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# RPNLU LAW REVIEW

**Double Blind Peer-Reviewed International Journal**

**DR. RAJENDRA PRASAD**

**NATIONAL LAW UNIVERSITY PRAYAGRAJ**

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# RPNLU LAW REVIEW

*Double Blind Peer-Reviewed International Journal*


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**Dated 20.11.2025**

# Foreword

It is a matter of great pleasure to write the foreword for the inaugural volume of the RPNLU Law Review, the double-blind, peer-reviewed international journal of Dr. Rajendra Prasad National Law University, Prayagraj. Under the scholarly editorship of Prof. Usha Tandon, Vice Chancellor of the University, this first volume marks an important milestone in the University's journey toward establishing itself as a hub of rigorous, thoughtful, and globally relevant legal scholarship in its very early years.

The scholarly guidance of the two distinguished international editors— Prof. Erimma and Prof. Konasinghe —has given the journal an international character and academic depth from its very inception. The strict double-blind review process followed by the Journal lends credibility, integrity, and scholarly seriousness that are rarely witnessed in the inaugural issue of a new publication. From the beginning, the *RPNLU Law Review* positions itself as a space where ideas are evaluated purely on merit, and where intellectual curiosity is encouraged through fairness, critical engagement, and openness.

We are living in an era shaped by rapid technological transformations, environmental uncertainties, and shifting socio-political landscapes. In such times, research becomes not just important but indispensable for shaping informed public debate and guiding policy choices. It is in this context that the *RPNLU Law Review* arrives—offering a platform that bridges theory and practice, national concerns and global perspectives, and emerging societal challenges with innovative legal reasoning. The Journal aspires to promote scholarship that is contemporary yet reflective, critical yet constructive.

The inaugural volume of the RPNLU Law Review includes eleven original research articles and three book reviews, reflecting the diversity and vitality of contemporary socio-legal research. The articles examine a wide range of themes: corporate accountability, sustainability, intellectual property, organ donation policies, misinformation, digital rights, tribal entitlements under the Forest Rights Act, among others. Complementing these are the book reviews, which offer insightful reflections on recent works dealing with constitutionalism, national security, and India's legal traditions. Together, these contributions demonstrate a shared commitment to understanding law not merely as a set of rules, but as a dynamic force shaping society and human experience.

As the RPNLU Law Review takes its first leap, it reflects University's commitment to fostering meaningful research and enriching legal discourse. I hope this inaugural issue will initiate new conversations, deepen inquiry, and inspire students, scholars, and practitioners to engage more with the persistent research queries of our time. I am confident that in the years to come, the RPNLU Law Review will grow into a respected and influential voice in legal scholarship—within India and beyond.

Vinay Kumar Pathak

**(Prof.Vinay Kumar Pathak)**
*President, AIU*

## From the Desk of Editor-in-Chief

It is with great pleasure that I present the Inaugural Volume of the RPNLU Law Review - an international, double blind peer-reviewed journal published by Dr. Rajendra Prasad National Law University, Prayagraj. This Journal marks an important step in the University's ongoing commitment to fostering a vibrant culture of academic inquiry and interdisciplinary research. The RPNLU Law Review aspires to be a forum where scholars, practitioners, and students from across the globe engage in rigorous legal and social science scholarship that reflects both theoretical depth and contemporary relevance.

In a rapidly transforming world shaped by technological advancements, environmental challenges, and evolving socio-political realities, academic research assumes a pivotal role in shaping law and policy. The RPNLU Law Review emerges at this crucial juncture to provide a platform that not only facilitates high-quality academic dialogue but also reflects the University's vision to contribute meaningfully to national and global discourses on justice, sustainability, and governance. This journal is significant for RPNLU as it reinforces the institution's growing academic identity as a center of excellence in legal education, research, and intellectual leadership.

The Inaugural Issue features eleven Research Articles and three Book Reviews, covering diverse and pressing areas of contemporary legal scholarship. The articles range from critical doctrinal analyses to empirical and policy-oriented studies. Prof. (Dr.) Harpreet Kaur's piece on "Lifting the Corporate Veil in India" interrogates the jurisprudential boundaries of corporate personality and constitutional accountability. The article "Loss of Profit or Loss of Profitability" examines evolving judicial reasoning in commercial claims and evidentiary standards. Another notable contribution, "Constitutional Perspectives of *Viksit Bharat* @ 2047 Mission", explores the constitutional imperatives of economic justice within the broader vision of national development.

