments have shown uneven commitment. Kerala and Maharashtra have shown relatively better LCC constitution and functioning compared to other states.[103] Most other states continue to treat POSH compliance as a low-priority administrative obligation.

Role of NGOs and Civil Society:

Non-governmental organizations have filled critical gaps where government machinery has failed. Organizations like Jagori, SEWA (Self Employed Women's Association), Breakthrough India, and Majlis Legal Centre have conducted grassroots awareness campaigns, trained LCC members, and provided legal support to informal women workers.[104]

SEWA deserves special mention. It has organized over 2.1 million informal women workers across India into cooperatives and trade unions.[105] It has developed simplified POSH awareness materials in regional languages and used community radio to disseminate information in rural areas. This community-based model has proven far more effective than top-down government campaigns.

Despite these efforts, NGO interventions remain geographically limited and financially precarious. Sustained, scaled impact requires formal government partnership and dedicated funding both of which remain inadequate.

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[99] Ministry of Women and Child Development, Government of India, *She-Box Portal: An Overview* (MWCD, New Delhi, 2022) 3.
[100] Ministry of Rural Development, Government of India, *National Rural Livelihood Mission Annual Report 2022-23* (Government of India Press, New Delhi, 2023) 56.
[101] Ministry of Labour and Employment, Government of India, *e-Shram Portal: Progress Report* (Government of India Press, New Delhi, 2022) 2.
[102] Ministry of Labour and Employment, Government of India, *e-Shram Registration Data* (January 2024) https://eshram.gov.in accessed 10 March 2026.
[103] Ministry of Women and Child Development (n 42) 38.
[104] Nandita Gandhi and Nandita Shah (n 43) 221.
[105] Self Employed Women's Association, *SEWA Annual Report 2022-23* (SEWA, Ahmedabad, 2023) 12.

Suggestions and Recommendations:

The analysis across the preceding sections points clearly toward the reforms needed. These recommendations are practical, legally grounded, and directly responsive to the identified compliance gaps. *First*, India must *ratify ILO Convention No. 190* without further delay. Ratification would create binding international obligations to extend POSH protection to all informal workers regardless of employment status.[106] It would also *provide a clear international benchmark* for domestic legislative reform. The ten-employee threshold for ICC formation must be abolished. Every workplace, regardless of size, must fall within the Act's protective framework.[107]

The *definition of "employer" must be expanded* to include contractors, labour brokers, and household employers. A deemed employer provision similar to the Contract Labour (Regulation and Abolition) Act, 1970 should be introduced.[108] Every district must have a *fully functional, adequately staffed, and independently funded LCC*. LCCs must be granted *suo motu* powers to investigate harassment complaints. Mobile LCC units must be deployed in rural and remote areas.[109] *Complaint procedures must be simplified* to allow oral complaints for illiterate workers. The *e-Shram portal's* database of 294 million workers must be leveraged immediately. POSH awareness *content in regional languages must be delivered* through SMS alerts, IVR calls, and community radio tied to e-Shram registration.[110]All LCC members must receive *mandatory training* on gender, caste, class, and migration-sensitive approaches to harassment complaints. This training must be funded centrally and delivered annually.[111] These reforms together can transform the POSH Act from a law that protects the few into one that protects every working woman in India.

Conclusion:

The POSH Act, 2013 was a historic legislative achievement. It gave Indian working women a dedicated legal shield against sexual harassment. It translated Supreme Court directions into enforceable statutory obligations. It created institutional mechanisms for complaint and redressal. For all these reasons, it deserves genuine appreciation. But appreciation must not become complacency.

The women who need this law the most, the domestic worker, the construction labourer, the street vendor, the agricultural worker, remain its most forgotten beneficiaries. Nearly 90% of India's working women are employed in the informal sector. For them, the POSH Act is largely a distant promise. Its compliance mechanisms do not reach them. Its committees do not represent them. Its procedures do not accommodate them.

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[106] ILO Convention No. 190 (n 55), art 3
[107] Shyamala Pappu (n 39) 81.
[108] The Contract Labour (Regulation and Abolition) Act, 1970, No. 37 of 1970, Acts of Parliament, 1970 (India), s. 20.
[109] Nandita Gandhi and Nandita Shah (n 43) 224.
[110] Ministry of Labour and Employment (n 100) 8.
[111] UN Women India (n 92) 45.

This paper has demonstrated that the failure is not accidental. It is structural. The law was designed around formal employment relationships that simply do not exist in the unorganised sector. Every element of the compliance architecture, the ICC, the written complaint requirement, the employer definition, and the inquiry procedure assumes a formal workplace that most Indian women workers will never occupy.

International law has moved ahead. ILO Convention No. 190 has set a new global standard, one that explicitly includes informal workers. Countries like South Africa, Nepal, and the United Kingdom have adopted more inclusive, prevention-oriented, and accessible frameworks. India must learn from these experiences.

Reform is not optional. It is a constitutional obligation under Articles 14, 15, and 21. It is an international commitment under CEDAW and the SDGs. Most importantly, it is a moral imperative owed to millions of invisible women who work hard, suffer silently, and deserve better. The POSH Act must grow beyond its current limitations. Every working woman in India, regardless of her employment status, literacy level, or workplace, must be able to say with confidence: this law is for me.

India's DPDPA 2023 and DPDP Rules 2025: Structural Deficiencies, Comparative Benchmarks, and Reform Imperatives

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&
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Abstract:
The enactment of the Digital Personal Data Protection Act, 2023 (DPDPA) represented India's first standalone statutory response to the constitutional mandate of informational privacy recognised in Justice K.S. Puttaswamy (Retd.) v. Union of India. The subsequent notification of the Digital Personal Data Protection Rules, 2025 (DPDP Rules) on 14 November 2025 operationalised the statute and brought the Data Protection Board of India (DPBI) into formal legal existence — developments that require critical reassessment of the Act's strengths and remaining deficiencies. This article argues that the DPDPA-Rules framework, while marking a legislative advance, remains structurally insufficient to discharge India's constitutional obligations towards informational self-determination. The sweeping governmental exemptions of Section 17, the compromised structural independence of the DPBI as constituted, the absence of a statutory private right of action, and the failure to protect sensitive personal data categories collectively constitute a pattern of insufficiency that requires urgent legislative recalibration. Benchmarking against a comparative matrix that extends beyond the European Union's General Data Protection Regulation (GDPR) — incorporating Singapore's Personal Data Protection Act, Brazil's Lei Geral de Proteção de Dados Pessoais, and South Africa's Protection of Personal Information Act — reveals that India is an outlier in each of these respects. The article concludes with taxonomised recommendations calibrated to constitutional urgency and comparative best practice.

Keywords: Digital Personal Data Protection Act 2023; DPDP Rules 2025; Data Protection Board of India; Informational Privacy; Exemptions; GDPR; Comparative Data Protection; Democratic Deficit; Sensitive Personal Data

Introduction:

India's digital economy, one of the largest in the world, generates an extraordinary volume of personal data daily. With over 950 million internet users and a rapidly expanding base of digital financial, healthcare, and governance services, the governance of personal data is no longer a technocratic concern; it is an urgent constitutional one.[3]

The constitutional journey towards recognising privacy as a fundamental right culminated in the nine-judge bench decision in *Justice K.S Puttaswamy (Retd.) v. Union of India*,[4] where the

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[3]Telecom Regulatory Authority of India, Annual Report on Telecom Subscriptions (TRAI 2024); Ministry of Electronics and Information Technology, India's Techade: Digital India (MeitY 2023).
[4]Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1 (India).

Supreme Court unanimously held that the right to privacy is intrinsic to Article 21 of the Constitution and encompasses the right to informational self-determination. The legislative response, spanning six years from the Justice B.N. Srikrishna Committee Report of 2018 through successive Bill iterations, was the Digital Personal Data Protection Act, 2023 (DPDPA),[5] which received Presidential assent on 11 August 2023.

The legal landscape has since evolved materially. On 14 November 2025, the Ministry of Electronics and Information Technology notified the Digital Personal Data Protection Rules, 2025 (DPDP Rules),[6] Formally operationalising the statute. The provisions concerning the establishment of the DPBI took effect immediately, while consent manager regulations apply 12 months after finalisation, and the remaining obligations apply within 18 months, establishing a compliance deadline of 13 May 2027.[7]

These developments represent genuine institutional progress and must be acknowledged rather than minimised. However, they do not discharge India's constitutional obligations. This article argues that the DPDPA-Rules framework suffers from five foundational structural deficiencies: (i) the unchecked governmental exemption architecture of Section 17; (ii) the compromised structural independence of the DPBI as constituted; (iii) the absence of a statutory private right of action and individual compensation for data breach victims; (iv) the failure to classify or protect sensitive personal data categories; and (v) the democratic deficit arising from pervasive delegated legislation in a domain of constitutional magnitude. The paper proceeds in eight substantive parts and concludes with taxonomised reform recommendations.

Constitutional Foundations of Informational Privacy:

The trajectory of privacy as a constitutional right in India was neither linear nor uncontested. For decades, the Supreme Court's position was constrained by the narrow holdings in *M.P. Sharma v. Satish Chandra*[8] and *Kharak Singh v. State of UP*[9] which cast doubt on privacy as a standalone fundamental right. The transformative shift arrived with *Puttaswamy*, which comprehensively overruled those authorities and articulated a textured, multi-dimensional conception of privacy rooted in human dignity and autonomy.

Justice D.Y. Chandrachud's concurring opinion is particularly instructive. His Lordship situated informational privacy as the capacity of individuals to control information about themselves and to prevent its use inconsistently with their reasonable expectations.[10] This formulation resonates with the European concept of informationally Selbstbestimmung, informational self-

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[5]Digital Personal Data Protection Act, 2023, No. 22 of 2023, Acts of Parliament (India) [hereinafter DPDPA].

[6]Ministry of Electronics and Information Technology, Digital Personal Data Protection Rules, 2025, Gazette of India, Extraordinary, Part II, Section 3(i), Nov. 14, 2025 [hereinafter DPDP Rules].

[7]Id. The phased implementation designates a compliance deadline of 13 May 2027 for the majority of obligations under the Act. Consent manager registration rules apply twelve months from notification; all remaining rules apply eighteen months from notification.

[8]M.P. Sharma v. Satish Chandra, AIR 1954 SC 300 (India).

[9]Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295 (India).

[10]Puttaswamy, (2017) 10 SCC 1, at 638 (Chandrachud, J., concurring).

determination, articulated by the German Federal Constitutional Court in the Census Act case of 1983,[11] which subsequently influenced the GDPR's architecture. The Court in Puttaswamy established that any encroachment upon privacy must satisfy three requirements: legality, legitimate state aim, and proportionality.[12] This constitutional yardstick applies with full force to the DPDPA. The framework also resonates with Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights,[13] confirming that effective data protection is both a domestic constitutional obligation and a commitment arising from India's international treaty undertakings.

A dimension insufficiently engaged by the DPDPA is the three-statute surveillance architecture that now governs India's digital landscape. The Telecommunications Act, 2023[14] confers broad interception and monitoring powers on the central government, functioning in parallel with the interception regime under Sections 69, 69A, and 69B of the Information Technology Act.[15] The DPDPA neither harmonises with nor expressly prevails over these parallel powers. The constitutional impossibility of protecting informational privacy through one statute while authorising mass surveillance through two others demands urgent legislative harmonisation.

Data Principal Rights and Fiduciary Obligations Under the Act and Rules, 2025:
The DPDPA establishes a consent-centric paradigm for personal data processing. Under Section 6, a data fiduciary must obtain free, specific, informed, unconditional, and unambiguous consent before processing personal data.[16] The DPDP Rules 2025 have substantially operationalised these requirements, mandating itemised, granular privacy notices that specify not merely what data is collected but precisely which purposes each data category serves.[17] The rights accorded to data principals under Chapter III include the right to access (Section 11), correction and erasure (Section 12), grievance redressal (Section 13), and the right to nominate (Section 14).[18] Three structural weaknesses persist in the regime as constituted by the Act and Rules together.

First, DPO and DPIA requirements extend only to entities formally designated as Significant Data Fiduciaries (SDFs) a government-controlled designation process that creates regulatory uncertainty and allows large-scale processors to remain outside the enhanced compliance architecture pending designation. The DPDP Rules 2025 have made meaningful progress: Rule

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[11]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 15, 1983, 65 BVerfGE 1 (Volkszählungsurteil) (Ger.).
[12]Puttaswamy, (2017) 10 SCC 1, at 309–10 (enunciating the three-part test of legality, legitimate aim, and proportionality as applicable to all encroachments upon the right to privacy).
[13]Universal Declaration of Human Rights art. 12, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 17, Dec. 16, 1966, 999 U.N.T.S. 171.
[14]Telecommunications Act, 2023, No. 44 of 2023, Acts of Parliament (India).
[15]Information Technology (Amendment) Act, 2008, No. 10 of 2009, SecSec 69, 69A, 69B, Acts of Parliament (India). Section 69 authorises interception of any information transmitted through any computer resource in the interests of sovereignty, integrity, security, or public order, without prior judicial authorisation.
[16]DPDPA Sec 6(1).
[17]DPDP Rules r. 3 (requiring data fiduciaries to provide itemised notices specifying each category of personal data collected and connecting that category to the specific purpose for which it is processed).
[18]DPDPA SecSec 11–14.

13 requires SDFs to appoint a Data Protection Officer resident in India, to conduct annual Data Protection Impact Assessments, to commission independent compliance audits, and to submit findings to the DPBI.[19] These are genuine advances. However, the GDPR's comparable DPO obligations under Articles 37–39 apply to all controllers that process personal data on a large scale or systematically monitor data subjects, irrespective of any government designation.[20] The restriction of enhanced obligations to government-notified SDFs creates a structural gap that the constitutional right to informational privacy cannot tolerate.

Second, and most critically, the Act's silence on sensitive data categories remains entirely unremedied by the Rules. GDPR Article 9 creates a special category encompassing racial or ethnic origin, political opinions, religious beliefs, health data, sexual orientation, and biometric data, imposing heightened requirements for their processing.[21] The DPDPA contains no equivalent classification. For India's Dalit and LGBTQ+ communities, whose caste-based and identity data carry unique risks of targeted discrimination and persecution, this lacuna has acute human rights dimensions that the existing literature has identified, but the legislature has failed to address.[22]

Third, the deemed consent mechanism under Section 7 remains unreformed.[23] Processing is permitted without explicit consent for state functions, medical emergencies, and public-interest purposes, which are sufficiently broad to render consent largely illusory in practice for a significant proportion of digital interactions. The DPDP Rules 2025 did not circumscribe these exceptions. The result is a consent architecture whose protective promise is qualified by exceptions wide enough to swallow it.

Exemption Provisions and Constitutional Implications

A. The Section 17 Exemption Regime

The most constitutionally contentious dimension of the DPDPA is Section 17, which grants sweeping exemptions to central and state governments and their instrumentalities.[24] Under Section 17(2)(a), the central government may, by notification, exempt any instrumentality of the state where necessary or expedient in the interests of sovereignty, national security, public

[19]DPDP Rules r. 13 (specifying additional obligations of Significant Data Fiduciaries, including appointment of a Data Protection Officer resident in India, annual Data Protection Impact Assessments, independent compliance audits, and periodic reporting to the Data Protection Board of India).

[20]Council Regulation 2016/679, arts. 37–39, 2016 O.J. (L 119) 1 (EU) [hereinafter GDPR] (requiring appointment of a Data Protection Officer for all controllers or processors that carry out large-scale systematic monitoring of data subjects or process special categories of data on a large scale, irrespective of government designation).

[21]GDPR art. 9 (establishing a special category of personal data encompassing racial or ethnic origin, political opinions, religious beliefs, health data, sexual orientation, and biometric data, and prohibiting their processing except under specified conditions with heightened safeguards).

[22]Anita Gurumurthy & Nandini Chami, Towards a Feminist Data Future 34–38 (IT for Change 2019) (documenting heightened data-based discrimination risks for Dalit and LGBTQ+ communities in India's digital ecosystem, and arguing for statutory recognition of sensitive personal data categories).

[23]DPDPA Sec 7(a)–(j) (permitting processing without explicit consent for performance of state functions, compliance with law, medical emergencies, employment-related processing, and furtherance of public interest, among other purposes).

[24]DPDPA Sec 17.

order, or prevention of incitement to offences. The constitutional problem is manifest. The Puttaswamy three-part test demands that restrictions on privacy be grounded in valid law, pursue a legitimate state aim, and be proportionate.[25] A blanket executive notification power granting exemptions for unspecified instrumentalities without procedural safeguards, independent judicial oversight, or sunset clauses fails the proportionality limb with considerable constitutional force. The DPDP Rules 2025 prescribe procedural "Standards for processing of personal data by State and its instrumentalities" in the Second Schedule but do not require judicial authorisation, proportionality review, or independent oversight of exemption invocations. The Rules, therefore, entrench rather than cure the structural constitutional deficiency of Section 17.

B. The Three-Statute Surveillance Architecture and the Aadhaar Nexus:

The exemption regime acquires particular constitutional gravity in the context of the Aadhaar ecosystem. The Supreme Court in Justice *K.S. Puttaswamy (Retd.) v. Union of India* (Aadhaar)[26] imposed significant limitations on Aadhaar data use, recognising the risk of surveillance creep. A data protection statute that permits the central government to exempt the Unique Identification Authority of India from core obligations effectively reverses those judicial safeguards and disturbs the constitutional equilibrium the Court established.

The interaction between Section 17 and the surveillance powers under Sections 69, 69A, and 69B of the IT Act[27] is further compounded by the analogous interception and monitoring provisions of the Telecommunications Act, 2023.[28] The DPDPA does not repeal, modify, or expressly prevail over these powers. The cumulative result is that privacy protection and institutionalised surveillance operate in hermetically sealed compartments, a constitutional impossibility given that the right to privacy is a unified and indivisible constitutional guarantee.

Remedial Architecture: The DPBI As Constituted:

A. Institutional Design and Independence

Chapter VI of the DPDPA establishes the DPBI as the primary adjudicatory body for data protection disputes.[29] On 13 November 2025, the provisions establishing the DPBI were formally brought into force[30] representing a material advance over the pre-existing regime of consumer courts and general civil jurisdiction, and rendering obsolete the critique that the DPBI remained constitutionally promised but institutionally nonexistent.

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[25]Puttaswamy, (2017) 10 SCC 1, at 309–10.
[26]Justice K.S. Puttaswamy (Retd.) v. Union of India (Aadhaar), (2019) 1 SCC 1 (India).
[27]Information Technology (Amendment) Act, 2008, No. 10 of 2009, SecSec 69, 69A, 69B, Acts of Parliament (India).
[28]Telecommunications Act, 2023, No. 44 of 2023, SecSec 20–22, Acts of Parliament (India) (conferring upon the central government broad powers to intercept, monitor, and block telecommunications in the interests of national security and public order, without provision for prior judicial authorisation or independent oversight).
[29]DPDPA SecSec 18–27.
[30]Ministry of Electronics and Information Technology, Press Release on DPDP Rules Notification (Nov. 13, 2025), https://www.pib.gov.in/PressReleasePage.aspx?PRID=2190655 (confirming that provisions in respect of the establishment of the Data Protection Board of India were brought into force on 13 November 2025).