Sustainability and intellectual property feature prominently in this volume. The articles "IPR, Sustainable Development and SDGs: Examining the Intersection from Legal and Policy Perspectives" and "Balancing Green Innovation and IP Protection" offer critical insights into how intellectual property regimes intersect with environmental innovation and global sustainability goals. The discussion extends further in "Harnessing Law and Technology for a Sustainable Future: Legal Pathways to Eco-Innovation", which elucidates how legal frameworks and international cooperation can foster eco-innovation and sustainable progress.

Other contributions address equally vital themes of public policy and social justice. The article on "Comparative Analysis of Opt-Out Organ Donation Laws in Developed Countries: Lessons for India" offers a nuanced comparative study with actionable implications for Indian lawmaking. The pieces "Misinformation and Disinformation: Threats to the Information Ecosystem in the Modern Era" and "Freedom of Speech in the Digital Age: Legal and Judicial Responses to Fake News in Indian Democracy" address urgent concerns of democratic discourse and information integrity in the digital age. The

remaining works, such as “Awareness and Access: Whether Western Himalayan Tribe Knows Their Rights under the FRA, 2006” and “Sustainable Development and Social Justice: Perspective from India”, highlight critical intersections of environmental justice, governance, and inclusion.

The Book Reviews covered under this volume include 'Constitutionalism and the Rule of Law - In a Theatre of Democracy (2023) written by Justice A.K. Sikri; 'Artificial Intelligence and National Security' (2024) by Vijay S. Khare and Amit Sinha; and 'Legends in Law: Our Great Forebears' (2024), By V. Sudhish Pai. These recent writings were selected to cover different domains and perspectives in the socio-legal fields and scholars had reviewed them very meticulously.

I extend my deepest appreciation to Prof. Konasinghe and Prof. Erimma for their invaluable editorial insights, which have greatly enriched this volume. My gratitude also goes to the reviewers whose meticulous evaluations ensured academic rigor and integrity. I commend the Editorial Board of the RPNLU Law Review for their editorial assistance. Dr. Prakash Tripathi and Yash Saxena deserve special mention for their meticulous editing of the final drafts.

I express our sincere gratitude to Prof. Vinay Kumar Pathak, President of the Association of Indian Universities and Vice-Chancellor of CSJM University, Kanpur, for graciously contributing the foreword. His insightful words lend great strength and vision to this inaugural volume.

It is my sincere hope that this journal will not only enrich academic discourse but also inspire meaningful reflection and innovation among researchers, policymakers, and practitioners. The RPNLU Law Review stands as a testament to the University's growing scholarly legacy and its aspiration to contribute to the global pursuit of knowledge, justice, and sustainable development.

It is anticipated that readers will find the articles within these pages both engaging and thought-provoking, reflecting the diverse and dynamic landscape of contemporary social science research.As we embark on this endeavor, we warmly invite constructive feedback and suggestions for improvement. This feedback will be invaluable in shaping the future direction of this publication and ensuring that it remains a vibrant platform for academic excellence.

**Date: 22-11-2025**

**Sr. Prof. (Dr.) Usha Tandon**
Hon'ble Vice-Chancellor
RPNLU Prayagraj

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## EDITORIAL NOTE

Law is an ever-growing element of human society, and it is subjected to change depending on political, social, economic, cultural, religious and several other ideologies established within the human society. What is law in one era of human civilisation may not be applicable to another era with different values and principles. Therefore, exploration into international, comparative and doctrinal analysis of law is undoubtedly a fascinating exercise that is full of excitement to find new adventures of meeting various paradigm shifts. At present this exercise has become ever more challenging with the development of artificial intelligence and its by-products in the world of research and academia. In order to find new knowledge with originality and creativity one must take the risk to take a deep dive into the complex system of research publications to find original research that has been produced with genuineness and integrity. RPNLU Law Review, published by Dr. Rajendra Prasad National Law University, Prayagraj, India is a double blind peer-reviewed international journal that is dedicated to publish articles that present high-quality research by the contributing authors, with insightful analyses from diverse legal perspectives. The first volume is a testament to sincere attempts by the journal to produce cutting-edge research that contribute to the advancement of critical thinking and independent writing of original research. As an international member of the Editorial Board, I take great pride in the collective efforts of the editorial team,

reviewers, and contributors of the RPNLU Law Review, whose determination to promote multidisciplinary legal research that addresses law from diverse angles. The team is dedicated to maintaining the international level of the journal by drawing insights from an international panel of academia that enriches the journal publication from different perspectives. I extend my sincere appreciation for the effort made by the Vice Chancellor, Prof. Usha Tandon and the publication team for maintaining a high-level of publication in the RPNLU Law Review.

Sincerely,

Prof. (Dr.) Kokila Lankathilake Konasinghe
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Founding Director of the Centre for Environmental Law and policy
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**FACULTY OF LAW**

**DEPARTMENT OF PRIVATE & PROPERTY LAW**

## EDITORIAL NOTE

The need to continue to explore albeit scientifically driven thoughts and empirically generated recommendations remains pivotal to the achievement of scholarly engagements. This maiden volume is an assemblage of very relevant and trending topics, for example from constitutional matters bordering on issues of lifting the corporate veil, Forest Governance/Rights, Sustainable Development and Social Justice, to discourse on legal Pathways to Eco-Innovation. Even the book reviews are hot and freshly baked from the press, each of them bear prints of careful analysis that most readers cannot resist the urge to savor the content of the books. It is indeed my considered opinion that this special issue is a very significant contribution to the growing body of knowledge in the field. Comprising of fourteen well researched academic articles, I am convinced that policy makers and practitioners will leverage this knowledge and bring it to bear in their policy decisions, ensuring effective implementation and compliance with the laws. A glimpse into the content of some of the papers will bear this out.

This volume sets out with a discussion on a very topical issue namely providing Civil and Constitutional Perspectives on the issues of Lifting the Corporate Veil in India drawing from the recent case of *Dhanush Vir Singh* v *Dr. Ila Sharma & Ors*. Its apposite and scintillating discussion makes further reading irresistible. It argues that while the judgment in that case underscores the importance of legal certainty, it simultaneously raises constitutional and societal concerns regarding access to justice and protection of weaker parties. By drawing comparative insights from other jurisdictions, the article reflects on whether Indian law requires calibrated statutory or constitutional interventions to reconcile corporate autonomy with the imperatives of accountability in a democratic society.

In a similar vein the duo of Anuj Kumar Vaksha and Shivani Pundir analyzed the Constitutional perspectives of *Viksit Bharat* @ 2047 Mission. The analysis is robust, very instructive and appear quite novel. In the paper titled, IPR, Sustainable Development and SDGs: Examining the Intersection from Legal and Policy

Perspectives ; legal and policy perspectives, the authors examined the role of IPR, in the pursuit of SDGs especially as it relates to Sustainable Development innovations, patents, trademarks and the need for openness, and an inclusive and collaborative approach to finding sustainable solutions. On the other hand , Parikshet Sirohi in 'Balancing Green Innovation and IP Protection' attempted to explore the intersection of environmental innovation and IP, and how patent laws can both vitalize and obstruct the development of green technologies. The author believes that promoting a thriving green technology sector, while also meeting our environmental commitments on a global scale depends on our ability to strike the right balance between IP protection and accessibility. Furthermore, the comparative analysis on the opt-out system of organ donation of various countries like France, Spain and Austria by the article on Comparative Analysis of Opt-Out Organ Donation Laws in Developed Countries: Lessons for India, is a good contribution to knowledge especially from the angle of Health law. The discussions on digital age and its impact on news especially in the absence of a legal frame work is equally informative.

Overall, there is no doubt, that this edition presents well-researched works, offering overarching solutions to diverse issues and challenges. Therefore, I strongly recommend it to law students, legal practitioners, Judges, researchers and policy makers.

Finally, I must at this point commend my dear friend of many years Snr. Prof Usha Tandon, an astute academic and intellectual giant for her unremitting efforts that has produced this Journal. Indeed the national and international academic community owe her a lot for her numerous academic publications and contributions to knowledge.