However, the institutional design raises serious concerns about structural independence. Under Section 19, the Chairperson and members are appointed on the recommendation of a Selection Committee entirely composed of government nominees.[31] The broader constitutional principle that regulatory bodies exercising constitutionally sensitive functions require insulation from executive capture is well-established in Indian administrative law.[32] The DPDP Rules 2025 introduced the Fifth Schedule, specifying terms and conditions of service,[33] providing some security of tenure but doing nothing to cure the structural appointment problem. An independent regulatory body derives its credibility from appointment architecture, not merely from post-appointment tenure protection. The Act further specifies in Section 20 that the DPBI shall function as a digital office.[34] While enhancing efficiency for technologically literate complainants, digital-only proceedings create formidable barriers for rural, elderly, and economically marginalised data subjects who are simultaneously the most vulnerable stratum of India's digital population and the most likely to suffer the harms that data protection law is designed to prevent.

B. The Penalty Framework, Mediation Mechanism, and the Absence of Individual Compensation

The penalty framework under Schedule I provides for financial penalties up to Rs. 250 crore for specific categories of breach and up to Rs. 10,000 crore, approximately EUR 1.1 billion, for the most serious violations.[35] Contextualised against cumulative GDPR enforcement of over EUR 4.5 billion since 2018, including a EUR 1.2 billion fine against Meta Ireland in 2023,[36] The DPDPA's penalty ceiling raises deterrence concerns for large multinational technology companies. Moreover, unlike GDPR Article 83, the DPDPA contains no proportionality-based calculation methodology or mandatory consideration of the nature, gravity, duration, or categories of data affected.

[31] DPDPA Sec 19(2) (providing that the Selection Committee for appointment of the Chairperson and Members of the DPBI shall be composed of a Cabinet Secretary (Chairperson) and two Secretaries to the Government of India nominated by the central government).

[32] Supreme Court Advocates-on-Record *Ass'n v. Union of India*, (2016) 5 SCC 1 (India). While this decision concerned judicial appointments specifically, the broader constitutional principle it articulates — that bodies exercising constitutionally sensitive functions require structural independence from executive domination in the appointment process — is of general application in Indian administrative constitutional law.

[33] DPDP Rules sched. V (specifying terms and conditions of service of the Chairperson and other Members of the Data Protection Board of India, including tenure and removal provisions).

[34] DPDPA Sec 20.

[35] DPDPA sched. I (specifying penalty tiers: up to Rs. 10,000 crore for the most serious violations including breach of children's data protection obligations and failure to implement adequate security safeguards; up to Rs. 250 crore for specific categories of breach including failure to notify the DPBI of a personal data breach).

[36] European Data Protection Board, Annual Report 2023, at 14 (EDPB 2024) (reporting cumulative GDPR fines exceeding EUR 4.5 billion since the GDPR's entry into force in May 2018, including a EUR 1.2 billion fine against Meta Ireland for unlawful data transfers); Graham Greenleaf, Global Data Privacy Laws 2023: 162 National Laws & 20 Bills, 181 Privacy L. & Bus. Int'l Rep. 1, 3 (2023).

The DPDP Rules 2025 introduced a mediation mechanism that may serve as an indirect avenue for dispute resolution.[37] This is a welcome development but structurally insufficient. A mediation mechanism is consensual and discretionary it does not constitute a rights-protective remedy enforceable as of right. GDPR Article 82 entitles data subjects to compensation from controllers or processors for any material or non-material damage suffered as a result of an infringement.[38] The absence of a statutory private right of action in the DPDPA transforms the penalty mechanism into a purely public-law sanction, leaving the aggrieved data principal as a bystander in proceedings ostensibly designed to protect them.

Comparative Analysis: India in a Global Framework:

A. The GDPR Benchmark

The GDPR, operative since May 2018, has influenced legislation in over 162 jurisdictions and remains the global standard for data protection law.[39] At the level of foundational principles, both instruments espouse legality, purpose limitation, data minimisation, accuracy, storage limitation, and security. Yet the GDPR's accountability principle enshrined in Article 5(2), placing the burden of demonstrating compliance on the controller, finds no direct equivalent in the DPDPA, which is obligation-focused rather than accountability-focused. This distinction carries significant practical implications for enforcement culture and compliance incentives. The most significant structural divergences are the sensitive data lacuna, the restriction of DPO requirements to government-designated SDFs rather than all large-scale processors, the absence of a private right of action, and the compromised independence of the supervisory authority. These deficiencies collectively make an unlikely, medium-term GDPR adequacy determination by the European Commission a commercially significant outcome for Indian businesses operating in EU markets and a diplomatic signal about the quality of India's rights-protective framework.

B. Singapore's Personal Data Protection Act

The Personal Data Protection Act, 2012 (as amended in 2020) (PDPA) offers a more proximate comparator, given Singapore's common-law heritage and comparable developmental context. The PDPA imposes obligations on all organisations without a government-designation requirement analogous to India's SDF mechanism. Singapore's 2020 amendments introduced mandatory breach notification to the Commission and affected individuals within three business days for significant breaches,[40] a model now partially replicated by India's 72-hour notification

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[37]See generally Dhruv Suri, The Mediation Mechanism Under India's DPDPA Rules: Indirect Redress or Structural Inadequacy?, 5 Indian J. Data Prot. L. 112, 118 (2025) (noting that the mediation mechanism under the DPDP Rules 2025 may serve as an indirect avenue for settling disputes between data fiduciaries and data principals but does not constitute an enforceable right to compensation equivalent to GDPR Article 82).

[38]GDPR art. 82 (conferring upon data subjects the right to receive compensation from the controller or processor for any material or non-material damage suffered as a result of an infringement of the Regulation, including both controllers and processors as potentially jointly and severally liable).

[39]Greenleaf, supra note 35, at 1.

[40]PDPA Sec 26D (as amended 2020) (requiring notification to the Personal Data Protection Commission and affected individuals within three business days of becoming aware of a notifiable data breach, defined as one that results in or is likely to result in significant harm to the affected individuals).

rule under the DPDP Rules 2025. Singapore's framework also provides for civil remedies for breach victims through designated courts a model that India's absence of a private right of action makes impossible to replicate without statutory amendment.

C. Brazil's Lei Geral de Proteção de Dados Pessoais

Brazil's LGPD of 2018[41] is architecturally closer to the GDPR, recognising ten legal bases for processing and mandating DPOs for controllers and operators processing sensitive data. Most critically, the LGPD explicitly protects sensitive personal data including racial or ethnic origin, religious belief, political opinion, health data, and biometric data[42] providing a direct statutory analogue of GDPR Article 9 that India's framework entirely lacks. Brazil's experience confirms that statutory sensitive-data classification is constitutionally achievable and practically necessary within a developing economy legal framework, and that India's approach is not mandated by any exceptionalist consideration unique to the Indian context.

D. South Africa's Protection of Personal Information Act

South Africa's POPIA, enacted in 2013 and operative from 2021,[43] establishes eight conditions for lawful processing including processing limitation, purpose specification, and data subject participation. Most instructive for India is POPIA's appointment architecture for the Information Regulator appointed by the President on the recommendation of a multiparty parliamentary committee composed of representatives of all parties in the National Assembly.[44] This model combining executive nomination with mandatory parliamentary involvement and multiparty representation provides the template that India's DPBI appointment mechanism conspicuously lacks and should adopt.

E. Comparative Synthesis

The comparative analysis reveals that India's framework is an outlier in three critical respects: (i) the absence of statutory sensitive-data classification, present in the GDPR, Brazil's LGPD, and South Africa's POPIA; (ii) the restriction of DPO requirements to government-designated entities, unparalleled in any major contemporary framework; and (iii) the absence of a private right of action for data breach victims, present in all three comparator jurisdictions. India's framework is more consistent with older-generation data protection statutes enacted before the rights-centred wave of GDPR-influenced reform than with contemporary international best

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[41]Lei Geral de Proteção de Dados Pessoais [LGPD], Law No. 13,709, Aug. 14, 2018, as amended by Law No. 13,853, July 8, 2019 (Brazil) [hereinafter LGPD].

[42]LGPD art. 5(II) (defining sensitive personal data to include racial or ethnic origin, religious belief, political opinion, trade union membership, data relating to health or sexual life, genetic data, and biometric data, where the processing of such data triggers heightened consent and impact assessment requirements under Article 11).

[43]Protection of Personal Information Act 4 of 2013 (S. Afr.) [hereinafter POPIA] (fully operative from 1 July 2021). South Africa was the first African state to enact comprehensive data protection legislation aligned with the GDPR's rights-centred framework. See also Colin Thatcher, South Africa's POPIA and the Emerging Global Data Protection Consensus, 39 S. Afr. L.J. 845, 848 (2022).

[44]POPIA Sec 42 (providing for the appointment of the Information Regulator by the President of the Republic on the recommendation of a committee of the National Assembly composed of members of all represented political parties, thereby ensuring multiparty parliamentary oversight of the appointment process).

practice. This matters not merely for international reputation but for the domestic constitutional question of whether the DPDPA discharges the obligations imposed by Puttaswamy.

Structural Deficiencies and the Democratic Deficit:
The DPDPA suffers from what may be characterised adapting Andrew Moravcsik's concept as a legislative democratic deficit: a statute whose substantive content is determined substantially by executive notification rather than parliamentary deliberation.[45] The Act delegates extraordinary rule-making power to the central government across more than twenty provisions, permitting the government to define SDFs, prescribe exemptions, specify data localisation requirements, and determine the operative rights-architecture of the statute through subordinate legislation. The DPDP Rules 2025, comprising twenty-two rules, confirm rather than remedy this concern the entire operational content of India's data protection framework was determined by executive rule-making following minimal parliamentary oversight.

The Act was enacted without review by the Parliamentary Standing Committee on Information Technology[46] a significant democratic deficit for legislation of such constitutional magnitude. The consequence is not merely procedural: the DPDPA contains definitional lacunae (most notably the complete absence of a definition of sensitive personal data), drafting ambiguities, and conceptual inconsistencies that a deliberative committee process would likely have resolved.

The Supreme Court's essential functions doctrine, articulated in *State of Tamil Nadu v. P. Krishnamurthy*,[47] imposes limits on the extent to which Parliament may abdicate core legislative functions to the executive. A privacy statute whose operative rights-content is predominantly determined by executive notification is one whose protective character is contingent upon executive goodwill an inadequate guarantee for the vindication of a fundamental constitutional right.

Children's Data Protection: Progress And Remaining Gaps:
The DPDPA's children's data provisions under Section 9 prohibit processing without verifiable parental consent and prohibit behavioural monitoring, targeted advertising, and tracking of

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[45]Andrew Moravcsik, In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union, 40 J. Common Mkt. Stud. 603, 605 (2002). The concept is adapted here to describe the DPDPA's structural over-delegation of fundamental rule-making power to the executive, producing a statutory framework whose rights-protective content is substantially determined by administrative fiat rather than democratic deliberation. This adaptation is defensible because Moravcsik's core concern — the displacement of deliberative democratic processes by technocratic or administrative actors — maps directly onto the DPDPA's enactment without parliamentary committee review and its operationalisation through twenty-two subordinate rules.
[46]Usha Ramanathan, The Data Protection Bill's Democratic Deficit, The Wire (Nov. 22, 2022), https://thewire.in/government/the-data-protection-bills-democratic-deficit.
[47]State of Tamil Nadu v. P. Krishnamurthy, (2006) 4 SCC 517 (India) (articulating the essential legislative functions doctrine — the principle that Parliament may not delegate the determination of legislative policy on matters of fundamental importance to the executive, and that subordinate legislation must operate within a framework sufficiently delineated by the parent statute).

minors under eighteen years.[48] The DPDP Rules 2025 have meaningfully operationalised these provisions: Rule 10 specifies that organisations must verify parental identity using reliable identity and age information, including documents voluntarily provided by parents or virtual tokens issued through government-authorised Digital Locker service providers.[49] The Fourth Schedule carves out specific exemption categories for healthcare professionals, educational institutions, and child transport providers.[50] These developments represent genuine legislative progress.

However, significant implementation gaps persist. The Rules do not prescribe technical standards for age verification systems, leaving architectural compliance indeterminate. The United Kingdom's Age Appropriate Design Code, updated in 2023,[51] mandates age assurance by design, default privacy-protective settings for minor users, and algorithmic audits for child-facing services obligations entirely absent from the DPDPA framework. Without equivalent technical standards, the children's data provisions risk remaining largely declaratory for platforms that routinely operate without robust age verification, a reality documented across the Indian digital ecosystem.

Recommendations & Conclusion

A. Taxonomised Recommendations

(i) Constitutional Imperatives

First, Section 17's exemption architecture must be fundamentally restructured. Exemptions for state instrumentalities must be specific, time-bound, judicially authorised, and subject to independent oversight with parliamentary notification and sunset clauses. A blanket executive notification power is constitutionally unsustainable under the Puttaswamy proportionality standard and must be replaced with a targeted, safeguarded regime.

Second, the DPBI must be reconstituted with genuine structural independence. The appointment process must incorporate parliamentary confirmation, judicial participation, and civil society representation, modelled on South Africa's POPIA framework. Members must enjoy security of tenure and freedom from executive directions. The DPBI should be accorded constitutional status equivalent to the Election Commission insulated from political interference.

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[48]DPDPA Sec 9 (prohibiting the processing of personal data of children, defined as individuals below eighteen years of age, without verifiable parental consent, and prohibiting tracking, behavioural monitoring, and targeted advertising directed at children).

[49]DPDP Rules r. 10 (specifying age verification requirements for parental consent, including acceptable verification mechanisms such as documents voluntarily provided by the parent or virtual tokens issued through a government-authorised Digital Locker service provider under the Information Technology Act, 2000).

[50]DPDP Rules sched. IV, pt. A (enumerating classes of data fiduciaries to whom the parental consent requirements of DPDPA Sections 9(1) and 9(3) do not apply, including clinical establishments, medical practitioners, educational institutions providing primary, secondary, and higher education, and child transport service providers operating under the Motor Vehicles Act, 1988).

[51]Information Commissioner's Office, Age Appropriate Design: A Code of Practice for Online Services (ICO 2020, updated 2023) (issued under the Data Protection Act 2018 (UK) pursuant to Section 123 of that Act; mandating age assurance by design, default privacy-protective settings for users likely to be children, and algorithmic and content audits for child-facing services).

Third, a statutory private right of action and individual compensation mechanism equivalent to GDPR Article 82 must be legislated. The mediation mechanism under the DPDP Rules is insufficient as a rights-protective substitute for an enforceable claim against controllers or processors for material and non-material damage arising from breaches.

(ii) Best-Practice Reforms

Fourth, sensitive personal data must receive enhanced statutory protection through a dedicated legislative category covering health, biometric, financial, caste, religious, and sexual orientation data, with heightened consent requirements, mandatory impact assessments, and stricter purpose limitation. Brazil's LGPD and South Africa's POPIA provide ready legislative models. Fifth, the Act must be amended to include the rights to data portability, objection to automated decision-making, and restriction of processing. These rights are essential to informational self-determination in an algorithmic society and are present in all major comparative frameworks. Their absence from the DPDPA reflects a legislative choice that is difficult to justify on constitutional grounds.

Sixth, DPO requirements must be extended by statute to all data fiduciaries processing personal data above a legislatively specified volume or risk threshold, removing the dependency on a government designation process. The DPDP Rules' positive development of DPO requirements for SDFs should be generalised.

Seventh, a robust age assurance-by-design framework for children's data must be enacted, specifying technical standards for age verification systems, mandating default privacy-protective settings for child-facing platforms, and requiring algorithmic audits drawing from the ICO's updated Age Appropriate Design Code.

(iii) Aspirational Reforms

Eighth, the DPDPA must be harmonised with the Information Technology Act and the Telecommunications Act, 2023, to eliminate the three-statute surveillance architecture that currently operates beyond data protection scrutiny. Any interception or monitoring power must be subject to independent judicial authorisation and the Puttaswamy proportionality standard. India cannot claim constitutional compliance with privacy obligations under one statute while maintaining an unreviewable surveillance capacity under two others.

Ninth, cross-border data transfer rules should be revised towards an adequacy-based model, empowering the DPBI to make adequacy determinations based on the legal framework, enforcement record, and judicial independence of recipient jurisdictions. This reform is both constitutionally required and a prerequisite for India achieving a GDPR adequacy determination from the European Commission.

Conclusion:

The notification of the DPDP Rules on 14 November 2025 and the formal constitution of the DPBI represent genuine advances in India's data protection infrastructure. The 72-hour breach notification requirement, the DPO and DPIA mandates for Significant Data Fiduciaries, the operationalised parental consent verification mechanism, and the structured, phased compliance architecture are contributions to data protection governance that should not be minimised amid the enthusiasm for critique.

But these advances do not discharge India's constitutional obligations under the Puttaswamy judgment. The sweeping governmental exemptions under Section 17, unremedied by the Rules, remain fundamentally incompatible with the proportionality framework that the Constitution demands. The DPBI, constituted through an appointment mechanism that excludes parliamentary and judicial participation, cannot be regarded as structurally independent in the sense required by constitutional adjudication. The absence of sensitive data classification, the restriction of DPO requirements to government-designated entities, the continued absence of a private right of action, and the three-statute surveillance architecture collectively constitute a framework that treats privacy as a regulatory preference rather than a constitutional entitlement.

The comparative analysis confirms that none of these deficiencies is mandated by India's developmental context or constitutional tradition. Singapore, Brazil, and South Africa, each operating in distinct constitutional, economic, and legal environments, have legislative frameworks that address each identified gap. India's exceptionalism is a choice, not a necessity.

India stands at a pivotal moment in its digital governance trajectory. The constitutional promise of Puttaswamy demands a data protection framework that regards individuals not merely as data subjects to be regulated but as constitutional persons whose dignity, autonomy, and informational self-determination are inviolable. The DPDPA-Rules framework is a necessary foundation but a constitutionally insufficient one. The reforms recommended herein represent the minimum required to bring India's data protection framework into conformity with its constitutional obligations and contemporary international standards. Until they are enacted, India's commitment to informational privacy will remain, in substantial measure, a judicial aspiration awaiting legislative fulfilment.

AI Governance Under India's New Criminal Laws and Data Protection Regime

***Dr. Deepti Singla*[1]**

Abstract:
The use of technology in crime, as well as in investigation and prosecutions, has become more common than ever before. Both law enforcement agencies and cybercriminals use various technologies in their criminal endeavours, making the application of criminal law even more challenging and creating new issues regarding privacy and ethics, among others. Recently, India adopted major reforms to its criminal laws, in the form of the Bharatiya Nyaya Sanhita (BNS, 2023), Bharatiya Sakhshya Adhiniyam (BSA, 2023) and Bharatiya Nagrik Suraksha Sanhita (BNSS, 2023) alongside the Digital Personal Data Protection Act (DPDP Act, 2023). These legislations update the Indian criminal law framework to acknowledge the use of e-evidence, forensic technology and electronic trials. Alongside criminal law reforms, discussions have already been initiated regarding a new draft bill named the Artificial Intelligence (Ethics and Accountability) Bill (AI Bill, 2025) which sets the tone for future regulation of ethical uses of AI. The paper describes the criminal law reformations undertaken by India to curb crime through artificial intelligence. It also makes a comparison between the criminal law reforms adopted by the European Union countries and the United States with respect to AI.

Keywords: Artificial Intelligence, Criminal Law Reform, Digital Evidence, Data Protection, AI Ethics, Algorithmic Accountability.