**Dr. Erimma Gloria Orie**
**Former Head of Department Private & Property Law**

# Lifting the Corporate Veil in India: Civil and Constitutional Perspectives from *Dhanush Vir Singh* v. *Dr. Ila Sharma & Ors.*

*Harpreet Kaur**

**ABSTRACT**

*The doctrine of separate corporate personality has long been recognized as a cornerstone of corporate law offering certainty and autonomy to business entities. Yet, its rigidity often raises questions of fairness, particularly when the corporate veil shields individuals from liability in civil proceedings. This review article examines the decision of the Allahabad High Court in Dhanush Vir Singh v. Dr. Ila Sharma & Ors.,[1] which declined to lift the corporate veil in execution of a money decree, thereby reaffirming the autonomy of the corporate entity. Through this case study, the article interrogates the limits of corporate veil-piercing in Indian jurisprudence, situating the reasoning within both private law doctrine and constitutional principles.*

*The analysis reveals a parallel between the judicial reluctance to lift the corporate veil in civil contexts and the cautious approach adopted under Article 12 of the Constitution in extending fundamental rights obligations to private corporations. While such consistency preserves predictability and commercial stability, it also highlights a societal gap for creditors, small businesses, and individuals interacting with corporations who may be left without effective remedies.*

*The article argues that while the judgment underscores the importance of legal certainty, it simultaneously raises constitutional and societal concerns regarding access to justice and protection of weaker parties. By drawing comparative insights from other jurisdictions, the article reflects on whether Indian law requires calibrated statutory or constitutional interventions to reconcile corporate autonomy with the imperatives of accountability in a democratic society.*

***Keywords:*** *Corporate Law, Civil Proceedings, Constitution, Accountability.*

* Vice-Chancellor, National Law University, Jodhpur.

[1] 2024:AHC:113931.

## 1. Introduction

Corporate personality as a concept, is one of the most significant fictions created by the law, whereby, by conferring a distinct legal personality upon a company, not only are individuals able to organize economic activity through a separate entity that owns property, incurs obligations, and sues or is sued in its own name, but such individuals are also encouraged to take risk and carry out their economic activity smoothly, by virtue of protection accorded to them from personal unlimited liability. This principle, rooted in the celebrated English decision in *Salomon v. Salomon & Co. Ltd.* (1897)[2], forms the bedrock of corporate law in India as well. The crux of the principle of separate legal personality can be illustrated through the following observations of Lord Halsbury in the case of Salomon:

*"…[a] limited company was to be viewed like any other independent person with its rights and liabilities appropriate to itself…either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon. If it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not."*[3]

The doctrine of corporate personality, also often referred to as the doctrine of separate legal personality, provides certainty and predictability to commercial actors, encourages entrepreneurship and protects individuals involved in a company from unlimited liability. However, this principle has time and again given rise to multiple controversies surrounding accountability in the corporate structure, when the same is used as a shield to evade legal obligations or act in bad faith. Thus, the judiciary has developed the doctrine of "lifting the corporate veil" as an exception to the general rule of corporate personality. Under this doctrine, courts may disregard the separate personality of a company and hold its directors, members, or controlling officers personally liable in circumstances such as fraud, tax evasion, or where the company is a mere sham. While the veil is not lightly lifted, judicial discretion in this area has remained an evolving terrain, often balancing competing imperatives of fairness to creditors and protection of the corporate form.

The decision was rendered by the Hon'ble High Court of Allahabad [hereinafter referred to as "High Court"] in the judgement of *Dhanush Vir Singh v. Dr. Ila Sharma & Ors.*[4] [hereinafter referred to as "Case of Dhanush Vir"] stands as a significant recent reaffirmation of the limited application of the principle of lifting the corporate veil, wherein the High Court

[2] *Salomon* v *A Salomon & Co Ltd* [1896] UKHL 1.
[3] *Id.* at 31, per Halsbury LC.
[4] *Supra* note 1.

held that in the execution of a money decree against a company, its directors could not be personally fastened with liability unless specific statutory or equitable grounds for piercing the veil were demonstrated. By refusing to extend liability beyond the corporate entity, the judgment underscores the judiciary's commitment to preserving the integrity of corporate personality in private law disputes.

This decision, however, also raises a broader question involving constitutional and societal considerations. While the case at hand arose in a civil context, the reluctance of the judiciary to pierce the corporate veil, resonates with precedents and judicial trends not only in the private law context, but also in the realm of constitutional law, specifically with regard to Article 12 of the Constitution of India, 1950 [hereinafter referred to as “Article 12”] where private entities are generally not treated as “State” and hence not directly accountable for violations of fundamental rights. This parallel demonstrates a consistent judicial posture—whether in civil liability or constitutional accountability—that the corporate form will not be disregarded except under stringent conditions.

However, such an approach, while preserving commercial predictability, highlights a lacuna in the law whereby individuals and smaller entities dealing with companies may find themselves without meaningful remedies when the corporate form protects officers from liability. The societal implications of this jurisprudence are particularly significant in an era of increasing privatization, where companies dominate essential services. If the judiciary continues to uphold a strict separation between the corporate personality (company) and its officers, weaker sections of the society such as employees, consumers and creditors may be left vulnerable.

This article, thus, uses the case of Dhanush Vir as a focal point to examine the contours and trends of the corporate veil doctrine in India, its interaction with constitutional principles, and its broader social implications. By situating the case within both private law and constitutional jurisprudence, the analysis aims to evaluate whether the current judicial approach adequately balances corporate autonomy with accountability in a society, increasingly shaped by corporate power.

This article is structured into four parts with the first part providing a doctrinal overview of the corporate veil in Indian jurisprudence, tracing its historical foundations, exceptions, and policy rationale. The second part discusses the case of Dhanush Vir, examining the facts, judicial reasoning, and implications for civil liability, with attention to societal impact. The third part explores the intersection of corporate personality with

constitutional principles, particularly under Article 12, and situates the case within broader debates on accountability and fundamental rights. The final part offers comparative insights, reflecting on international approaches to corporate accountability and potential reforms, and concludes by discussing the implications of maintaining corporate separateness for law, governance, and society.

## 2. Corporate Veil Doctrine in India

### 2.1 Introduction to the Corporate Veil Doctrine

The doctrine of corporate veil refers to the legal distinction between a company – as an independent legal entity and its officers – and forms a significant cornerstone of modern corporate law. The principle thus ensures that it is the company itself, rather than its officers, that is held accountable and liable for activities undertaken in respect of the operations of the company. The principle of corporate veil can be jurisprudentially and internationally traced back to the decision rendered in the case of *Salomon* v. *Salomon & Co. Ltd.*,[5] where the House of Lords affirmed the principle that a company upon its incorporation possesses a separate legal personality that is distinct from its shareholders. This principle has, thereafter, been adopted and adapted in multiple jurisdictions, including Indian Law.

Section 9 of the Companies Act, 2013 [hereinafter referred to as "Act"] codifies under Indian Law, the aforementioned principle by providing,

"*From the date of incorporation mentioned in the certificate of incorporation, such subscribers to the memorandum and all other persons, as may, from time to time, become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company under this Act and having perpetual succession with power to acquire, hold and dispose of property, both movable and immovable, tangible and intangible, to contract and to sue and be sued, by the said name.*"[6]

The corporate veil, therefore, protects shareholders and officers from personal liability for the company's debts, except in specific, narrowly defined circumstances.

### 2.2 Historical Development of the Corporate Veil Doctrine in India

The Supreme Court of India [hereinafter referred to as "SC"] recognized the aforesaid principle in the year 1950 in *Chiranjit Lal Chowdhuri v. The Union*

5 *Supra* note 2.

6 Companies Act, 2013 (Act 18 of 2013), s. 9.

*of India*[7], and thereafter, reaffirmed the same at length in *Bacha F. Guzdar v. CIT, Bombay* in 1954.[8] In both the instances, the court observed that the identity of the company was separate from that of its shareholders. Over the years, Indian courts have articulated that while the corporate veil is generally sacrosanct, it is not inviolable. In the State *of U.P. v. Renusagar Power Co. Ltd.* (1988), the Supreme Court recognized that although a company is distinct, the veil may be pierced where misuse, fraud, or statutory violation occurs.[9] Similarly, in *Life Insurance Corporation of India v. Escorts Ltd.* (1986), the Court had emphasized that the doctrine protects business actors while simultaneously allowing judicial scrutiny to prevent misuse.[10] Thereafter, the principle has constantly been applied and evolved by the judiciary of the country, but with multiple recognized exceptions which were required to be created for conclusively delineating the principle of corporate veil as well, which have been discussed at a later stage of this article. For instance, in the case of *State of Rajasthan v. Gotan Lime Stone Khanij Udyog Pvt. Ltd.*[11]*,* the Supreme Court pierced the corporate veil to hold that the real substance of the transfer in question was the impermissible transfer of a mining lease without the approval of the State Government. Furthermore, in the case of *State of Karnataka v. Selvi J. Jayalalitha,* the High Court of Karnataka pierced the corporate veil, where a chain of shell companies had been used to create a facade over the acquisition of assets in a corrupt manner.[12]