1. Introduction:

Artificial Intelligence (AI) technology has swiftly progressed from academic study to real-life implementation in our routines, corporate dealings and even governmental functions. AI is involved not only in crime itself but also in how crimes can be investigated. Law enforcement organisations employ AI technology in conducting digital forensics, reviewing footage and recognising patterns. Criminals, on the other hand, have used AI to commit cyber-fraud, deepfake scams, identity theft and similar criminal activities.

1.(1) Meaning and Scope of Artificial Intelligence:

AI refers to computer-based systems that can perform tasks typically done by humans. Activities involving learning from data, pattern recognition, language comprehension, decision-making and prediction can all be carried out through AI applications. AI improves itself based on data and feedback. The current generation of AI technology involves machine learning, deep learning, natural language processing (NLP) and computer vision.

1.(2) Historical Evolution of AI: From Rule-Based Systems to Adaptive Learning

The concept of smart machines has been around for a long time, with Alan Turing being one of the first people to explore the question of whether machines can think. Turing's research was instrumental in establishing the basis for AI studies. The initial computing systems used

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hard-coded programs created by humans, and thus the machines could only perform tasks based on specific programming and lacked any capability for learning or adapting their behaviour to changing circumstances.[2]

1.(3) Contemporary AI Techniques and Practical Applications

Modern AI technology is based on multiple technologies. For example, machine learning makes it possible for computers to learn from input data instead of having to program them manually in each instance. In deep learning, neural network layers are used to analyse complex inputs such as images and speech. Natural language processing makes it possible for computers to interpret human language and even generate language output. Finally, computer vision makes it possible to analyse imagery and video frames.[3]

1.(4) Ethical Principles and Policy Governance of AI

There have been efforts by the government and policymakers to understand that ethics should govern the use of AI. There can be great implications for freedom, reputation and opportunities associated with AI technology. There may be severe consequences if any bias or inaccuracies occur within an AI system. For example, in India, there is guidance from NITI Aayog on responsible AI usage. The key principles are fairness, transparency, accountability, safety, human involvement, inclusiveness and non-discrimination.[4]

1.(5) AI as a Driver of Digital Crime

AI technology has been developing concurrently with cybercrimes. As internet and phone usage has increased, there has been an upsurge in criminal activities such as fraud, phishing, extortion, and other related crimes that operate in the virtual realm. The advancement of AI technology has helped criminals become more efficient in their operations. With AI technology, they can create fake voices and videos. In addition, they can automate their fraudulent messages and personalise them using stolen data. These trends can also be seen in national crime statistics. The number of cognizable crimes recorded nationally stands at more than six million. Cybercrime has experienced substantial increases. More than 80,000 cases have been reported as being related to cybercrimes. These cases included financial scams and impersonation fraud. This indicates that crimes facilitated by AI are not uncommon incidents.[5]

1.(6) Use of AI in Law Enforcement and Criminal Investigation

The use of AI is also very helpful for investigations. AI-supported systems are very useful for carrying out forensic examinations, detecting anomalies, and making predictions. AI can help examine datasets more quickly than any human team, identifying abnormal movements of money, detecting suspicious activities within networks and identifying hidden

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[2] A. M. Turing, Computing Machinery and Intelligence, 59 *Mind* 433 (1950).
[3] Z. Zhou et al., Edge Intelligence: Paving the Last Mile of Artificial Intelligence with Edge Computing, 107 *Proc. IEEE* 1738 (2019).
[4] NITI Aayog, *Responsible AI for All* (2021), https://www.niti.gov.in/sites/default/files/2021-02/Responsible-AI-22022021.pdf.
[5] Nat'l Crime Recs. Bureau, *Crime in India 2023*, https://ncrb.gov.in.

communications channels.[6] However, in investigation-related activities, AI programs must also be supervised, validated and tested for reliability and bias. The judicial system has already addressed issues concerning the admissibility of evidence derived from electronic documents and computer outputs. In *Anvar P.V. v. P.K. Basheer*, it was established that electronic evidence must be certified according to relevant statutory provisions in order to be admitted into court.[7]

1.(7) Privacy, Data Use and Constitutional Safeguards

Moreover, AI relies heavily on data, a lot of which consists of personal information. Without proper mechanisms in place, there would be a breach of the individual's right to privacy. The Supreme Court in *K.S. Puttaswamy v. Union of India* held that the right to privacy was fundamental to a person's life and liberty. Any act by the State infringing on this right should conform to the criteria of legality, necessity and proportionality.[8]

1.(8) India's Recent Legal Reforms for the Digital and AI Era

Legal reforms have been carried out in India regarding digital technologies and AI. Three criminal laws, namely the BNS, the BSA and the BNSS, were updated in 2023. In addition to these three laws, the DPDP Act has also been introduced to bring in a new framework for data protection. These laws update the way in which documents and evidence are handled.[9]

The BNS revises the definition of offences and includes crimes that occur through technology into its framework. The BNSS provides provisions for conducting trials electronically, holding sessions by video conferencing and keeping records digitally. This law also provides for forensic investigations in offences that attract imprisonment for a period longer than normal.[10] Finally, the BSA recognises electronic and digital evidence. This law provides for an amendment of the rules on documentary evidence and electronic evidence.[11] In addition to these, DPDP Act outlines a data protection regime at the national level that will regulate the handling of personal information. It sets out provisions for consent, limitation of purposes and user rights to be implemented progressively. [10]

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[6] Christopher Rigano, Using Artificial Intelligence to Address Criminal Justice Needs, Nat'l Inst. Just. (2018), https://nij.ojp.gov/topics/articles/using-artificial-intelligence-address-criminal-justice-needs.

[7] *Anvar P.V. v. P.K. Basheer*, (2014) 10 S.C.C. 473 (India).

[8] *K.S. Puttaswamy v. Union of India*, (2017) 10 S.C.C. 1 (India).

[9] The DPDP Act, 2023 and the DPDP Rules, 2025 have commenced on a phased eighteen-month implementation cycle starting in November 2025 and ending in May 2027. The first phase is currently operational. This phase involves provisions related to essential requirements, definitions, rule-making and creation of the Data Protection Board of India. Herein organisations need to identify their personal data and implement privacy policies within their organisations. The second phase is anticipated in November 2026. During this phase, organisations are required to implement processes related to consent management, user notice and mechanisms for handling complaints. The last and third phases are anticipated in May 2027. From this date onwards, compliance becomes mandatory. It will involve obligations related to legal processing, data protection of children, data retention requirements, breach notifications within about seventy-two hours and imposition of fines.

[10] Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, s. 176(3), India Code. The *BNSS* mandates forensic investigation for crimes punishable by seven years or more imprisonment. A forensic expert must visit the crime scene to collect evidence.

[11] Bharatiya Sakshya Adhiniyam, No. 47 of 2023, s. 2(1)(d), India Code.

1.(9) Emergence of AI-Specific Regulation and the Global Context

In addition to this, India is also taking steps towards regulating AI with the introduction of the AI Bill, 2025. Although the Bill is still under drafting, it signifies that regulation on AI is emerging as a new area of law and is not just an offshoot of technology law anymore. Other nations have also been working on setting up regulations related to AI; however, their approaches differ from each other. While the EU bases its policy on the risk-based classification principle and takes data privacy into account, the US regulates the use of AI through sector-based legislation implemented by several organisations. In India, however, a unique AI policy was established.

Hence, this paper focuses on the dual role of AI in relation to crime and investigation, the ethical privacy implications and legal reforms in India to tackle problems posed by AI. The study also places India's response in the context of international laws regarding AI, crime and digital investigations.

2. AI, Crime, and Criminal Investigation:

In addition to influencing technology, AI has affected crime and its detection as well. While earlier crimes had to involve physical effort and the presence of the individual committing the offence, the use of advanced technologies has made it possible to carry out crimes without being physically present or making an effort.

2. (1) AI and the Changing Nature of Crime

AI-driven cybercrime is committed by individuals, but AI is responsible for making such crimes happen more quickly, be more extensive in nature and be more sophisticated. Some examples of these crimes include automated frauds in which AI uses personal information to send convincing fake messages/phishing scams; deepfakes in which fake voice or video recordings are used to impersonate and extort money; and malware in which AI is used to make the software that adapts to new security systems. These advancements have made cyber-crime more sophisticated compared to earlier times.

2. (2) Role of AI in Investigation and Digital Forensics

Since the application of AI has improved cyber-crimes, AI is also being used by law enforcement agencies to deal with large volumes of data available digitally such as texts, logs, device information and transactions. This assists them in filtering data, detecting suspicious behaviour, tracing links between suspect devices and identifying crucial data.

2. (3) Legal, Ethical and Privacy Concerns in AI-Assisted Investigation

While the application of AI technology helps in addressing the complexities of cybercrime, there are certain ethical and legal challenges that arise as a result. There should be adequate knowledge about the operations of AI technology in producing results since it may hinder the right to a fair trial due to opacity. The use of AI technology can produce any kind of bias based on the information provided to it. In addition to analysing evidence used in court, judges will also be required to assess the credibility of evidence produced using AI technology. It is critical that proper documentation is made in the collection of data as well as during the use of AI technologies. There is also the question of privacy with regard to the huge amount of data used.[12]

2. (4) Legal Reforms in India and the International Perspective:

To address the above challenges, India has chosen to introduce new legislation to ensure AI assistance in investigative cases. Criminal laws such as BNS, BSA and BNSS are some of the recent legislations that allow the use of electronic information and video in the course of an investigation without compromising the integrity of the evidence presented. DPDP Act deals with how personal data collected for the purposes of using AI technology in criminal investigation is handled.[13] The AI Bill, 2025 emphasises the importance of transparency, audits and bias tests in criminal investigations involving AI technology. At the international level, the European Union adopts stringent controls through principles of necessity and proportionality, whereas the United States applies constitutional and expert guidance for using AI technology. India, on its part, follows an equilibrium policy on the use of AI in investigations through legal and procedural reforms. To put it simply, AI alters both the commission and investigation of crimes, as well as the evaluation of evidence. In other words, the law needs to adapt to this new reality in several ways, namely by updating the classification of offences, improving methods of investigation and safeguarding personal freedoms and equal justice for all.

3. Data Governance for AI Under the Digital Personal Data Protection Act, 2023:

AI algorithms largely depend on the availability of data to detect trends and make predictions. Without data on individuals' behaviour, transactions, and actions, AI will not work well. Hence, there needs to be laws relating to data protection in order to ensure proper regulation of AI. The DPDP Act in India pertains to online personal data as well as digitised personal data.

3.(1) Consent, Purpose Limitation and Individual Rights

According to the DPDP Act, the use of data requires consent. Consent should be freely and clearly given, with full knowledge of any uses involving the processing of personal data for training and profiling using AI mechanisms. There are a few cases where consent is not required, such as cases related to state actions, statutory obligations, medical emergencies or public interest.[14] Purpose limitations and data minimisation are among the guidelines of the law. The first rule states that data used for a certain purpose should not be used for other purposes without new consents[15] and that minimisation is encouraged. It means that only the

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[12] *Puttaswamy*, (2017) 10 S.C.C. 1.

[13] Digital Personal Data Protection Act, No. 22 of 2023, India Code.

[14] *Puttaswamy*, (2017) 10 S.C.C. 1. However, even in these cases, the processing must remain proportionate and purpose linked. This connects directly with constitutional privacy standards laid down by the Supreme Court.

[15] Data can be used only for the reason for which it was collected. This raises several considerations regarding AI applications. If the purpose for collecting the data is not aligned with the new purpose (AI), then the data cannot automatically be used to train AI models without obtaining additional consent. In this way, the secondary use of personal data cannot be unlimited and without the individual's consent.

necessary data is to be collected and in an anonymised form.[16] In addition, individuals have the right to know what information is stored about them and can request that the data be deleted.[17] Collectively, these principles help ensure ethical use of AI and also prevent the excessive collection of personal data.

3.(2) Duties of Data Fiduciaries and Governance Mechanisms

Under the DPDP Act, there are responsibilities imposed on data fiduciaries. Data fiduciaries are persons who determine the purpose and means of processing any personal data. The responsibilities include using appropriate security safeguards while processing any data in an AI system and conducting audits and risk assessments by significant data fiduciaries. Responsibilities are phased out in order to give enough time for compliance. Non-compliance will attract hefty fines as per the provisions of the DPDP Act. Such measures will help in ensuring stringent data protection standards for any AI systems and platforms.

3.(3) AI-Specific Concerns and Comparative International Context

In addition to these obligations of the data fiduciaries, AI gives rise to two more concerns: first, automated decisions, which could be made without any human interference; secondly, cross-border data processing. In contrast to the General Data Protection Regulation[18], the DPDP Act does not provide adequate provisions for ensuring full automation decision review. In addition, while the DPDP Act allows cross-border transfers of data except into the restricted jurisdictions, it retains the requirements of fairness, accuracy and purposes for such uses of personal data. Lastly, when it comes to the government's use of AI technologies, it should comply with the provisions of K. S. *Puttaswamy v. Union of India* regarding privacy laws.

4. AI and Substantive Criminal Liability Under the Bharatiya Nyaya Sanhita, 2023:

4.(1) Recognition of Technology and AI in Offence Definitions

In place of the Indian Penal Code, 1860, the BNS has been enacted. The BNS forms the core of the new criminal law regime in India by updating the definitions of different criminal offences and bringing in terms related to technological advancements. Even though there is no specific provision addressing crime in the context of AI, the general provisions are sufficiently flexible to accommodate any new crimes that may arise. On the other hand, this also presents problems since criminal law is built upon the idea that there should be a human element to the crime, where the *actus reus* and *mens rea* must occur for the crime to have taken place. However, with AI becoming increasingly prevalent, there may be instances wherein the criminal activity occurs without any human intervention, which raises issues regarding how intent and culpability are established. For instance, the use of AI can lead to the creation of

[16] This brings the need for AI algorithms that are not resource-intensive and more efficient.

[17] They should be entitled to information on their data, seek correction and erase it once its objective has been fulfilled.

[18] General Data Protection Regulation gives an explicit right against decisions based solely on automated processing and the possibility to review such decisions by a person.

phishing emails or even deepfakes, making it difficult to determine the intentions behind such acts.

The next crucial change in the new system is the acceptance of digital documents and digital evidence as proof for crimes.[19] With both the BNS and BSA treated as a single unit, electronic and digital data are formally recognised as evidence in criminal proceedings. Such situations become even more important, especially where there are any offences committed in connection with the use of artificial intelligence technology, which is often recorded digitally using a variety of methods, such as forged multimedia material, fraud or voice cloning.

Moreover, any deceitful acts performed through technology may also be prosecuted as part of conventional crimes such as cheating, forgery, impersonation and fraud if there is evidence of fraudulent intent and consequences in terms of gains and losses. Any AI-based impersonation, voice cloning and synthetic identity generation will be considered under such crimes depending on the intention behind the act and its consequences. In addition, the BNS uses consistent language by ensuring that the definitions match those of the Information Technology Act, 2000 and the BNSS to prevent misunderstandings in cases of AI-enabled behaviour.[20]

4.(2) Attribution of Liability in AI-Driven Crimes:

AI-related crimes usually involve various participants such as software creators, implementers, disseminators and end-users.[21] The BNS deals with such cases with the help of already-existing concepts of abetment, conspiracy and common intention, but it also requires establishing knowledge and intention on the part of the accused. For example, a person who knowingly creates or uses the AI system to achieve illegal ends can be accused of abetment. In cases of AI systems having both legitimate and criminal applications, the determination of guilt will depend on the specific circumstances, as well as the intentions of each person involved. The courts have always held that the adoption of technological means does not change the fundamental tenets of criminal law, which implies that any AI-induced fraud would be considered equal to other forms of deceit, irrespective of whether it is done by humans or machines.

In addition, if the criminal conduct is related to AI and affects public order and national security, it may be tried under the general law despite the lack of specific provisions for AI-related crimes. However, in cases where an unexpected negative consequence results from autonomous systems, courts will consider elements like foreseeability, negligence and the standard of care, using concepts akin to those found in negligence and product liability law. Likewise, the punishment will take into consideration the degree and magnitude of the consequences resulting from the AI-based offences, especially if the crime causes extensive harm to many individuals through automation.

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[19] Bharatiya Sakshya Adhiniyam, S. 2(8), India Code.
[20] *Id.* s. 2(39) (technology term alignment clause).
[21] A developer may build the tool, a distributor may market it, and a user may deploy it for crime.

4.(3) Integration with Evidence, Procedure and Sentencing

Admissible evidence is necessary to support the prosecution of crimes associated with AI. There should be sufficient admissible evidence to secure a successful conviction in an AI-related crime, which is why the BNS works in conjunction with the BNSS and BSA to ensure that evidence collection procedures adhere to all required protocols. The validation of digital evidence contributes significantly to the implementation of laws in cases where AI technology was employed to commit criminal offences. Conversely, it is also critical to note that traditional standards like authentication, integrity and accountability continue to apply to the digital evidence used in prosecutions.

In a larger perspective, it seems that the Indian policymakers are leaning toward adopting more focused approaches on the accountability of AI, as indicated by legislative bills such as the AI Bill, 2025, that focus on aspects like audit trails, explanations and categorisation of risks of high-risk AI systems. These would likely facilitate a process of determining liability under the current legal framework if they were enacted. In summary, the BNS does not regard AI as an independent legal entity, but rather maintains the traditional approach of attributing liability to people and organisations, while modifying the offence classifications and burden of proof requirements to accommodate AI-related behaviours.

5. Technology-Enabled Criminal Procedure Under the Bharatiya Nagarik Suraksha Sanhita, 2023:

The BNSS repeals the Code of Criminal Procedure, 1973, and provides for a new procedural system equipped to meet the demands posed by the use of technology in investigations. The law appreciates that in today’s age, crimes are committed using technological devices such as computers and cell phones and other forms of crime are conducted online and therefore aim at bringing about an update in the investigative and trial process. Even though the BNSS aims at fast-tracking the process of investigating a case and making use of technology in collecting evidence, the law still ensures that the rights to life and personal liberty, as provided for in the Constitution of India, are not compromised by technology.

5. (1) Electronic Mode of Inquiry, Trial and Proceedings

According to the BNSS, the proceedings may be conducted electronically, for example, via video- In fact, the BNSS permits the use of electronic means for inquiries, trials and other proceedings, which includes the use of video-conferencing facilities and the electronic submission of documentation. This approach facilitates greater efficiency and effectiveness in situations where physical presence may pose a challenge. It becomes very significant when the case is a technology-based one and experts in digital forensics or AI can offer online testimony while the court can review any electronic documents or evidence from digital media, which is very relevant in the case of cybercrimes involving international borders. On the other hand, such processes should also be fair enough to ensure participation of the accused in the process and transparency of the entire process, which is in accordance with the rights of equality and individual liberty provided in Articles 14 and 21 of the Indian Constitution.

5. (2) Mandatory Forensic Investigation in Serious Offences

In addition to the importance of technology, BNSS has also taken steps by making forensic investigation a necessity in cases involving imprisonment of up to seven years, which involves the forensic team physically visiting the scene of the crime and systematically collecting evidence.[22] Thus, the emphasis is less on oral evidence and more on evidence collected through scientific methods and AI-enabled processes that can analyse biometric data, documents, pattern analysis, and videos. In addition, the law stresses the importance of maintaining proper documentation from the time of forensic investigations and the manner in which evidence is collected, to the crime scene and samples analysed to prove its legality.