### 2.3 Statutory Provisions pertaining to the Doctrine of Corporate Veil in India

Before moving further, it is important to examine Sections 339, 210, 211, 212 and 216 of the Act for a meaningful discussion on the doctrine of corporate veil in India. Section 210 of the Act empowers the Central Government to order an investigation into a company's affairs if it receives a report from the Registrar, gets a special resolution from the company itself for investigation, or if it's in the public interest. Additionally, if a court or the Tribunal orders an investigation in any proceedings before it, the Central Government must initiate one. For this purpose, the government can appoint one or more inspectors to look into the company's affairs and report their findings.[13] Thus, the provision of Section 210 permits the Government (Ministry of Corporate Affairs) to lift the corporate veil of a company, on fulfilling of the conditions provided therein, as elucidated above. Section 211 of the Act, in

[7] *Chiranjit Lal Chowdhuri v. The Union of India*, [1950] S.C.R. 869.
[8] *Bacha F. Guzdar v. CIT, Bombay*, 1954 INSC 102.
[9] *State of U.P. v. Renusagar Power Co. Ltd.*, 1988 AIR SC 1737.
[10] *Life Insurance Corporation of India v. Escorts Ltd.*, 1986 AIR 1370.
[11] *State of Rajasthan v. Gotan Lime Stone Khanij Udyog Pvt. Ltd.*, AIR 2016 SC 510.
[12] *State of Karnataka v. Selvi J. Jayalalitha*, AIR 2017 SC (Supp) 481.
[13] Companies Act, 2013 (Act 18 of 2013), s. 210.

connection with the previous provision, establishes the Serious Fraud Investigation Office (SFIO) to investigate corporate fraud,[14] the process of which is carried out in accordance with the provisions of Section 212 of the Act. Under Section 212, the Central Government can order an SFIO investigation based on a Registrar's report, a special resolution by the company, the public interest, or a request from a government department. Once assigned, the SFIO must conduct the investigation according to specific procedures and submit a report to the Central Government.[15]

Section 216 of the Act, grants the Central Government, power to appoint an inspector to investigate a company's ownership when there are suspicions of financial interest or undue influence by certain individuals. The inspector examines beneficial ownership, financial interests, and potential undisclosed arrangements to protect shareholder interests and ensure good corporate governance.[16] This thus, serves as yet another provision, similar to Section 210, whereby the Ministry of Corporate Affairs can lift the corporate veil.

Section 339 of the Act establishes liability for fraudulent conduct of business during a company's winding-up proceedings. If a company's business was conducted with the intent to defraud creditors or for any fraudulent purpose, the National Company Law Tribunal (NCT) can declare that certain individuals are personally responsible for the company's debts and liabilities, even without limitation. This includes directors, managers, officers, or any other person knowingly party to the fraud.[17] Section 339, therefore, acts as a provision enabling the Tribunals constituted under the Act to lift the corporate veil.

### 2.4 Recognized Exceptions to the Doctrine of Corporate Veil

The foregoing discussion has established that while the doctrine of separate corporate personality is firmly entrenched in Indian law, it is not absolute. Moreover, the above situations are not the only ones where the corporate veil may be lifted by courts. Judicial rulings have established, as stated above, certain conclusive exceptions to the doctrine of corporate veil, where the same may be lifted:

i. *Fraud or Improper Conduct* **-** One of the principal grounds for piercing the corporate veil is the presence of fraud or other inequitable conduct. Courts will disregard the corporate entity when it is used as an instrument to evade legal

[14] Companies Act, 2013 (Act 18 of 2013), s. 211.
[15] Companies Act, 2013 (Act 18 of 2013), s. 212.
[16] Companies Act, 2013 (Act 18 of 2013), s. 216.
[17] Companies Act, 2013 (Act 18 of 2013), s. 339.