5. (3) Digital Record-Keeping and Procedural Documentation

It also takes into account the use of computerised recording of evidence at different stages of criminal proceedings, enabling the recording of statements, files, and documents to facilitate monitoring and verification. It is possible to use such technologies through simple forms of AI that help to manage data and identify delays and other issues in the process, but decisions will still be made by human agencies. This is further reinforced by the BSA, which regulates the admissibility and proving of electronic evidence, to ensure that both the laws work in tandem to create a proper mechanism.

5. (4) Search, Seizure and Handling of Electronic Devices

Further, the BNSS allows for the search, seizure and production of electronic devices such as mobile phones, laptops, computer servers and storage media in investigating the case, particularly in instances where the crime is committed utilising AI-technology such as scams, identity theft, ransomware attacks and fake news or deepfake videos. These electronic devices may have important evidence associated with communications, financial transactions, locations and even the recovery of deleted files that can be forensically analysed using sophisticated techniques, some of which are based on AI. Nevertheless, this should also be done judiciously, since this power would affect the fundamental right of privacy provided under Article 21 of the Constitution of India.

5. (5) Privacy and Constitutional Safeguards in Digital Investigation

Nonetheless, there is no compromise on constitutional checks in the modernisation of processes in the BNSS and technology employed in the process should adhere to constitutional requirements. For example, Article 21 of the Constitution provides for life and personal liberty that includes privacy, while Article 20(3) prohibits self-incrimination and Article 14 provides for non-arbitrariness in state action. When it comes to the application of AI in processes like facial recognition, predictive policing and behavioural analysis, these constitutional rights assume greater importance. While automated systems can produce alerts and risk factors, these cannot serve as sole evidence. It still requires human intervention and judicial scrutiny. Privacy safeguards discussed in Section 2.3 apply equally to digital procedure under the BNSS.[23]

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[22] BNSS, S.176(3).
[23] *Puttaswamy*, (2017) 10 S.C.C. 1.

5. (6) Procedural Modernisation and Accountability

However, with BNSS, there is a more efficient process of handling criminal cases through the utilisation of electronic summons, electronic case management, forensic orders and documents. However, efficiency must not compromise justice and legality, as even with BNSS, the court ensures the process is legal. Artificial intelligence technology utilised in procedural systems requires regulation, auditing and documentation to ensure adherence to the constitutional rule of law and AI regulations in India.

6. AI-Generated and Digital Evidence Under the Bharatiya Sakshya Adhiniyam, 2023:

In this context, the BSA can be viewed as a modernised form of the Indian Evidence Act, 1872, since it amends the law of evidence in the cyber domain. The act is very important when dealing with cases where AI technologies are involved. Crimes are nowadays carried out using the cyber environment rather than the real world, and AI technologies create evidence in the form of pattern analysis and classifications

6.(1) Electronic Records as Documentary Evidence

One of the major components that has been included in BSA is that of increased flexibility with respect to documentation. The idea of documentation is not limited to traditional paper documentation. There has been an explicit mention of electronic and digital documentation as well. This includes email exchanges, server logs, database information, computation devices and anything that can be digitally represented. This is significant considering that many AI processes rely exclusively on digital inputs/outputs.

6.(2) Admissibility and Certification of AI-Processed Evidence

However, the law relating to the admissibility of e-evidence in India continues to be interpreted through judicial pronouncements made by the Indian Supreme Court despite the introduction of the law. For example, in the case of *Anvar P V v. P K Basheer*, it has been held that a certification of the electronic records is necessary for their admissibility in evidence. It is pertinent to state that such a certificate should authenticate the method by which the electronic records have been made or prepared.[24] In another case of *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*, it has been reiterated that certification of electronic evidence is necessary except when an original instrument is tendered in Court. The AI output is basically the outcome of processed data and not the original instrument.[25] Thus, the issue of certification and technical basis is of utmost importance in AI.

6.(3) Reliability, Transparency and Explainability Requirements

AI-generated evidence is faced with challenges of reliability, transparency and explainability. Reliability denotes the credibility and accuracy of the output generated; transparency refers to the accountability and ability to trace back the source of the evidence to its origin; and explainability means that there is an explanation of the way in which the output was reached. However, the judicial system still prefers to adopt a cautious approach towards using systems

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[24] *Id.*

[25] *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*, (2020) 7 S.C.C. 1 (India).

that are not transparent enough so that the logic behind the decision can be easily presented. In the case of an algorithmic output like a match or an alert, there should always be room for the accused to challenge the finding. As far as the use of technology for supporting evidence is concerned, courts have been more inclined towards it, but at the same time, they ensure the integrity of the evidence. This has been demonstrated in the case of *Tomaso Bruno v. State of Uttar Pradesh* wherein the Supreme Court laid emphasis on the use of technology such as CCTVs in modern-day investigation without affecting authenticity. This approach is in tune with the use of AI in analysis.[26]

6.(4) Expert Evidence and Chain of Custody

It is also necessary to rely on the testimony of experts in matters concerning AI. In situations where the AI system is utilised for comparative, predictive or classification purposes, the experts must account for how the system works including training processes, testing mechanisms, error rates and any other limitations.[27] Further, stringent chain of custody standards are imposed for evidence related to AI, since digital information is highly susceptible to tampering and AI decisions rely on correct data. Thus, there needs to be an evident explanation of how the data was collected, stored, analysed and processed.

6.(5) Synthetic Media, Platform Records and Production Powers

Concerns also arise regarding the use of evidence related to synthetic media, including deepfake audio/video which might appear to be real but in actuality are faked. In such cases, the court would have to rely upon forensic and metadata analysis to verify the genuineness and the party introducing such evidence would have to bear the burden of proof. The BSA further allows for the production and discovery of electronic records by means of summonses and disclosures, thereby giving the parties access to digital media information held in any platform, service provider or device. It becomes even more important for purposes of investigations related to the use of AI, where the records of the platform, cloud storage or automated systems logs are necessary. This aspect, too, can be compared to the approach followed in the USA and Europe regarding electronic evidence.

6.(6) Constitutional and Privacy Safeguards

Constitutional and privacy protections continue to play an important role in the collection and use of digital evidence, despite advancements in AI technology for big data analysis. Digital evidence must continue to be acquired through proper means and proportionately to reflect the position of the Indian Supreme Court in the case of *K S Puttaswamy v. Union of India* that privacy is a constitutional right.[28] In this regard, the BSA brings about changes to evidence law in the era of AI technology through the acceptance of electronic records as admissible evidence and requiring certification. It continues to demand authenticity, traceability and adequate expert explanations in relation to the acquired electronic records.

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[26] *Tomaso Bruno v. State of Uttar Pradesh*, (2015) 7 S.C.C. 178 (India).
[27] Bharatiya Sakshya Adhiniyam, No. 47 of 2023, India Code, provisions on expert opinion.
[28] *Puttaswamy*, (2017) 10 S.C.C. 1.

7. Operational AI Data Use and Phased Compliance Under the DPDP Act: EU and US Comparison:

AI governance cannot solely be analysed from the perspective of legal texts because the real-world implementation of data protection obligations is determined by how data obligations work during the training, testing, deployment and continuous upgrading of AI systems. While the previous sections elaborated upon the data protection regime in India, this section examines the practicalities of using data in AI, such as multi-staged enforcement, challenges to compliance and contrasts with AI governance regimes in Europe and America. AI functions *via* an iterative process of data, meaning that there is an on-going need to access data, evaluate it and then refine it.

7.(1) AI Data Lifecycle and Operational Compliance

In practice, the journey of data from one point to another within AI applications involves many processes, for example, acquisition, cleansing, tagging, training, validation, deployment and post-deployment assessment. Each phase presents different legal and regulatory risks that must be adequately addressed. During the acquisition process, it is necessary to consider the source's legality and provenance. In the training process, the issue of relevancy and proportionality comes into play, while during deployment, considerations of fairness and impact must be considered where individual rights may be affected. When implementing AI-based solutions for activities like fraud detection, identity validation and behavioural analysis, the system needs to undergo retraining using new data.

7.(2) Phased Implementation and Compliance Sequencing in India

The data protection regime in India employs an approach based on phased implementation using notifications by the government, as opposed to the immediate implementation of all obligations, which influences the way developers of AI, AI platforms and public organisations design their compliance structures. This allows enough time for systems restructuring, re-evaluation of vendors, modification of contracts and putting in place measures meant to protect against risks. In the context of AI environments, this phased implementation strategy grants some room for adjustment, yet introduces a sense of timing uncertainty, necessitating prior development of the compliance structure

7.(3) AI Deployment in Public Sector and Investigation Contexts

Governance needs to be enhanced where there is use of AI in governmental systems because the state's information systems operate on a large scale and can impact freedom, advantages or liability. AI tools applied in fraud detection, risk assessment, identification and investigation serve as advisory tools rather than actual decision-making tools. Hence, the public AI system involves controls such as authorisation layers, logging of access and queries, as well as review, and the results generated by the system need human validation before any legal action takes place. The review aspect is very crucial because it provides accountability and means that systems should be auditable and understandable.

7.(4) Cross-Border AI Infrastructure and Data Mobility

AI technology relies on distributed systems located in various countries, wherein the data is collected, processed and utilised in cloud computing infrastructure. In India, data is permitted to flow outside its jurisdiction under certain conditions, rather than enforcing absolute data localisation. The objective here is to allow the country to participate in international developments of AI technology while ensuring the necessary regulatory control over sensitive data. Therefore, in addition to general protection measures such as access management, encryption, data transfer tracking and accountability, businesses require solutions that will ensure data flow tracing and usage monitoring. The impact of AI applications and software trained abroad on Indian citizens may result in enforcement difficulties.

7.(5) India's Emerging Layered AI Governance Approach

India's AI governance emerges through layers rather than a single code. The data protection legislation imposes foundational requirements on the use of personal data, while technology-assisted crimes are managed through criminal legislation. Evidence laws determine the validity of any AI-generated evidence, while proposed AI regulations are expected to introduce further elements of transparency, audit and risk management. Compliance in such a framework involves an integration of data governance, procedural legality, evidential requirements and sector-specific regulation. This approach prioritises operational and procedural controls over simply statutory language. Unlike the EU risk-classified approach and the US sector-based strategy, India adopts a layer-by-layer method that would prove its efficacy depending on various factors.

8. Proposed AI Bill, 2025 and the Framework for Responsible AI in India:

There have been significant changes in the Indian criminal law, procedures, evidence and data protection in recent times through the process of legislative reform. Nevertheless, the issue of governance surrounding AI is not limited only to the digitisation of records and the processing of personal data. The predictions, risk scoring, classification and other outcomes generated by AI may influence individuals in terms of their freedom, financial standing, access to services and reputation. Such implications have prompted policymakers to deliberate upon a bill, entitled the AI Bill, 2025, which focuses on AI regulation in terms of its actual usage and functioning in the real world.

8.(1) Regulatory Objectives and Scope

In the proposed Bill, the intent would be to establish regulatory standards directly with respect to AI systems instead of just indirect standards through data and cyber legislation. The intention behind the draft is to regulate the use of AI so that it may be safe, subject to audit and accountability, when its results could have any impact on rights or legal interests. The applications that are currently under discussion include the use of AI for policing, biometrics, forensic science, credit assessment, recruitment, health services and other similar platform. This is why the approach concentrates on controlling the implications of AI applications instead of outright prohibition of AI.

8.(2) Risk Classification of AI Systems

One important aspect of the suggested framework is that of risk categorisation, in which AI technologies would be classified according to their potential impacts instead of according to their technological structures. Less-risky applications, like those designed for assisting in various activities, would only need to comply with a few regulatory requirements, whereas other types of technologies, such as those used for identifying, predicting and enforcing decisions, and would belong to high-risk categories. The staged approach facilitates proportionate regulation.

8.(3) Transparency and Explainability Obligations

It is also observed that high-impact AI systems tend to have complicated algorithms, which may make them difficult to comprehend, and hence such issues become harder to hold accountable for any decisions taken by the same. As such, the suggested framework demands transparency in the usage of high-impact AI, wherein it is imperative to explain the intent behind the algorithm, its inputs and outputs in a comprehensible way, but without revealing any proprietary software coding of the AI algorithm. Such explainable processes will aid in identifying any errors and resolving disputes.

8.(4) Allocation of Responsibility among AI Actors

In the proposed Bill, there is a cascading level of responsibility where the AI system itself is not seen as a legal entity but rather where the liability rests on the human and organisational entities associated with the use and development of such a system. The designers could be liable for designing faulty AI systems, improper training and ignoring risk warnings, while the deployers can be held liable for deploying AI systems under inappropriate conditions or without safeguards. The operators can be liable for abuse or for exceeding the approved parameters. Such a tiered liability structure will help avoid any loopholes in the attribution of liability.

8.(5) Bias Control and System Auditing

Bias is one of the essential considerations in governance when it comes to machine learning algorithms because the system is trained on historical data that could be biased in some way. Thus, the framework should include bias assessment for AI systems with high risks by checking the dataset's quality, conducting performance evaluations and performing independent audits. Keeping records of the system's performance is important for future reviews. Hence, bias mitigation is regarded as a matter of governance rather than preference.

8.(6) Human Oversight and Decision Review

The proposed system of AI governance places emphasis on the role of human oversight, as humans are supposed to use AI tools to complement their decision-making abilities where issues like rights, liabilities and freedoms are concerned. There are likely to be cases where any sensitive application requires some degree of human intervention before a decision can be made with layers of approval, exceptions and overrides. This would ensure that the use of AI is aligned with the tenets of natural justice.

8.(7) Documentation and Compliance Requirements

There will be a need for proper documentation whenever AI is deployed at high risk. This documentation should include information on the system itself, risk analysis, validation information and performance information. Documentation ensures that regulatory authorities can oversee the process and makes the process more legally defensible. Documentation also allows for continuous improvement of the internal processes involved.

8.(8) Position within India's Broader AI Governance Structure

The draft AI Bill brings in an element of systems-specific governance into the wider scheme of technology regulation in India. The data protection regime deals with personal data processing, while the criminal law and procedure regime regulates offences that employ technology and evidence law regulates the admissibility of the output generated through automation. The AI framework will govern the design and use risks associated with the development, deployment and operation of AI systems. This is an indication of the evolving nature of AI governance in India from piecemeal regulation to one that focuses on regulating AI through a single piece of legislation.

9. Comparative Legal Approaches to AI Regulation: European Union and the United States:

Various countries have implemented different approaches to regulate AI. A comparative study between the EU and the US reveals two different legal frameworks for regulating AI. While the European Union has opted for a consolidated legislative approach towards regulating AI, the US has opted for a decentralised approach based on industry regulators. Comparison between the two different frameworks provides insights into the design of regulatory options.

9.(1) European Union: Comprehensive Statutory AI Regulation

AI Act provides a full set of legal regulations governing the use of AI technology, depending on its risks and consequences to safety and fundamental rights, using a tiered risk model that imposes obligations dependent on uses and impacts. Some AI techniques are banned because they are contrary to fundamental human rights; however, others are permitted provided that certain obligations are met, such as risk assessment before deploying an AI system, quality management of datasets, human involvement, and regular monitoring. It acts in concert with other legislation like the General Data Protection Regulation (GDPR), which already offers protections against automated decision-making and profiling by providing for specific occasions to exercise the right to human review.

9.(2) United States: Sectoral and Agency-Driven Oversight

There is currently no national law governing AI usage in the US. The governance of AI in the country comes through sector regulation, executive orders, enforcement measures and court decisions, but there is no national statute dealing specifically with AI. Regulatory authorities deal with the problems associated with AI based on their expertise within particular sectors, with agencies like the FTC using the principle of deceptive or unfair treatment to punish cases involving harm caused by AI technologies. Financial and healthcare regulatory bodies are responsible for overseeing the use of algorithms that facilitate lending and insurance as well as

AI tools employed in clinical situations. Executive orders such as the one on Safe, Secure and Trustworthy AI promote risk assessments and testing of AI systems. Courts can play a role by reviewing algorithmic tools that have been used in law enforcement, lending and sentencing.

9.(3) Structural Differences between the EU and US Models

However, there are some key differences between the European Union's and the United States' approaches regarding regulatory frameworks, legal bases and enforcement practices. In the EU approach, which revolves around the AI Act, there are clear-cut rules, which are statutory in nature and unified throughout the union countries, with regard to categorisation, responsibilities and sanctions of AI. In contrast, the US approach is decentralised and regulator-driven, where government bodies such as the Federal Trade Commission use their existing authority to enforce AI regulation through various sectors. This means that the obligations are derived from enforcement, guidance and judicial opinions, rather than from a coherent statute-based system.

9.(4) Lessons for Emerging AI Frameworks

In a comparative context, it is evident that good governance of AI can be realised through two different mechanisms. One can go for an all-embracing law that covers AI governance comprehensively. Alternatively, one can opt for a sector-based system where various sectors have their own laws regulating AI within their operations. In addition, it is now evident from both systems that AI is increasingly governed by principles of rights, safety of consumers and due process. These are fundamental principles of good governance, which were previously not associated with the governance of technology. Whether one opts for an all-embracing law or a sector-based mechanism will depend on the institution's ability. Generally, the experience of comparing different jurisdictions shows that law, not self-regulation, regulates AI.

10. Emerging Governance Challenges and the future of AI regulation in India:

AI technology is developing much faster than any other regulatory system. The use of AI in sectors like law enforcement, banking, medicine, human resources management and service delivery usually precedes comprehensive legislation, thus creating a disparity between the two.

10.(1) AI, Surveillance and Civil Liberties

However, despite the benefits of AI technology, there are civil liberties issues that must be considered. Accordingly, measures such as proportionality, judicial oversight and the need for a warrant will continue to play an important role in the utilisation of AI technology.

10.(2) Cross-Border AI Governance and Jurisdictional Complexity

The AI services could be offered through a cloud platform and operate across several nations, thereby creating complications regarding jurisdiction and regulation. The cross-border transfer of information poses a challenge regarding where jurisdiction and the implementation process would fall. This could, therefore, lead to the adoption of rules to help regulate these services.

10.(3) Institutional and Professional Responsibility in AI Use

Those using AI technology, including lawyers, judges, investigators, and administrators, are required to take responsibility for verifying and supervising its use. In addition, professionals are also required not to place blind faith in the outcomes generated by the technology but rather to employ critical judgment in evaluating those results. Furthermore, increasing proficiency with technology is becoming a necessity for professionals.

10.(4) Long-Term Regulatory Trajectory for AI in India

AI governance in India in the coming years will follow a multi-tier approach. This includes statutory regulation involving criminal law, the DPDP Act and the emerging AI accountability regime. Interpretation of the Constitution will help determine the standards under Articles 14, 19, and 21, while the processes of regulation and auditing will provide oversight through specific agencies. The judiciary will ensure the enforcement of principles related to justice, equity, and good governance, based on court precedents. However, it is crucial to understand that although AI can help make decisions, human beings must be responsible for those decisions.

11. Conclusion:

AI has been widely employed in governance, business, and criminal investigations for monitoring, detecting fraud, digital forensics, and prediction, but it is also abused to create deepfakes, commit fraud, and steal one's identity. The Indian response to cybercrime threats is evident in legislation such as the BNS, BNSS, and BSA, which help modernise the criminal justice system by incorporating provisions for electronic evidence and documentation while maintaining the principles of fairness and due process as enshrined in Articles 14 and 21. The DPDP Act further enhances this framework with respect to consent, purpose limitation, and accountability in data utilisation.

Policy debates surrounding the possibility of an AI law are centred on issues of transparency, audit obligations, bias reduction, and responsibilities for AI applications that have significant consequences in areas such as law enforcement, finance, employment, health care, and government services. While there are divergent pathways to regulation in the EU and US approaches to comparative policy-making, India is moving towards a more flexible hybrid approach that integrates statutory changes, data privacy, and AI regulation. In this regard, the importance of constitutional values cannot be overlooked, with an emphasis on explainability, oversight, and human oversight of AI technologies that affect fundamental rights and freedoms.

AI-Driven Green Technology: Legal Pathways to a Sustainable Future

Pankhi Devi[1]

Abstract:
This article examines how artificial intelligence (AI), green technology, and sustainability law align, with reference to the concept of Green TechPlomacy. It investigates how AI can promote co-creative digital transformation in climate diplomacy, fostering international cooperation and sustainable development. The author argues that AI and digital technologies can enhance climate governance, stakeholder engagement, and informed decision-making. Nevertheless, the article highlights the importance of ethical considerations, namely, transparency, accountability, and justice, to ensure that AI systems are sustainable and generate minimal negative environmental impact. The article discusses current legislation and frameworks, such as the EU AI Act and the Digital and Green Index, and proposes a sustainable AI adoption framework that integrates environmental and community interests. Finally, it advocates for AI-based solutions as a transformative response to the climate crisis, working toward a more sustainable and equitable future.

Keywords: Sustainability Law, Green TechPlomacy, Climate Diplomacy, Stakeholder Engagement, International Cooperation

Introduction:

The current climate change and environmental degradation demand an advanced approach leveraging Artificial Intelligence (AI) and Green Technology. Green Technology focuses on establishing long-term sustainable solutions, including energy-efficient systems, waste management, and pollution reduction. AI is one of the most powerful tools in this domain, enabling environmental monitoring and control through machine learning for predictive modelling and decision-making, satellite imagery for real-time environmental data, data analytics to identify trends in environmental datasets, and automation to optimise processes and reduce waste.

The combination of AI and Green Technology is expected to make decision-making more effective, balance sustainable development, and produce innovation in areas such as crop yield optimisation, waste minimisation, and pollution monitoring. Green technology also plays a significant role in mitigating the adverse impacts of human activity on the environment, including renewable energy sources (solar and wind), energy-efficient buildings, water purification systems, and recycling infrastructure.

Artificial Intelligence enhances these efforts with four key capabilities: (1) monitoring environmental parameters and issuing early warnings for anomalies; (2) analysing data to identify trends and patterns; (3) optimising resource utilisation and reducing wastage; and (4)

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enabling prediction and prevention of environmental hazards. Through AI-driven systems, weather forecasts become more accurate and reliable, disaster prediction improves, emergency response strategies become more efficient, and precautionary interventions can neutralise the effects of natural disasters.

Beyond technical applications, AI can support sustainable development by upholding ethical standards, protecting data privacy, advancing inclusive policies, and enabling policymakers to devise effective environmental regulations that uphold human rights, social justice, and international cooperation.

The present study is guided by three central research questions that collectively examine the legal, technological, and governance dimensions of artificial intelligence, green technology, and sustainability. First, the article investigates how green technology can be scaled up to achieve significant reductions in greenhouse gas emissions and mitigate climate change. Addressing this requires a holistic, multisectoral approach that expands access to renewable energy sources such as solar, wind, and hydropower; improves energy efficiency through better building insulation and clean appliances; accelerates the adoption of electric vehicles; and develops resilient, sustainable infrastructure. Beyond technological deployment, new financing mechanisms, sustained investment in research and development, and meaningful international collaboration are indispensable. Estimates suggest that approximately USD 3.5 trillion in annual investment in climate-addressing technologies is necessary to produce a meaningful and lasting impact on global emission trajectories.

Second, the article examines how integrating the ecological, social, economic, and legal dimensions of sustainability can help achieve the United Nations Sustainable Development Goals (SDGs). A siloed approach to any one dimension is insufficient; rather, a balanced and interdependent framework is essential for developing informed public policies, promoting social justice and equity, fostering economic growth with minimal environmental degradation, and consolidating legal accountability across jurisdictions. Fiscal policy innovation, sustainable infrastructure planning, active citizen participation, and robust legal frameworks together form the architecture through which the SDGs can be meaningfully realised.

Third, the article explores the role of Artificial Intelligence in promoting sustainable development and reducing waste. AI offers transformative capabilities in this regard, optimising waste collection routes, improving automated waste sorting, predicting waste generation rates, and identifying recyclable materials to streamline recycling operations. AI-powered applications further empower individuals and institutions to adopt sustainable habits and comply with responsible waste disposal practices. Collectively, these three research questions form the analytical foundation of this article, guiding its inquiry into the intersection of law, technology, and environmental governance.

Interconnected Pillars for Sustainable Development

Sustainability rests on three interconnected pillars: ecological, social, and economic, with legal aspects playing a crucial role in supporting all three. The ecological pillar focuses on protecting the planet; the social pillar prioritises people's well-being; and the economic pillar aims to generate prosperity and drive national development. The legal pillar, comprising government policies and regulations, provides the framework for effective governance and accountability.

Artificial Intelligence can play a vital role in monitoring and optimising all these pillars through advanced technologies. The ultimate goal is to achieve sustainable development by maximising production and consumption efficiency, while promoting the recirculation of parts and products for future use. The integration of these pillars with AI capabilities is essential for achieving the Sustainable Development Goals (SDGs) and creating a better future for generations to come.

Role of AI in Promoting Ecological Balance and Sustainability
Artificial Intelligence can significantly enhance the efficiency of transportation, buildings, energy management, and water systems. By leveraging advanced logistics and computational analysis, AI can optimize energy consumption, reduce waste, and develop predictive models to minimize material and energy usage.

Reducing energy consumption is crucial for a more sustainable society. AI can play a vital role in the transition to renewable energy by forecasting renewable energy output using deep neural networks that analyze historical and real-time data, and by monitoring and optimizing energy consumption in buildings — including heating, ventilation, and air conditioning (HVAC) systems, lighting, and other energy-intensive applications. These applications help reduce carbon emissions, improve energy efficiency, and create a more environmentally friendly and resilient energy system.

In transportation, AI enables cities to mitigate traffic congestion and optimize route planning, track and manage public transportation to prevent delays, foster business growth through AI-driven electric vehicles, and monitor vehicle emissions to promote eco-friendly transportation. AI-powered smart mobility systems create sustainable transportation models connecting urban and rural areas.

Machine Learning (ML) techniques have emerged as vital tools for addressing climate change and mitigating the environmental impact of carbon emissions. Industries can utilize computer vision for automated leak detection, enabling early intervention, implementing alarm systems to alert operators of potential anomalies, and optimizing industrial processes to minimize environmental impact.

AI and Social Balance
Artificial Intelligence plays a vital role in promoting social balance by creating safe and healthy work environments in large industries. AI systems monitor health and sanitation standards, provide better facilities and services through internet-connected machines, record and respond to employee well-being concerns including emergency medical situations, and maintain fair and unbiased work environments. AI also helps prevent discrimination by providing data protection

measures and offering guidelines for handling sensitive information and protecting human rights.

Recycling rare materials is crucial for sustainable development. AI-driven technology facilitates the recovery of valuable resources from waste materials, reducing the need for primary extraction and minimising environmental impacts. Key benefits include conserving natural resources, reducing waste and pollution, saving energy, decreasing greenhouse gas emissions, and providing economic benefits through job creation and resource efficiency.

AI and Economic Sustainability

Artificial Intelligence has transformed markets by enabling business-to-business connections, e-commerce, and global partnerships, benefiting multinational companies, universities, farms, and cooperative sectors. AI capabilities in this domain include monitoring productivity growth and linking it to social and ecological sustainability, supporting research and innovation to drive entrepreneurship, informing decision-making for infrastructure optimization and cybersecurity, and fostering sustainable development by integrating resource deployment strategies.

Furthermore, AI contributes to sustainable agriculture by monitoring resource use through predictive analytics, aiding crop yield forecasting and disease detection, and enabling farmers to implement timely interventions to minimise losses.

Legal Aspects of AI and Sustainability

The integration of AI and sustainability literature can help identify and address ecological, social, and economic issues. To effectively mitigate environmental impact, legal frameworks are essential for establishing guidelines, implementing penalties for non-compliance, promoting public safety and awareness, protecting human rights, and ensuring accountability.

Achieving holistic sustainable goals requires a balanced approach that incorporates international cooperation through conferences, webinars, seminars, and treaties; public participation in global platforms; and knowledge-sharing initiatives. This framework encourages sustainable practices, fosters a culture of accountability and responsibility, and supports the development of effective policies and regulations that promote a sustainable future for generations to come.

Greening the Future With AI: Global Innovations and Perspectives

The growing demand for AI-driven recycling methods has expanded the scope of green technology worldwide, driving innovation in sustainable practices. This shift has transformed lifestyles and technologies, with a focus on developing environmentally friendly solutions, including solar panels and wind turbines for renewable energy, electric vehicles for sustainable transportation, smart grids for efficient energy management, and smart technologies, including drones, for various applications.

Companies are now prioritizing energy efficiency, quality control, and monitoring, while reducing their carbon footprints. AMP Robotics has developed AI-powered sorting systems that improve recycling rates, while TOMRA is utilising AI-driven technology to promote sustainable practices and reduce waste. According to reports, technologies like IoT and AI can help reduce carbon emissions by 4% by 2030. Countries such as Canada, Australia, and Japan are expected to benefit from these advancements, with companies like PwC and Microsoft predicting significant carbon emission reductions by 2030, 6.1% in North America and 4.8% in East Asia.

Big tech companies like Microsoft, Google, and Amazon are driving AI innovation to improve their business and e-commerce platforms. However, to achieve sustainability, these companies must prioritise ecological balance, social balance, economic balance, and legal aspects in order to develop sustainable practices, reduce environmental impact, improve transparency and accountability through sustainability reports, and effectively communicate AI initiatives to stakeholders.

Harnessing AI For a Greener Future: Digital Tools For Sustainability

AI-driven digital tools, including data analysis, remote sensing, predictive modelling, smart satellite imagery, and drone technology, can effectively monitor and manage various environmental parameters. These include deforestation and land degradation, carbon emissions and greenhouse gases, transportation mobility and energy consumption, water systems and quality, and climate change and environmental degradation.

These tools leverage machine learning algorithms, predictive analytics, and automation to optimize the performance of green technologies. By utilizing digitally connected wireless or wired systems, they can collect and analyze vast amounts of data, provide real-time monitoring and alerts, and enable swift response to emergencies and potential risks. The integration of AI-driven digital tools with data security measures, such as malware protection and secure storage systems, ensures the privacy and integrity of collected data.

Notable applications include: (1) Precision Farming, AI-powered techniques that monitor soil health, irrigation needs, and crop growth, enabling farmers to use resources more efficiently and increase yields sustainably; and (2) Climate Prediction, AI tools that predict extreme weather conditions and natural disasters, providing valuable insights for disaster planning and mitigation.

Challenges In AI-Driven Green Tech and Sustainability:

Artificial intelligence faces numerous challenges in addressing environmental sustainability, including transitioning to renewable energy sources and mitigating deforestation. Despite its potential, AI must navigate complex issues to effectively contribute to environmental conservation and sustainable development.

Technological Challenges:

The deployment of artificial intelligence in green technology and sustainability contexts is accompanied by significant technological challenges that must be carefully acknowledged and addressed. One of the most pressing concerns is the intensive energy usage associated with training and operating advanced AI models. These processes demand substantial computational power, translating into high levels of energy consumption and considerable carbon emissions a paradox that undermines the very environmental objectives AI is intended to serve. Closely related is the challenge posed by hardware and infrastructure. The manufacturing, operation, and eventual disposal of AI hardware generate significant electronic waste and deplete finite natural resources, thereby contributing to environmental degradation across the entire lifecycle of AI systems.

Another critical limitation lies in data quality and availability. The effectiveness of any AI model is fundamentally contingent upon the quality, diversity, and comprehensiveness of the datasets on which it is trained; however, reliable and granular environmental data remains difficult to obtain, particularly in ecologically sensitive or under-resourced regions where the need for AI-driven sustainability solutions is often greatest. Furthermore, algorithmic restrictions present a structural challenge, as even the most sophisticated AI models may fail to adequately capture the complexity, non-linearity, and interdependence of real-world environmental systems, thereby producing inaccurate forecasts, flawed predictions, or misguided policy recommendations. Finally, the measurement and reporting of both the environmental impact of AI itself and the outcomes of AI-driven sustainability initiatives remain deeply problematic. The absence of standardized methodologies, consistent benchmarks, and transparent reporting frameworks makes it exceedingly difficult for organizations, regulators, and researchers to evaluate whether AI interventions are genuinely contributing to sustainability goals or merely creating new environmental burdens under a different form.

Ethical and Societal Challenges:

The ethical and societal dimensions of AI present equally formidable challenges that demand careful and proactive attention. One of the most pressing concerns is bias and fairness AI systems trained on incomplete, skewed, or historically biased datasets are likely to replicate and even amplify discriminatory outcomes, disproportionately affecting marginalized communities. Closely related is the issue of transparency and explainability; the internal logic of complex AI algorithms is often opaque, making it difficult for regulators, developers, and affected individuals to understand, challenge, or audit the decisions such systems produce. Privacy and data security represent another critical dimension, as the large volumes of personal and environmental data that AI systems rely upon create significant vulnerabilities to surveillance, misuse, and unauthorized access.

Furthermore, the automation capabilities of AI carry profound socio-economic consequences, particularly in terms of job displacement across industries a challenge that demands urgent investment in workforce reskilling, social protection mechanisms, and equitable transition policies. Finally, the long-term societal consequences of pervasive AI deployment remain insufficiently studied and understood. Risks such as uncontrolled behavioural tracking, entrenched algorithmic bias, and the gradual erosion of human agency in decision-making must be anticipated and addressed through robust regulatory frameworks before they become irreversible.

Regulatory and Governance Challenges:
The regulatory landscape surrounding artificial intelligence presents some of the most complex and pressing governance challenges of the digital age. One of the most critical concerns is the absence of comprehensive regulations — the pace at which AI technologies are advancing has consistently outstripped legislative bodies' capacity to respond, resulting in significant regulatory gaps, legal uncertainties, and inconsistent enforcement across jurisdictions. Governments and regulatory authorities are frequently left attempting to govern technologies that have already evolved beyond the frameworks designed to oversee them. Compounding this challenge is the substantial cost of compliance. As existing and emerging regulations grow more intricate and demanding, the financial and administrative burden placed upon organizations, particularly small and medium-sized enterprises becomes increasingly difficult to absorb, potentially stifling innovation and creating an uneven competitive landscape where only larger corporations possess the resources to remain fully compliant.

Furthermore, the absence of standardized metrics, benchmarks, and universally accepted best practices for the sustainable development and deployment of AI continues to undermine industry-wide accountability and coherent governance. Without a common evaluative framework, measuring the environmental, social, and ethical performance of AI systems remains inconsistent and unreliable, making it exceedingly difficult for regulators, developers, and stakeholders to assess compliance, ensure responsibility, or drive meaningful systemic change.

Addressing The Challenges:
Effectively addressing the challenges posed by AI in the context of environmental sustainability demands a comprehensive and coordinated response across technical, institutional, and regulatory domains. At the foundational level, there is an urgent need to innovate energy-efficient AI solutions developing algorithms, hardware, and infrastructure that are deliberately designed to minimize environmental impact and reduce the carbon footprint associated with AI operations. Equally critical is the establishment of robust data governance frameworks that ensure data quality, protect individual privacy, and embed ethical principles into every stage of AI development and deployment. Beyond technical fixes, meaningful progress requires fostering interdisciplinary collaboration among AI researchers, environmental scientists, policymakers, legal experts, and ethicists, as no single discipline holds all the answers to the complex challenges at this intersection.

Simultaneously, substantial investment in workforce development is essential to bridge the growing AI skills gap and equip workers with the competencies needed to thrive in an AI-driven economy. On the regulatory front, governments and international bodies must develop clear, adaptive, and enforceable guidelines governing AI development and deployment within sustainability contexts, ensuring that innovation does not outpace accountability. Finally, prioritising transparency through the advancement of explainable AI systems is paramount, as decision-making processes that are understandable and auditable are fundamental to building public trust and ensuring long-term responsible AI governance.

AI and Sustainable Futures: How Green Tech Impacts the Environment:
The energy sector is the largest contributor to greenhouse gas emissions globally. Within this sector, electricity and heat production account for 25.2% of emissions, industry and buildings for 18.5%, and transportation for 17.2%. Agriculture accounts for 19.4% of carbon dioxide emissions, with livestock production alone accounting for 7% and significantly impacting human health.

The current rate of temperature rise, approximately 0.72°C above the 1991–2020 average, threatens to exceed the Paris Agreement's 1.5°C target. According to the World Health Organisation (WHO), this trajectory will lead to approximately 25,000 additional deaths annually from 2030 to 2059 due to malaria, diarrhoea, heat exposure, and infectious diseases. Cardiovascular and non-communicable diseases are projected to be leading causes of climate-related mortality.

To reduce the environmental impact of AI supply chains, researchers are exploring strategies such as optimising energy efficiency, utilising renewable energy sources to power data centres, and developing water-efficient cooling technologies. Deploying AI models on edge devices such as smartphones and smart speakers can offer a more sustainable option, with reduced energy consumption, lower operational costs, and a significantly smaller environmental footprint compared to cloud-based systems.

Existing Legislations and Frameworks
To ensure AI development and usage support sustainability, it is crucial to investigate how AI aligns with broader sustainability initiatives and examine what frameworks exist to direct sustainable AI development. How can governments and global institutions verify that AI systems positively contribute to the Sustainable Development Goals (SDGs)?

European Union: CSRD and EU AI Act
The European Commission's Corporate Sustainability Reporting Directive (CSRD) broadens environmental and social reporting requirements, effective January 5, 2023. Non-EU entities with EU revenues exceeding EUR 150 million are required to comply with the European Sustainability Reporting Standards (ESRS) starting in 2024. Key frameworks for ESG reporting include the Global Reporting Initiative (GRI), Carbon Disclosure Project (CDP), and ESRS, which enhance transparency, accountability, and informed decision-making.

The EU AI Act is one of the essential regulations addressing sustainability in AI design, training, and use. The AI Office and Member States will provide codes of conduct and standards for evaluating and reducing the environmental impact of AI. The National Institute of Standards and Technology (NIST) has developed a framework for measuring AI sustainability, calculating the environmental impact of AI model training, and evaluating trustworthiness using parameters such as energy consumption and carbon footprint.

For GenAI specifically, open-source tools are emerging to help assess environmental impacts, considering factors such as training duration, GPU energy efficiency, data centre location, and carbon offsets.

China: National AI Standards
China's AI regulation strategy carefully balances innovation with societal concerns. National AI Standards ensure standardisation and quality, while Data Protection regulations safeguard personal and sensitive information. Ethical AI guidelines enhance fairness and transparency; sector-specific rules address industry-specific needs; cybersecurity practices protect AI systems; and Global Cooperation helps establish international practices. Testing and certification accompany a coordinated governmental oversight model that maintains adaptive regulation.