obligations, perpetrate deception, or commit illegality. For instance, in the case of *Delhi Development Authority v. Skipper Construction Company (P) Ltd. and Ors.,* the Apex Court lifted the corporate veil in a case involving multiple fraudulent companies being created for the purpose of using them as a cloak for carrying out fraud, holding the accused therein, directly liable for fraud.[18]

ii. *Sham Companies* - The corporate veil may also be lifted where the company exists merely as a sham concealing the true actors behind its operations. This exception allows courts to examine the substance and true nature of transactions rather than their form or external structure. The Apex Court in the case of *Tata Engineering & Locomotive Co. Ltd. v. State of Bihar*, applied this principle and reasoning while lifting the veil in a case pertaining to sham companies created for the purpose of tax evasion.[19] It is pertinent to also mention that tax evasion is yet another recognized exception to the doctrine of corporate veil in India, applied in situations similar to the above.

iii. *Agency or Instrumentality* - In situations, where a company functions as an agent or instrumentality of its officers or members, courts may pierce the corporate veil to hold the said officers or members accountable. This exception ensures that the corporate personality cannot be exploited to protect individuals from responsibility for their own actions.

iv. *Evasion of Legal Obligations* - The judiciary has also recognized, as an exception to the doctrine of corporate veil, situations where the company is used to circumvent and evade legal duties or statutory requirements, and this prevents the officers of the company from manipulating the corporate structure to evade the due process of law.

### 2.5 Doctrine of Corporate Veil in the Civil Law Context

The corporate veil is a principle that is primarily rooted in and applied to private law, which predominantly, in practical terms can be understood as civil law. In the civil law context, the doctrine serves the primary purpose of protecting and shielding the officers of a company, from personal liability for actions arising out of the day - to - day activities of the company. This principle aims at providing and ensuring a degree of certainty in commercial operations of the company, enabling and encouraging individuals to invest and participate actively, take risk without the looming threat of unlimited personal liability. For instance, in

[18] *Delhi Development Authority v. Skipper Construction Company (P) Ltd. and Ors.*, 1999 INSC 574.
[19] *Tata Engineering & Locomotive Co. Ltd. v. State of Bihar*, AIR 1965 SC 40.

the case of Dhanush Vir, as elucidated at length in the next section of the article, the High Court upheld the principle that directors could not be personally held liable for corporate debts in execution proceedings sans statutory or exceptional grounds.[20] This illustrates the civil law approach that this article discusses - a high threshold utilised and applied by courts for piercing the corporate veil, which reflects the general trend and preference of the judiciary towards preserving the distinct nature of the corporate entity, while allowing limited judicial intervention in the event of exceptional situations.

**2.6 Doctrine of Corporate Veil in the Constitutional Law Context**

In the constitutional law domain, the corporate veil aids greatly in determining the scope of application and accountability under Article 12, which defines the term "State" for the purposes of enforcing the fundamental rights of citizens enshrined under Part III of the Constitution. Judicial interpretation has generally excluded private corporations from being treated as "State" actors, except in situations where the company is subject to "deep and pervasive control" by the government, or is performing functions that are essentially public in nature. The Apex court through various rulings, including those of *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology* and *Zee Telefilms v. Union of India* have reaffirmed this principle, which shall be discussed at length at a later section of the article.

The interplay between civil and constitutional contexts with regards to the corporate veil, reveals a trend in the rulings of the judiciary that favours commercial stability and certainty. However, it also exposes lacunae in terms of societal protection, whereby creditors and small stakeholders may face hardships in enforcing their claims, which is the aspect this article seeks to explore in the upcoming sections.

**3. Case Study: *Dhanush Vir Singh* v. *Dr. Ila Sharma & Ors.***

The case of Dhanush Vir,[21] stands as a strong example of the application of the doctrine of corporate veil by the judiciary in India in contemporary times, where the Allahabad High Court addressed whether directors or representatives of a company could be arrested or detained to enforce a money decree against the company.