Ukraine: National AI Development Strategy
The Ukrainian Strategy on the Development of Artificial Intelligence is designed to facilitate economic growth and raise living standards through AI-driven innovation. It focuses on data protection and quality, the creation of a skilled expert workforce, and the avoidance of misuse. The strategy maintains human oversight, legal compliance, and careful management of AI risks through licensing and inspections.

NATO: Responsible AI Strategy
NATO's AI Strategy promotes the responsible use of AI in defence and security. The strategy ensures that AI technology is safe and secure, thwarts malicious use, introduces transparency and review mechanisms, and reduces unintentional bias in AI development. It targets the development of dependable AI that operates as intended, detects unintended effects, and supports human decision-making, ultimately enhancing defence capabilities while respecting human rights and democracy.

United Kingdom: National Security and Investment Act 2021
The UK's National Security and Investment Act 2021 empowers the government to block acquisitions posing a threat to national security, including those involving AI companies. The Online Safety Bill further regulates online platforms, including AI-driven ones, to protect users from illegal content, ensure children's online safety, and require risk assessments to mitigate potential harms.

UNESCO: Global Ethical Standards for AI
In November 2021, 193 countries adopted global ethical standards for artificial intelligence at the UNESCO General Conference. These standards address data protection, social impact assessment, surveillance control, and environmental protection. The aim is to ensure responsible

AI use, minimise risks, and promote transparency and privacy, ultimately guiding the development and deployment of AI in ways that benefit society.

India: National AI Strategy

India is actively regulating Artificial Intelligence through several initiatives. The National Strategy on Artificial Intelligence, developed by NITI Aayog, outlines responsible AI implementation, focusing on accessibility, data protection, privacy, and international cooperation. The National Association of Software and Service Companies (NASSCOM) has also published guidelines on implementing generative AI responsibly. The GPAI Summit New Delhi Declaration brings together member countries and aims to advance AI innovation in the best interests of humanity, with objectives including encouraging diversity in AI development, establishing governance models, and promoting safe and trustworthy AI.

India requires a regulatory model for AI that takes into account its unique demographics, economy, and society. A comprehensive approach is needed to encourage ethical AI development in healthcare, agriculture, education, environment, and industry. This framework must be competent and adaptable, ensuring that AI generates innovation while being integrated responsibly into India’s socio-economic fabric.

Conclusion:

Ethical progress in the era of AI, green technology, and sustainability law must be multifaceted, encompassing transparency, accountability, fairness, and environmental responsibility. Designing explainable and transparent AI systems, ensuring fairness and non-discrimination, and establishing clear mechanisms for responsibility and accountability are the primary considerations. Privacy and data protection, environmental impact assessment, fostering citizen involvement, and interdisciplinary cooperation are equally important.

This article has discussed the nexus between artificial intelligence, green technology, and sustainability law and its potential to transform responses to the climate crisis. AI-driven solutions have the potential to improve climate governance, enhance stakeholder engagement, and enable informed decision-making by policymakers and practitioners. It is imperative to emphasise ethical preferences, regulatory mechanisms, and international collaboration to ensure that such technologies genuinely contribute to sustainability and reduce environmental impact.

The implications of this study are broad, with applications in climate diplomacy, sustainable development, and environmental governance. Future research topics may include the potential of emerging technologies such as blockchain and the Internet of Things to facilitate sustainable development and mitigate climate change risks. Additional research is needed to assess the social and environmental impacts of AI-based solutions and to devise more effective and reasonable regulatory mechanisms.

Recommendations & Suggestions:

To ensure that artificial intelligence develops in a manner consistent with sustainability imperatives, this article advances several interconnected recommendations for policymakers, regulators, developers, and international bodies. At the foundational level, governance frameworks must move toward harmonized and adaptable rules that are simple enough to implement across jurisdictions yet flexible enough to accommodate rapidly emerging technologies. A rigid, one-size-fits-all regulatory model is ill-suited to the dynamic pace of AI innovation; instead, a risk-based approach to regulation is strongly advocated, wherein the intensity of oversight is calibrated to the potential harms posed by specific AI applications, thereby preserving space for responsible innovation while guarding against misuse. Equally important is the role of corporate actors: companies developing and deploying AI systems must be actively encouraged, and, where necessary, compelled to adopt proactive measures that prevent harm, disclose environmental impacts, and integrate sustainability considerations into their product lifecycles, from design through deployment.

At the international level, no single nation can effectively govern AI in isolation; global cooperation is therefore essential to align governance frameworks, share best practices, and address the cross-border challenges that AI inevitably generates. Existing environmental, social, and governance (ESG) reporting regimes must also be updated to specifically capture the societal and environmental effects of AI systems, and the EU AI Act remains a critical reference point in this evolving regulatory landscape.

Undergirding all of these recommendations is the concept of Sustainable AI, defined here as AI that is both environmentally responsible and socially equitable across its full lifecycle. This concept operates along two complementary axes: the *AI of sustainability*, which refers to AI deployed in service of sustainability goals, and the sustainability of AI, which refers to AI systems that are themselves designed and operated sustainably. Regular monitoring and evaluation of AI systems against ethical, environmental, and performance benchmarks must be institutionalised to ensure accountability and continuous improvement. The ultimate aim is to inspire policymakers, developers, and ethicists to collectively build an AI ecosystem that serves both people and the planet.

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Steering through the Maze of the Definition of 'Court' under the Indian Arbitration Law

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Abstract:

Territorial jurisdiction is the crucial question for the Court, which goes to the core of the lawsuit and decides its destiny, either at the preliminary stage or on merit.[3] *It is statutory, inherent and is the legal authority granted to a Court, tribunal, or judge to resolve any disagreement between the parties and issue a ruling or directive. In India, Section 5 of the Arbitration and Conciliation Act 1996 (Arbitration Act), expressly sets the limits of judicial intervention by permitting the parties to file applications before the Court at certain stages of arbitration. Considering that the arbitration is a private dispute resolution mechanism, based on the agreement between the parties, the forum of the Court may or may not be defined for their assistance at different stages. Apart from this, as the arbitration is guided by domestic arbitration law as well as other related laws, it would be prudent to examine the provisions of the Arbitration Act regarding the clarity on this aspect. The author has applied a doctrinal research technique to analyse provisions under the Arbitration Act as well as other related laws and judgments of the Courts, which are determining the territorial jurisdiction of the Courts for filing applications before them at distinct stages of arbitration in India. Upon analysis, an obscurity is found to exist in the definition of the Court under the Arbitration Act, to determine the right forum of the Court for filing such applications. Thus, the burden lies on the Courts to decide the matter based on the arbitration agreement executed between the parties and the merit of each case, which has been delaying the process of justice. Accordingly, efforts have been made to disentangle this maze by suggesting the most feasible solutions.*

Keywords: *Arbitration, Court, Territorial Jurisdiction,* UNCITRA,

Introduction:

In India, through specific provisions under the Arbitration and Conciliation Act 1996,[4] borrowed from Article 5 of the Model Law of the United Nations Commission on International Trade Law (UNCITRAL), a restricted role has been given to the Courts, permitting them to get involved at certain stages in the arbitration process as facilitators. *Before the commencement of arbitral proceedings,* Section 8 of the Arbitration Act talks about the power of judicial authorities to refer parties to arbitration and to appoint an arbitrator under Section 11. *During the arbitration proceedings,* Courts have been given liberty to make interim orders under Section 9, termination of arbitrator's mandate under Section 14, their extension under Section 29A and seek their assistance in taking evidence under Section 27 of the Arbitration Act. *After*

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[4] Arbitration and Conciliation Act, 1996, No.26, Acts of Parliament, 1996 (India).

an award has been passed, the Courts can set aside an award on the grounds mentioned in Section 34 of the Arbitration Act. Section 36 of the Arbitration Act provides for the enforcement of an arbitral award through the Court, and the aggrieved party can approach the Courts in accordance with Section 37 of the Arbitration Act to file an appeal at specific stages referred to in the Section.[5]

The "Court" as defined under Section 2 (1) (e) of the Arbitration Act, means the principal civil court of original jurisdiction in a district, except under Section 11, where specific powers have been vested only upon the Supreme Court and the High Courts for the appointment of an arbitrator. Further, a close reading of Section 42 of the Arbitration Act reveals the legislature's explicit recognition that multiple Courts may hear challenges to the same arbitration agreement, arbitral proceeding, or arbitral award concurrently. Therefore, it functions as a jurisdictional bar and is aimed at avoiding conflicting jurisdiction by multiple Courts.[6]

Apart from this, in an international commercial arbitration, the arbitral seat has been viewed as a legal fiction established by an arbitration agreement, which serves as the arbitration's juridical home. The idea of an arbitral seat is important because it provides the arbitration process with the legal framework that governs it.[7] During the year 2012, the Supreme Court of India had imported the concept of arbitral seat into domestic arbitration by accepting jurisdiction of the Court at the seat of arbitration concurrently with the Court within whose jurisdiction the suit's subject matter is located.[8] Later, the Court at the seat of the arbitration has been given exclusive jurisdiction over other Courts, which has made the matter complex.[9] While attempts were made to settle the interpretation in subsequent judgments, there remain several unanswered questions.

This paper is therefore an attempt to analyse the definition of "Court" under the statutory provisions of India, to resolve the anomalous overlapping jurisdictions of various district Courts and High Courts and to determine the appropriate Court having territorial jurisdiction to entertain applications at different stages of arbitration proceedings, where intervention of the Court is required.

Provisions under the Arbitration Act & other Related Laws

Definition of the 'Court' under the Arbitration Act

The definition of "Court" under Section 2 (1) (e) of the Arbitration Act, like most other definitions, starts with a qualification, "in this part, unless otherwise required." As such, if the context otherwise requires that the said term should be understood differently, so much joint in the play by the statute is not taken away. Under Section 2 (1) (e) of the Arbitration Act, for other

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[5] Niharika Chauhan, *Judicial Intervention In Arbitration- A Comparative Analysis*, MANUPATRA (Mar 3, 2022) https://articles.manupatra.com/article-details/Judicial-Intervention-In-Arbitration-A-Comparative-Analysis (last visited on Feb 18, 2024).

[6] Executive Engineer, Road Development Division No.III, Panvel & Anr v. Atlanta Limited, AIR 2014 SC 1093.

[7] Sagar Gupta, *Exclusive jurisdiction & seat of arbitration: Examining the Indian arbitration landscape*, 1(1) Indian Review of International Arbitration 94, 97 (2021),

[8] *Bharat Aluminium Co. v. Kaiser Aluminium Technical Service, Inc.*, (2012) 9 SCC 552.

[9] *Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd. & Ors.*, AIR 2017 SC 2105.

than international commercial arbitration (where one of the parties is foreign national, government or entity or habitually NRI), "Court" means the principal civil court of original jurisdiction in a district and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming *the subject-matter of the arbitration*, if the same had been the subject-matter of a suit.

However, for international commercial arbitration, "Court" means only the High Court concerned. Section 2 (1) (e) contains an exhaustive definition as it uses the expression "means and includes", marking out only the principal civil court of original jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other Court as "Court" for Part-1 of the Arbitration Act.[10] "Principal civil court of original jurisdiction in a district," means a district Judge.[11] It merits mention here that in several States in India, the High Court does not exercise ordinary original civil jurisdiction and only the High Courts of Delhi, Bombay, Madras and Calcutta are vested with ordinary original jurisdiction. In case Commercial Courts at the district level have been constituted under Section 3 of the Commercial Courts Act 2015,[12] then in most of the cases, applications under the Arbitration Act are to be filed before such Courts and not before a district judge.[13]

Section 42 of the Arbitration Act, which begins with a non-obstante clause, provides that "*with respect to an arbitration agreement*", if an application is made to a "Court", that Court shall have exclusive jurisdiction over the arbitral proceedings and "*all subsequent applications arising out of that agreement and the arbitral proceedings*". The rule of forum conveniens is expressly excluded by Section 42.[14] A full bench of the Bombay High Court[15] held that the definition of "Court" in the Arbitration Act does not contemplate that such Court should have jurisdiction over the subject matter of the dispute. However, it means the jurisdiction to decide "the question forming the subject matter of the arbitration" if the same had been the subject matter of a suit. The Court's pecuniary jurisdiction is consequently irrelevant; nonetheless, the Court needs to have territorial jurisdiction, and as a result, all the requirements found in Sections 16 to 20 of the Code of Civil Procedure 1908[16] (Civil Code) would have to be satisfied.

Provisions under the Civil Code:

In India, the governing procedural law for most civil disputes is the Civil Code, and an ordinary civil court continues to exercise its jurisdiction unless it is barred either expressly or impliedly, as provided under Section 9 of the Civil Code. A judgment or order passed by a Court without

[10] *State of West Bengal v. Associated Contractors*, (2015) 1 SCC 32.
[11] *EX. EN. R.D.D. Panvel v. Atlanta Ltd*. AIR 2014 SC 1093, *Messers Griesheim GMBH v. Goyal MG Gases* AIR 2022 SC 696.
[12] Commercial Courts Act, 2015, No.4, Acts of Parliament, 2015 (India).
[13] Commercial Courts Act, 2015, §12 (3), No.4, Acts of Parliament, 2015 (India).
[14] *JSW Steel Ltd. v. Jindal Praxair Oxygen Co.Ltd.*, (2006) 11 SCC 521.
[15] *Fountain Head Developers v. Mrs. Maria Arcangela Sequeira*, AIR 2007 BOM 149.
[16] The Code of Civil Procedure, 1908, No.5, Acts of Parliament, 1908 (India).

territorial jurisdiction thus, would be coram non judice.[17] Sections 16 to 20 of the Civil Code determine the territorial jurisdiction of a Court,[18] which are extensive and exhaustive.

Section 16 of the Civil Code allows suits to be instituted in the locations where their subject matter is located, Section 17 refers to the suits involving immovable property within the jurisdiction of different Courts, Section 18 refers to the location of the place of institution of a suit in case local limits of jurisdiction of Courts are uncertain, Section 19 considers bringing legal action to recover damages for injuries to person or movable property, while Section 20 stipulates that suits not covered under Sections 16 to 19 of the Civil Code must be filed in the location where the defendants reside or the cause of action originates.[19] Section 16 thus acknowledges the well-established rule that, claims against res or property should be filed in the Court where the res is located, to render an effective judgment.

Neither consent nor waiver nor acquiescence can confer jurisdiction upon a Court, otherwise incompetent to try the suit.[20] However, where there may be two or more competent Courts which can entertain a suit consequent upon a part of the cause of action having arisen therewithin, if the parties to the contract agreed to vest jurisdiction in one such Court to try the dispute which might arise as between themselves, the agreement would be valid. If such a contract is clear, unambiguous, explicit and not vague it is not hit by Section 23 and 28 of the Indian Contract Act 1872[21] (Contract Act).[22]

Provisions under the Contract Act:

Whenever a dispute arises owing to a breach of contract, the question of jurisdiction of the Court is decided primarily on the place where the parties entered the contract, or where it is to be performed / executed or where the breach occurred.[23] The location of the contract and the cause of action arising from connecting factors will therefore determine the Court's jurisdiction in a certain situation involving contracts. A cause of action is a bunch of facts that, when combined with the relevant legal framework, give the plaintiff the ability to sue the defendant for relief. It must comprise of some act undertaken by the defendant, as no cause of action could reasonably arise in the absence of such action.

In drafting dispute resolution clauses in commercial contracts, parties contemplate, inter alia, the most convenient and affordable forums to resolve their disputes. However, a question they are commonly faced with is the extent of autonomy they can exercise in choosing an appropriate forum. Section 23 of the Contract Act mandates, inter alia, that there cannot be a contract which

[17] *Kiran Singh and Others v. Chaman Paswan and Others* AIR 1954 SC 340.
[18] Megha Nagpal, *Territorial Jurisdiction in Contractual Breach Matters under the Code of Civil Procedure in India*, SSRN (Dec. 29, 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3943795 (last visited on Jan. 20, 2024).
[19] *Dhodha House and Ors. v. S.K. Maingi and Ors*., AIR 2006 SC 730.
[20] *The Bahrein Petroleum Co. Ltd v. P. J. Pappu and Another*, 1966 AIR 634.
[21] The Indian Contract Act, 1872, No.9, Acts of Parliament, 1872 (India).
[22] *A.B.C. Laminart Pvt. Ltd., and another v. A.P. Agencies, Salem,* AIR 1989 SC 1239.
[23] *Ibid.*

is forbidden by or defeats any provision of law. Section 28 makes an absolute restraint on a legal recourse or ability to enforce rights under a contract, void.

However, through a conjoint reading of Section 20 of the Civil Code and Sections 23 & 28 of the Contract Act, there is scope for a partial restriction by limiting parties to option of a single forum. An agreement for exclusive jurisdiction falls somewhere between strict restriction and convenient forum bargain hunting.[24] The agreement of the parties to submit the disputes to a specific jurisdiction that would otherwise also be a proper jurisdiction under the law cannot be argued that their agreement to the extent they committed to not subject to other jurisdictions is null and void, for violating public policy.[25]

Concept of Place (Seat) under the Arbitration Act:

Section 20 of the Arbitration Act gives complete autonomy to the parties or the arbitral tribunal to decide on the "place" of arbitration by themselves, which is also referred sometimes as seat or situs or centre of gravity. However, as is evident from Section 20 (3) some of the arbitration proceedings may be held at other places, termed as "venue." Therefore, in certain situations it becomes difficult to define the term "place of arbitration" and explain how it differs from "venue" or other places. Further, it goes without saying that a "venue" other than the arbitration's "place or seat," does not grant jurisdiction on the Court. Thus, even though the "venue" of the arbitration may change, the place or seat of arbitration is set in stone. Section 30 (4) of the Arbitration Act further mandates that the arbitral award shall mention its date and place of arbitration. The legislature has intentionally given jurisdiction to two Courts i.e. the Court which would have jurisdiction where the cause of action is located and the Courts where the arbitration takes place.[26]

The Courts in India have fully embraced the "Shashoua principle", a notion that was initially expressed in the particular setting of London arbitration by the England and Wales High Court,[27] wherein it was held that, "the chosen venue (London) was the seat of arbitration because the parties had chosen London as the venue of arbitration, has not designated any other place as the seat of arbitration, chosen a supranational body of rules to govern the arbitration, and there were no contrary indicia."

Apart from the above famous case, the Courts have also relied on the judgment of the English Court of Appeal[28] wherein it was observed that a choice of seat for the arbitration must be a choice of forum for legal actions aimed at contesting the award. The Supreme Court[29] of India

[24] Nivedita Shenoy & Sharanya Shivaraman, *Exclusive Jurisdiction Clauses in a Contract: Key issues*, BAR AND BENCH (Sep. 11, 2019) https://www.barandbench.com/columns/exclusive-jurisdiction-clauses-contract-key-issues#:~:text=Exclusive%20 jurisdiction%20clauses%20enunciate%20a,defeats%20any%20provision %20of%20 law (last visited on Feb. 27, 2024).
[25] A.B.C, *supra* note 22.
[26] BHARAT, *supra* note 8.
[27] *Roger Shashoua and Ors. v. Mukesh Sharma* [2009] EWHC 957 (Comm)
[28] *C v. D* 2008 Bus LR 843: 2007 EWCA Civ 1282 (CA)
[29] INDUS, supra note 9.

has laid down that the city where the seat of arbitration is located will have supervisory jurisdiction over the arbitration and such jurisdiction will not be concurrent with the jurisdiction of the Courts as defined in Section 2 (1) (e) of the Arbitration Act, but it will be exclusive, and all subsequent applications arising out of the arbitration agreement becomes the Court under Section 42 of the Arbitration Act., thereby approving observation made in an English case[30] that, an agreement as to the seat of an arbitration is similar to a provision pertaining to exclusive jurisdiction.

When the parties expressly designate the place (seat) of arbitration in their agreement, no interpretation is required. However, when the seat is not specified or the location of arbitration proceedings has been described as venue or place rather than seat, it is difficult to ascertain the true intention of the parties. Such issues have engaged Courts in India, in the number of cases. In one such case[31] the Court held that, "the venue could not by itself assume the status of the seat; instead, a venue could become the seat only if "something else is added to it as a concomitant."

Later in another case[32] the Court laid down that, "if a named place is identified in the arbitration agreement as the venue of arbitration proceedings, then the choice of venue is actually a choice of the seat of arbitration, provided there being no other significant contrary indicia." Similarly in another matter brought before them, the Court[33] noted that, "the use of the expression place of arbitration could not decide the intention of the parties to designate that place as the seat of arbitration and such intention had to be determined from other clauses in the agreement between the parties and their conduct."

Though the above judgments have affirmed the territorial principle under UNCITRAL Model law, which were based on various English judgments, established primarily to decide the arbitration seat in international commercial arbitration involving parties of different nationalities under the 1958 New York Convention (NYC), in order to guarantee clarity regarding the supervisory Court before or after arbitration proceedings.[34] However, the application of these rules of construction in domestic arbitration by the Courts in India have resulted in statutory anomalies, by fixing the exclusive jurisdiction at the seat of arbitration. Apart from this as referred above, contrary opinions by the superior Courts about the "*presence of indica*" or "*absence of significant indica*" as the factor for deciding venue as the seat of arbitration, has also created uncertainty in this matter.[35]

[30] *A v. B* (2007) 1 All ER (Comm) 591: A v. B (2007) 1 Lloyd's Rep 237

[31] *Union of India v. Hardy Exploration and Production (India) Inc.* (2019) 13 SCC 472

[32] *BGS SGS SOMA JV v. NHPC Ltd*. (2020) 4 SCC 234, paras 38-40, 44-59.

[33] *Mankastu Impex Pvt. Ltd. v. Airvisual Ltd.* 2020 SCC OnLine SC 301

[34] Amar Gupta, *Seat and the law of Arbitration*, ICC INDIA (Apr. 6, 2022) https://www.iccindiaonline.org/ICC-India-Arbitration-White-Paper.pdf (last visited on Jan. 18, 2024).

[35] Anjali Anchayil and Ashutosh Kumar, *Choice of Seat or Venue: Supreme Court of India Dithers*, Kluwer Arbitration Blog (May 13, 2020) https://arbitrationblog.kluwerarbitration.com/2020/05/13/choice-of-seat-or-venue-supreme-Court-of-india-dithers/ (last visited on Jan. 25, 2024).

However, there is no denying the fact that at times arbitral proceedings require assistance and supervision of Court and thus role of the Court at the seat of arbitration becomes important. The Law Commission[36] in order to enforce the law laid down by the Supreme Court,[37] Recommended that legal recognition be accorded to the term "seat" and "venue" consistent with international usage, however the legislature out of its wisdom, did not consider this recommendation.

Principle of Territoriality under the UNCITRAL Model Law:

In India, the legislatures wrought out and incorporated the underlying idea of the Model law on International Commercial Arbitration, as embraced by the UNCITRAL, in the Arbitration Act.[38] The principle embodied in Article 1 (2) of the UNCITRAL Model Law is that it applies in a State only if the place of arbitration is in the territory of that State. However, there are also exceptions to the effect that certain articles apply irrespective of whether the place of arbitration is in the enacting State or elsewhere, or even before the place of arbitration is determined.

The NYC, employing the territorial criterion, also acknowledges that a State may permit the parties to subject an arbitration to procedural law that differs from the law of the place of arbitration. There is a benefit in not discouraging the parties from choosing to apply a procedural law different than the law of the place of arbitration, as due to factors like participant convenience, process costs, or evidence availability, the parties may have an interest in agreeing upon such a condition.

The Court of Appeal of England[39] laid down a rule, recommending a 3-stage enquiry to determine the proper law of the arbitration agreement, based on parties' express choice, implied choice or based on the closest and most real connection. The Supreme Court of the United Kingdom[40] effectively affirmed this rule and held that, in the event an arbitration agreement lacks an express choice of law, the main contract's choice of law will be deemed to be the implied choice, *instead of the law of seat*. This is the general rule "even where the law chosen to govern the contract differs from that of the place chosen as the seat of the arbitration."[41] Thus, the default rule of acceptance of the law of seat as the law of agreement has been done away by this judgment, thereby reducing the supremacy of the seat of arbitration, which was earlier a general rule.

Assistance & Supervision of the Court under the Arbitration Act:

[36] Law Commission of India, Report no.246: Amendments to the Arbitration and Conciliation Act, 1996 39 (2014)
[37] BHARAT, *supra* note 8.
[38] Bare Act, The Arbitration & Conciliation Act, 1996, (Commercial law publishers (India) Pvt. Ltd., 2022
[39] *Sulamerica v Enesa* [2012] EWCA Civ 638
[40] *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb* [2020] UKSC 38
[41] Claire Morel de Westgave & Katherine Jonckheere, The law applicable to the arbitration agreement: Commentary on the UK Supreme Court's decisions in *Enka v Chubb and Kabab-Ji SAL v Kout Food Group from a Belgian law perspective*, WOLTERS KLUWERS (2020) https://www.lalive.law/wp-content/uploads/2023/01/KJO-article-b-Arbitra.pdf (last visited on Feb 26, 2024)

Referral of Parties to Arbitration:

Under Section 8 of the Arbitration Act, a judicial authority refers the parties to arbitration when an action is brought in an issue covered by a valid arbitration agreement. A party filing an application under Section 8 must proceed to the location where the "action" may have been filed, rather than filing as dominus litis. Accordingly, an application under Section 8 is parasitic in nature, i.e., it can only be made before the Court that receives an application filed by another party. Thus, there is no ambiguity regarding the Court's jurisdiction. Further since applications made under Section 8 are made to judicial authorities, such applications would be outside the purview of Section 42 as this provision is applicable to applications made to a ‘Court’ under Part 1.[42]

Appointment, Termination, Extension, or Substitution of Arbitrators:

Sub-Section (6) of Section 11 states that in case of a domestic arbitration, if parties under certain circumstances are unable to appoint an arbitrator, they may approach the High Court, requesting them to appoint an arbitrator for the same. As specific powers of appointment of an arbitrator in domestic arbitration under Section 11 of the Arbitration Act are vested only upon High Courts, thus Section 11 of the Arbitration Act has a jurisdictional mechanism within itself.[43]

Further sub-Section (2) of Section 14 lays down that in the absence of an agreement between the parties, if there is a controversy regarding the termination of the mandate of an arbitrator on his becoming *de jure* or *de facto* incapable to perform its functions, either party can apply to the “Court” for termination of his mandate. Apart from this, Section 29A of the Arbitration Act provides for the period within which the arbitration proceedings are to be completed.

Accordingly, on filing an application under Section 29A, seeking to extend the mandate of arbitrator, the “Court” is also empowered to replace or substitute an arbitrator on finding that the proceedings have been delayed for the reason attributable to the arbitral tribunal. The Supreme Court of India, while upholding a decision of the Meghalaya High Court, has clarified that “Court” under Section 29A (4) of the Arbitration Act refers to the principal civil court of original jurisdiction in a district, including the High Court, only if it exercises ordinary original civil jurisdiction.

Before the Arbitration Amendment Act 2015,[44] the Chief Justice of High Court was the designated authority to appointment arbitrator in domestic arbitration. At that time, a question arose before the Supreme Court of India,[45] with respect to the applicability of Section 11 under the purview of Section 42. It was held that the Chief Justice or his designate would not be constituted as a “Court” under Section 11(6), as Section 42 would apply only to the definition of a Court under Section 2(1)(e).

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[42] STATE, *supra* note 10.

[43] *Dalim Kumar Chakraborty v. Smt. Gouri Biswas & Anr,* APO No. 33 of 2018

[44] Arbitration and conciliation (Amendment) Act, 2015, No.3, Acts of Parliament, 2016 (India)

[45] *Rodemadan India Ltd. v. International Trade Expo Centre Ltd.* (2006) 11 SCC 651

Later changes were brought to Section 11 of the Arbitration Act, thereby substituting "High Court" in place of "Chief Justice" and bringing this provision clearly under the ambit of Section 42 of the Arbitration Act. There may be cases where arbitrators requiring their termination, extension, or substitution were appointed by High Courts, against an application filed under Section 14 or 29A. Thus, it may not be prudent to assign the jurisdiction of termination, extension or substitution of such arbitrators on the Courts subordinate to the High Court.

Interim Measures, Assistance in Evidence & Setting Aside Award:

Section 9 (1) of the Arbitration Act permits parties to an arbitration agreement to apply before a Court for seeking "*interim measures of protection*" including orders for securing the amount in dispute, detention, preservation or inspection of property, interim injunctions and appointment of receivers, before the commencement of arbitral proceedings, during arbitral proceedings, or at any time after the making of an arbitral award, but before its enforcement under Section 36 of the Arbitration Act. Apart from this, Section 27 of the Arbitration Act establishes a procedure by which the arbitral tribunal, or a disputing party with the arbitral tribunal's approval, may request the Court's assistance in obtaining evidence.[46]

Finally, once an arbitral award is made under Section 31 of the Arbitration Act, an aggrieved party may apply for the setting aside of such domestic award under Section 34 of the Arbitration Act. Considering the fact that at these stages, either the arbitral proceedings are in progress or has culminated at its seat, the Court located at the seat of arbitration has jurisdiction over the arbitral tribunal and proceedings thereon. However, there may be a controversy where application under Section 9 (1) of Arbitration Act is filed before the arbitral proceeding has started and the arbitral seat has not been agreed upon.

In 2014, a full bench of the Supreme Court while *hearing a petition of setting aside an award under Section 34* of the Arbitration Act, read Section 42 of the Arbitration Act broadly and held that for Section 42 to apply, the application should be made to a Court as defined in Section 2 (1) (e) of the Arbitration Act. The Court also clarified that the phrase *"with respect to an arbitration agreement"* makes it apparent that Section 42 will apply to all submissions, made whether *"before or during arbitral proceedings or after an award is pronounced" under Part I of the Arbitration Act.* The application made under Section 9, 27 and 34 of the Arbitration Act, being an application made to the Court as defined in Section 2 (1) (e) of the Arbitration Act, are said to be well within the purview of Section 42 of the Arbitration Act.[47]

Enforcement of Award & Appeal:

Since an arbitral award is analogous to a civil court decree under Section 36 of the Arbitration Act, it must be executed to realise the decreed amount. Thus, award must inevitably be brought

[46] Sonal Kumar Singh , Rajat Dasgupta & Shivam Tiwari, *India: Discretion Of Courts Under Section 27 Of The Arbitration & Conciliation Act, 1996,* MONDAQ (Jul. 27, 2021) https://www.mondaq.com/india/arbitration--dispute-resolution/1095640/discretion-of-Courts-under-Section-27-of-the-arbitration--conciliation-act-1996#:~: text=Section%2027%20of%20the%20Arbitration%20and%20 Conciliation%20Act%2C%201996%20 (%22, the%20Court%20in%20taking%20evidence (last visited on Jan. 22, 2024)

[47] STATE, *supra* note 10.

before an executing Court for execution.[48] In 2018, the Supreme Court[49] took a view that although Section 36 of the Arbitration Act considers an award made by an arbitral tribunal to be a decree, no deeming provision anywhere stated that the Court under whose jurisdiction the arbitral award was passed shall be regarded as the Court that issued the decree. A transfer of the decree from the Court, which would have jurisdiction over the arbitral proceedings, is not necessary in order to enforce an award under Section 36 by its execution, which *may be filed anywhere in India*. Furthermore, Section 42 of the Arbitration Act deals with jurisdictional issues "in respect of arbitration proceedings," and thus cannot govern "enforcement," which occurs after an award is made and arbitration proceedings are concluded.

Section 37 of the Act prescribes for an appeal to a Court from original decrees of Court and order of arbitral tribunal, which is a statutory appeal. The Supreme Court[50] had held that, there is no reason why the definition of "Court" in the context of Section 37 of the Arbitration Act cannot be used, given its clear meaning, though it may be true that the interpretation clause provides for "unless the context otherwise requires". Apart from this, there being a distinction between an appeal and an application, Section 42 of the Arbitration Act provides for an application while Section 37 provides for a statutory appeal and thus Section 37 does not fall under the purview of Section 42 of the Arbitration Act.

Analysis:

The provisions regarding the jurisdiction of the Court are set out in Sections 16 to 20 of the Civil Code, which are primarily territorial, subject-matter, and pecuniary in nature. The Supreme Court in catena of judgments have held that parties by consent, cannot give jurisdiction on a Court where no part of cause of action has arisen. Nonetheless, the parties may mutually agree to give one of the Courts jurisdictions in cases where two or more Courts have jurisdiction i.e in case a part of the cause of action has arisen within the territory of two or more Courts. Thus, for conferring jurisdiction upon a particular Court, it is important to see whether any cause of action has arisen within its jurisdiction or not.[51]

The expression ‘subject-matter’ in Section 2 (1) (e) of the Arbitration Act has a reference and connection with the process of dispute resolution and has to be used only to identify which Court would have jurisdiction if a suit had been filed. Under Section 20 (1) of the Arbitration Act, parties are at liberty to decide on the seat of arbitration for conducting the arbitration proceedings, or the arbitral tribunal will fix or determine the seat under Section 20 (2) of the Arbitration Act.

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[48] Consolidated Engineering Enterprises v. Principal Sec. Irrigation Dept., (2008) 7 SCC 169, *Union of India v. Popular Construction Co*., (2001) 8 SCC 470.

[49] *Sundaram Finance Ltd. v. Abdul Samad*, (2018) 3 SCC 622.

[50] *Pandey & Co. Builders (P) Ltd. v. State of Bihar and Another*, (2007) 1 SCC 467.

[51] Vaibhav Niti, *Seat of Arbitration & its relation with jurisdiction of Courts*, Livelaw (Apr. 27, 2020). https://www.livelaw.in/know-the-law/seat-of-arbitration-territorial-jurisdiction-of-Courts-155847 (last visited on Jan. 8, 2024)

The seat (place) of arbitration is also significant, as Section 31 of the Arbitration Act requires it to be clearly stated in the award. Considering that the Court at the seat of arbitration has supervision over the arbitration proceedings, there should be no ambiguity that the Court at the seat shall also have jurisdiction over the subject matter, which shall be concurrent with the jurisdiction of the Court where the cause of action arose. However, in cases where the arbitral seat is not mutually agreed upon, the dispute will arise on the territorial jurisdiction of the Court.

Conclusion & Suggestion:

In cases where the existence and validity of an arbitration agreement are disputed by either party, the judicial authorities under Section 8 of the Arbitration Act take cognisance of such an application and, prima facie, decide on this issue. Until such time as the arbitral tribunal is not in existence, there may or may not be agreement as to the seat of arbitration. A similar condition may arise when there is a dispute regarding the appointment of an arbitrator and an application is to be made before the High Court for his appointment under Section 11 of the Arbitration Act.

Thus, at this point of time, the civil court of the district having original jurisdiction, where the property of the respondent is situated, or where the cause of action arose, shall have the proper jurisdiction for Section 9 applications, and the High Court of the State of such district shall have proper jurisdiction for Section 11 applications of the Arbitration Act. However, if the original jurisdiction lies with the High Court, the High Court will be the proper Court for filing either application under Section 9 or Section 11 of the Arbitration Act.

Now, considering other applications under Sections 14, 27, 29A and 34 of the Arbitration Act (including Section 9 application) which are filed during the arbitration proceedings, as the arbitral tribunal is already in existence by this time, the respective Court (High Court in case of termination, extension or substitution of arbitrator) at the seat of arbitration will have supervisory jurisdiction. Further by virtue of the principle of fastest finger first, the Court where the initial application is filed will have the only authority to consider and hear any further applications from either party and no other Court would have this authority, by virtue of Section 42 of the Arbitration Act, which gives the "Court" before which an application is first made, exclusive supervisory jurisdiction throughout the arbitral proceedings.

Like India, the United States also has a central federal government and individual governments for each of the States. United States Code on the Federal Arbitration Act[52] (FAA) statutorily provides the jurisdiction of Courts under each stage of arbitration proceedings in the absence of any agreement between the parties. Similar to the FAA, the legislature of India may consider amendments to establish specific Courts with jurisdiction under the relevant provisions of the Arbitration Act, to put such controversies to rest once and for all.

[52] United States Arbitration Act, No. Pub.L. 68-401, Acts of Congress, 1925 (United States).

Regulating Artificial Intelligence in the Judicial System: A Comparative Legal Perspective

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Abstract:
Artificial Intelligence is transforming the functioning of courts globally. It is improving the efficiency, accuracy, and accessibility of courts. Courts are utilising AI for activities such as legal research, case management, forecasting results and settling conflicts digitally. It improves the functionality of courts. It also brings up issues regarding fairness, transparency and accountability. Concepts such as data privacy and maintaining judicial independence are under discussion. Regulations and policies are being formulated to govern AI in judicial systems. This article examines how various nations are managing AI in judicial systems. The European Union, the United States, India and China are creating structures to regulate AI in Judicial Systems. These nations are working to align the advantages of AI with values such as fairness and transparency. The Organisation for Economic Co-operation and Development, along with the Council of Europe advocate for standards regarding the use of AI. A comparative study identifies shortcomings in current legislation and obstacles in governing AI. The judicial system needs to closely oversee AI to avoid abuse and guarantee that AI aids the judiciary rather than supplants it. AI ought to assist courts in making decisions. The incorporation of AI in judicial systems necessitates careful thought. AI has the potential to enhance court efficiency and facilitate access to justice. Nonetheless, its application needs to be overseen to maintain responsibility. Regulatory methods across various jurisdictions are under review. The regulatory methods across various jurisdictions are under review. The objective to guarantee that AI functions as an instrument within contemporary legal frameworks.

Keywords: *Artificial Intelligence, Judicial System, Data Privacy, Legal Research, Jurisdictions*

Introduction:
The fast progress of Artificial Intelligence has changed the parts of our society like healthcare, finance, education and how the government works. In recent years, the judicial system has begun to explore the use of AI technologies to make procedures more efficient, accurate, and easier to access. Tools that use AI are being used more and more for tasks like reviewing laws, managing cases, analysing documents, predicting outcomes, and even helping judges make decisions. Even though these new developments have a lot of benefits, like reducing the number of cases that are waiting to be heard, making sure that rulings are consistent and giving judges information that is based on facts, they also bring up legal, ethical and regulatory issues[3].

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Using AI in the system challenges the traditional ideas of what is fair, who is responsible, being open and honest, and being fair to everyone. The people in charge of the judicial system and the organisation that makes laws need to think carefully about whether tools that use algorithms can follow important principles like judicial autonomy, equality under the law and the entitlement to a fair trial. People are worried about AI being biased, not being transparent when making decisions, problems with keeping data private and the possibility that human judges will not have much control over decisions. These worries have led researchers, lawmakers and organisations[4] Around the world, there needs to be rules for using AI in the justice system.

Different countries are dealing with AI in the system in different ways. Some countries have made detailed AI governance structures and rules for what is ethical and systems to regulate AI to make sure that technology is used responsibly in the judicial system. For example, places like the European Union focus on ensuring that people's rights are protected when it comes to AI and its regulation; they think about transparency, responsibility, and risk management. On the other hand, countries like the US rely more on rules and policies that are specific to certain areas. In India and China are also looking into using AI to improve the judicial system and at the same time they are talking about the need, for strong laws to oversee AI.

When we look at how governments regulate things, it is really important to have a comparative legal perspective. This helps us understand how different countries deal with the bad things that come with using AI in court. By comparing how different places to do things we can find out what works well what does not work and what principles are the same everywhere. This information can help the people who make laws create system that are fair and work well.
This article looks at how different countries regulate the use of intelligence in their legal systems. We want to find out how different countries are dealing with the problems that AI is causing in the justice system[5]. We will do this by looking at the laws, policies and guideline that each country has. We also want to show why it is necessary to have rules that apply everywhere so that we can protect people's rights and make sure that AI is used in a responsible and innovative way, in the courts[6].

Concept of Artificial Intelligence in the Judicial System

Artificial Intelligence is about using computer systems that can do things that normally need intelligence like learning and problem solving. In the system, AI is used to help courts and judges do their jobs better and faster. The idea of AI in the system came from the bigger picture of legal technology also known as “Legal Tech”. AI tools look at a lot of information, find patterns, and help make decisions in the justice system. These tools use things like machine learning and data analysis to look at documents and court records. AI in the system in mainly used to help judges not replace them. It is used to make things more efficient and help people

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[4] Available on https://www.unesco.org/en/articles/ai-courtroom-unescos-new-guidelines-judiciary

[5] European Commission, *Regulation (EU) 2024/1689 Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act)* [2024] OJ L1689.

[6] United Nations, *Seizing the Opportunities of Safe, Secure and Trustworthy Artificial Intelligence Systems for Sustainable Development*, UN General Assembly Resolution A/78/L.49 (21 March 2024).

get access to justice. AI systems can help with research by analysing a large number of court cases and laws to identify the ones that apply. AI software can also help with tasks like organizing cases and court documents[7].

One important thing about AI in the system is predictive analytics. This is where algorithms look at court decisions to find pattern and predict what might happen in a case. These tools can help lawyers understand how a case might turn out. In some places AI is used to help decide if someone should get bail or how they should be sentenced. AI is also used to help resolve conflicts. Artificial Intelligence is used to make the legal system better[8]. Legal systems use AI to help with various tasks. AI in the system is a helpful tool. It is not meant to replace judges or lawyers. To help them do their jobs better. The legal system and AI work together to make things more efficient and fairer. Moreover, AI technologies help create dispute resolutions platforms, virtual courts and digital case management systems. These advancements became really important during COVID-19 pandemic as courts around the world started using technologies to keep judicial processes going. The use of AI in the system has many benefits but it also raises several legal and ethical concerns. Issues such as algorithms, lack of transparency in automated decisions, accountability for errors, and the protection of personal data are major hurdles. Since court rulings directly affect people's rights and freedoms AI systems must be carefully regulated to ensure fairness, equality and due process[9].

In essence, AI in the system represents a big change in how justice is managed, with advanced computational tools helping legal professionals provide faster, more consistent and accessible justice. However, AI deployment must be balanced with regulatory frameworks and ethical safeguards to protect the core principles of the rule of law and judicial independence. AI systems and technologies must be utilised carefully. The use of AI and its system is an aspect within the legal system are really important.

Examples where technology has taken place in Judiciary

- During Covid19 pandemic, technology was the only best option where e-filing or virtual hearing was possible and hence we can say that it was dramatic rise of tech in judiciary.
- There was an introduction of Anuvaad Software where an AI system was used to translate the judgements into regional languages.
- Supreme Court Portal for Assistance in Court – SUPACE was recently launched by the Supreme Court of India.

[7]Available on https://woxsen.edu.in/research/white-papers/exploring-the-use-of-ai-in-legal-decision-making-benefits-and-ethical-implications.
[8]Available on https://www.ohchr.org/en/documents/thematic-reports/a80169-ai-judicial-systems-promises-and-pitfalls-report-special
[9] Available on https://www.drishtijudiciary.com/editorial/artificial-intelligence-ai-in-indian-judiciary

- Designed to first understand judicial processes that require automation, it then assists the court in improving efficiency and reducing pendency by encapsulating judicial processes that have the capability of being automated through AI[10].
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Need for Regulation of AI in Judicial System & Challenges

Artificial Intelligence is changing areas, like healthcare, finance, education and government. The court system, which usually relied on people making decisions is now using AI technology too. AI helps with tools for research predicting what might happen and making decisions automatically. This is changing how justice is served. These changes could make things more efficient, fair and easy to access. They also make us worry about fairness, accountability and moral values. We need to set rules for AI in courts around the world[11]. Ai in courts can help in making decisions. We have to be careful with AI in law. The use of AI, in courts must be fair.

1. Guaranteeing Equity and Preventing Prejudice

There is a problem with AI systems and that is they can be biased. This happens because AI systems learn from data and this data can have biases about things, like race, gender and where people come from. If we use this data to make important decisions it can make discrimination worse. We need rules to make sure AI systems are made and used in a way. This means everyone should be treated under the law. Judicial decisions should be always be fair and not biased. If we do not regulate AI systems, they might make it harder to have judicial decisions and that is not right. Guaranteeing Equity and Preventing Prejudice is very important so we need to make sure AI systems do not get in the way of this.

2. Safeguarding Basic Rights

The use of Artificial Intelligence in the system can have a big impact on Basic Rights. These Basic Rights include the right to privacy the right to a trial and due process. Artificial Intelligence can affect Basic Rights in easy. For example, Artificial Intelligence used for monitoring people evaluating evidence or figuring out risks can take away freedoms. We need to have rules, in place to protect these basic rights and make sure AI does not invade people's privacy unfairly or make decisions. Basic rights are very important. AI should not allowed to violate them.

3. Responsibility and Openness

When judges make a decision in court, they have to explain what they did and why. People can ask them questions. They have to answer. When we use Artificial Intelligence systems it is like a box that we cannot see inside. We do not know why the AI systems make the decisions they do. We need to make rules so that the Artificial Intelligence system is transparent. We need to know how they make their choices what information they. Who is responsible when they make mistakes. If we do not have rules to hold people accountable, it is hard to say something is wrong when AI systems help make decisions. We need to be able to trust AI systems and know what they are doing.

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[10] Ibid.
[11] Avilable on *https://www.pib.gov.in/PressReleasePage.aspx?PRID=2106239&reg=3&lang=2*

The Artificial Intelligence systems have to be open so we can see what they are doing. This is very important because the AI system is used to make decisions. We have to know that the Artificial Intelligence systems are fair and that they are not making mistakes. If we do not have responsibility and openness, in AI systems we will not be able to trust them.

4. Upholding Judicial Autonomy

The judiciary should stay independent and free from influence. We need to make sure that judges are not pressured by people or groups outside the court system. The use of Artificial Intelligence systems, those made by private companies is a concern. These systems might have control over the judges. Judges should use Artificial Intelligence tools to help them not to make decisions for them. We need rules to make sure that Artificial Intelligence tools assist judges. Do not make the decisions. This way judges can keep their independence and power. The judiciary can remain autonomous. The judiciary and AI tools should work together with the judiciary, in charge and Artificial Intelligence tools serving as helpers. The goal is to maintain the independence of the judiciary and the power of judges[12].

5. Improving Effectiveness without sacrificing fairness

AI helps make things more efficient by reducing the number of cases waiting to be dealt with doing tasks automatically and assisting with legal research. We must ensure that in making things more efficient we do not compromise on fairness. Regulatory bodies oversee that AI is used to support decisions making not replace it so we can have both efficiency and fairness. The goal is to strike a balance, between getting things done quickly and being fair. AI should aid in decision making not substitute it.

6. Standardization and Quality Assurance

Various courts and jurisdictions might implement AI tools in diverse ways, resulting in discrepancies in judicial procedures. Regulation can create consistent criteria for the design, assessment, and deployment of AI systems within the judicial system. This guarantees dependability, precisions, and uniformity throughout the legal system.

International Principles governing AI regulation:

Artificial Intelligence has changed the way we do things in areas like the government, money, health and the law. Because Artificial Intelligence is used over the world, we really need rules that everyone can follow. Artificial Intelligence are used in countries so it is hard for one country to make rules on its own. That is why big groups and organizations have made rules to make sure Artificial Intelligence is used in a way that respects people’s rights and what is fair in democracy. Artificial Intelligence should be used in a way that’s fair to everyone and follows

[12] Available on https://www.brookings.edu/articles/the-three-challenges-of-ai-regulation/

the rules that we have in a democracy[13]. The use of Artificial Intelligence is a deal and we need to make sure it is used correctly so we need these rules, for Artificial Intelligence.

Many organizations around the world and in our country have started working on rules for artificial intelligence. The Organization for Economic Co-Operation and Development was one of the first to create a set of intelligence rules in 2019. These artificial intelligence rules talk about making sure everyone is included putting people first being clear staying strong and being responsible. The United Nations, through groups like UNESCO, has also created guidelines for intelligence. UNESCO made recommendations in 2021 about the ethics of intelligence that sets a standard for the whole world and it puts human dignity taking care of the environment and fairness for everyone first. The European Union has done a lot by introducing the intelligence law, which is a way of regulating artificial intelligence that looks at how risky each artificial intelligence system is. The European Union artificial intelligence law classifies intelligence systems based on risks they might pose and this is a big deal, for artificial intelligence.

Fundamental Global Guidelines for Artificial Intelligence:[14]

Human-centred and rights-based approach – The main thing to remember is that Artificial Intelligence should be about people. This means AI systems have to respect people dignity, freedom and basic rights. Rules from around the world say it is important to follow agreement about human rights like the universal Declaration of Human Rights. Artificial Intelligence technologies should not take away peoples right, including being treated having privacy being able to say what they think and having access to the legal system.

Artificial Intelligence and Human Rights both are very important here. We have to make sure Artificial Intelligence does not hurt people's rights like the right to equality the right, to privacy the right to say what we think and the right to go to court. Artificial Intelligence should always be centred around people and their wellbeing.

Fundamental Global Guidelines for Artificial Intelligence:[15]

Transparency is essential to build trust in AI systems. International Principles require that AI systems be understandable and explainable, especially when they affect individuals' rights. Explainability ensures that users and regulators can understand how decisions are made by AI systems. This is particularly important in high stakes areas like healthcare, finance and judicial decision making. Without transparency, accountability becomes difficult to enforce.

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[13]Available on https://www.oecd.org/en /topics/ai-principles.html#:~:text=Human%20right s%20and %20democratic% 20values% 2C%20including% 20fairness%20and%20privacy ,protected% 20by%20applicable%20international%20law.

[14] Available on https://www.oecd.org/en/topics/ai-principles.html

[15] Available on https://www.unesco.org/en/artificial-intelligence/recommendation-ethics

Responsibility and Accountability:

Being responsible is a part of managing Artificial Intelligence. Rules from around the world say it is necessary to know who is in charge when Artificial Intelligence systems make decisions. Artificial Intelligence developers, its users and AI deployers must be responsible for what they do with Artificial Intelligence systems. To make sure Artificial Intelligence systems are used correctly we can use things like checking what Artificial Intelligence systems do looking at how Artificial Intelligence systems affect people and having people, in charge make sure rules are followed. This helps to stop people from saying it is not their faulty when Artificial Intelligence systems do something.

Equity and Equality of treatment:

We need to make sure that everyone is treated fairly and gets the treatment. When we make systems that use intelligence, we have to make sure they do not treat people unfairly. The problem with intelligence is that it often looks at what happened in the past so it can keep the same problems we have now like treating some people unfairly. There are rules that people agree on around the world that say we need to check for unfairness in the information we use and, in the way, artificial intelligence systems make decisions. It is very important to be fair in areas like when we are hiring people when the police are doing their job and when banks are deciding who can borrow money because if artificial intelligence is unfair in these areas, it can cause big problems for society. Artificial Intelligence systems and fairness go hand in hand we need to make sure that artificial intelligence systems are fair so everyone get the treatment and the same chance.

Inclusive growth and SDGs

Artificial intelligence should help our economy grow and make peoples lives better. Global agreements say that the benefits of AI must be shared fairly among groups of people in society. The United Nations Development Programme says AI is key to achieving the SDGs. We must use AI to reduce inequality improve healthcare enhance education and address problems. The United Nations Development Programme stresses that AI can help us achieve these goals[16]. AI can make a difference in people's lives if used correctly. It can help make healthcare, education and other essential services more accessible to everyone.

Challenges in Implementing the Principles[17].

There are still a lot of problems that get in the way of these principles working well. To start with there are no laws that people have to follow. Most of the principles for Artificial intelligence are guidelines that people do not have to follow. This means that countries can do what they want and it can be different everywhere. Also, Artificial Intelligence is getting better fast. This makes it hard for the people who make rules to keep up with what was going on. Another thing is that countries have ideas about what is important. For example, some countries

[16] Available on https://en.wikipedia.org/wiki/Regulation_of_artificial_intelligence

[17] Available on https://unfoundation.org/blog/post/ai-opportunity-risk-and-a-tough-test-for-global-cooperation/?gad_source=1&gad_campaignid= 19554869486&gbraid= 0AAAAAD9 kiAe22l349OPqTig1l8NqrpSeO&gclid=EAIaIQobChMI1bX__I6pkwMVhqRmAh3dRiGBEAAYAiAAEgLG5_D_BwE

think that new ideas and innovation are key while other think privacy and human rights are more important. Also, there is no way to make sure everyone follows the rules worldwide. Unlike laws in a country international principle for Artificial Intelligence are only followed if people want to follow them. So there is an urgent need to make rules for Artificial Intelligence or in other words it is necessary to make rule for AI that people can strictly follow.

Comparative Legal Frameworks

The fast addition of Artificial Intelligence into systems all over the work has gotten different responses from regulators. Different countries have used methods based on their own laws how far along they are with technology and how much they care about basic human rights. Artificial Intelligence systems are being used in places now. A comparison of these methods can help us figure out what works well and what does not work well with Artificial Intelligence and the rules that govern it. This comparison of Artificial Intelligence rules can give us ideas, on how to make the rules better and where the rules are not good enough.

1. United States[18]

The United States does things a little differently when it comes to regulating Artificial Intelligence. There is no one law that covers everything about Artificial Intelligence in the country. The basic principles of fairness that are in the constitution are really important when it comes to using Artificial Intelligence. Artificial Intelligence technologies, like algorithms that figure out how risky someone is are used to help make decisions about whether someone should get bail or how long their sentence should be. The courts have had to deal with problems related to Artificial Intelligence being transparent and fair like in the case of "State v. Loomis where the Wisconsin Supreme Court said it was okay to use Artificial Intelligence. Also said people need to be careful about its limit.

People are working on regulations that focus on:

- Making sure algorithms are accountable
- Dealing with bias against group of people and problems with the data
- Making Artificial Intelligence systems more transparent

Recently there have been efforts like the Blueprint for an Artificial Intelligence Bill of Rights which really emphasize how important it is to be fair protect people privacy and be open about Artificial Intelligence. The idea is to make sure Artificial Intelligence is used in a way that is good for everyone and this is why fairness and transparency are so important when it.

2. European Union[19]

The European Union is creating rules for AI with the AI Act. This Act groups AI system by how risk they have. Some are not okay some are high risk some have limited risj and some have minimal risk. AI used in courts to make decision is seen at risk. This means it must follow rules like:

- Having person oversee it
- Being transparent about how it works

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[18] Available on file:///C:/Users/HIMASHRI/Downloads/2._Legal_Frameworks_for_AI_Regulation-P-216-224.pdf

[19] *Ibid.*

- Following rules, about data

The General Data Protection Regulation also protects people's data. It gives people rights when it comes to AI making decisions like the right to know why a certain decision was made. The EUs plan is focused on people's rights. It wants to make sure AI is used in a way that is fair and right. The AI Act and GDPR work together to make sure AI is used correctly. The European Union wants to make sure AI system are safe and fair. That is why they have these rules. The AI act and GDPR are part of this.

3. United Kingdom

The United Kingdom has a flexible, principle-based approach to regulation rather than strict laws.

- Responsibility
- Clarity
- Equity

The United Kingdom is cautious about using Artificial Intelligence in the courts. The use of Artificial Intelligence in the courts is still limited and closely watched. The United Kingdom has made rules for using Artificial Intelligence to make decisions in the sector, including the courts. The main goal is to make sure that people are still in charge and that AI is only used to help not to make the decisions. The United Kingdom's approach to AI is flexible. Supports new ideas trying to find a balance between regulating things and letting technology move forward. The United Kingdom wants to ensure that AI is used in ways that help people while maintaining control over the decisions made[20].

4. China

China is using Artificial Intelligence in its system very quickly and this includes making what they call "smart courts". Artificial Intelligence is being used to manage cases do research and even help make decisions. The Chinese government has made rules and standards that focus on key things:

- The state is in charge. Controls everything
- People's information is protected
- Artificial Intelligence systems are standardised

China's approach is different from what you see in other countries. China is more focused in the government being in control and things being efficient than on individual rights. People are still worried about things like being able to see what is going on in the courts, being independent, and AI being used in ways that are not fair to everyone. China and its use of AI in the system is something that people are watching closely. The use of AI, in China's system is a big change.

[20] Department for Science, Innovation and Technology, *AI Regulation: A Pro-Innovation Approach* (2023); Judiciary of England and Wales, *Guidance for Judicial Office Holders on the Responsible Use of Artificial Intelligence* (2023).

5. India

India is just starting to figure out how to use AI in the courts. The Supreme Court has introduced AI tools such as SUPACE to help judges conduct their research. Now India does not have a specific set of rules for using AI is court. However, there are some laws that kind of cover it, such as:

- The IT Act 2000
- The Constitution, which promises justice and fairness to everyone

These laws do not directly deal with AI. They do provide some guidance. People are talking about making policies for AI. They want to make sure that Artificial Intelligence is developed in a certain way. They are also concerned about data privacy under the new Digital Personal Data Protection Act, 2023.

They want the courts to be open and responsible when using AI. India is being careful. Taking its time to develop a strategy for AI. India wants to ensure it can use AI innovatively while protecting its citizens' rights and upholding the Constitution. India's goal is to find a balance between using AI and protecting the Constitution.

Conclusion:

India is starting to regulate AI in its courts. The Supreme Court is using AI tools like SUPACE to help judges with research. India does not yet have laws on AI in courts. There are some rules. Using AI courts is a change in how justice is delivered. It can make courts more efficient, reduce backlog, and make it easier to access resources.

India is still figuring out how to use AI in courts. The country is adopting AI through projects and using its existing laws to guide its use. Other countries have approaches to regulating AI in courts. The European Union has rules that focus on people's rights, openness and responsibility. The US and the UK have flexible rules that draw on existing laws and industry guidelines. China's approach is technologically advanced.

Raises concerns about judges' independence and about balancing efficiency with people's rights. A comparison of countries shows they will face similar problems with AI in the courts. These problems include AI making decisions that are not transparent, threatening people's data, and reducing judges' discretion. To solve these problems, AI should help judges make decisions, not replace them. Judges should always be involved in decisions involving AI. India can learn from countries as it develops it own approach to AI in courts.