In the case of Dhanush Vir, the Revisionist (Dhanush Vir Singh), in the capacity of General Manager and Branch Head, had been authorized by M/s Benett Coleman and Co. Ltd., [hereinafter referred to as "Company"] to enter into a lease agreement for a period of 9 years, and the lessee was entitled to terminate the lease by giving a notice of 3 months. The

[20] *Supra* note 5.
[21] *Ibid.*

lease agreement was terminated by the lessor on 22.04.2016 and a request was made to the Company to vacate the premises leased out and handover the vacant possession of the same within 30 days from the date of the notice. Furthermore, mesne profits to the tune of Rs. 2,500/- per day until actual handing over of the possession was also claimed by the lessor. The Company did not vacate the premises, and thus, a suit came to be instituted by the lessor, claiming eviction and recovery of mesne profits. Subsequently, the Company stated before the Trial Court that it was willing to hand over vacant possession of the land but it was the lessor who had refused to accept the same. Notwithstanding the above submission, the possession of the premises was handed over to the lessor on 01.10.2019, following which the suit was proceeded ex - parte and decreed on 05.08.2021, whereupon, the Company was directed to pay mesne profits as claimed by the lessor, to the tune of Rs. 2,500/- per day from the date the suit was filed till the date of delivery of possession (01.10.2019). Subsequently, an execution petition was filed by the lessor in order to seek execution of the aforesaid decree, and the Revisionist was impleaded, by virtue of him being the signatory to the lease agreement. Thereafter, a warrant of arrest was issued against the Revisionist on an Application by the decree holder (lessor), and the same was challenged before the High Court of Allahabad in the instant case of Dhanush Vir. Thus, the question before the High Court was "*whether the Directors/Authorized Representatives of a Limited Company be arrested and detained in Civil Prison for execution of a Money Decree against the Company or so to say whether the Directors/Authorized Representatives of the Company are bound in a representative capacity for the Judgment Debtor Company for the execution of the said Decree*".

The court, while allowing the Revision Petition, held *firstly*, that the provisions of the Code of Civil Procedure, 1908 [hereinafter referred to as "CPC"], pertaining to the execution of a decree, attachment of property thereof, etc. were applicable only to the judgement debtor, which as the Company in the case at hand, and not the Revisionist. The court observed in this regard that the CPC does not provide for the execution of a decree against a Company, through its Employee/Representative/Director, and at most provides only for the execution of a money decree against a firm from the assets of its partner,[22] and the oral examination of an officer of a corporation to determine the assets of the corporation.[23]

Thereafter, the court examined the aspect of piercing the corporate veil and noted in clear terms that no ground for lifting the corporate veil existed in the present case. The case of *Tata Engineering and Locomotive Co. Ltd. v. State of Bihar* was referred by the court, in

[22] Code of Civil Procedure, 1908 (Act 5 of 1908), Order XXI, Rule 50.
[23] Code of Civil Procedure, 1908 (Act 5 of 1908), Order XXI Rule 41(1)(b).

which the Apex Court had observed that the veil was to be lifted only where dualism existed between a company and its members or shareholders.[24] On this basis, the court concluded that since it was the Company and not the Revisionist who was the judgement debtor, and the Revisionist was only the then General Manager and Branch Head and current Vice President of the Company, he could not be arrested, therefore, the trial court had committed a manifest error of law in issuing an arrest warrant against him.

This judgement, thus, reinforces fundamental principles of corporate separateness in civil enforcement proceedings, and not only delineates the boundary that exists between a corporate judgement debtor and its officer, but also affirms the high threshold that needs to be fulfilled under the law for courts to disregard corporate personality. The ramifications of this judgement furthermore, radiate to the society and the constitution as well, which the next section of the article seeks to examine.

## 4. A Comprehensive Analysis of The Doctrine of Corporate Veil

The decision of Dhanush Vir case, emulates the judiciary's reluctance to extend the doctrine of piercing the veil, beyond well-established categories. However, this judicial conservatism indicates a conflict within the private law: while courts recognize and accept that corporate structures may at times be misused, they are hesitant to erode the fundamentally recognized principle of separate legal personality. This is in striking contrast to the decision making observed in public law contexts, where courts have at times resorted to treating state - owned corporations as authorities under Article 12. The decision in Dhanush Vir reaffirms the approach of the courts that diluting the doctrine of corporate veil to ordinary disputes would generate unpredictability and discourage risk taking. However, this trend requires examination into the ramifications of the same, in non - private areas of the law.

### 4.1 Comparative Perspectives

An analysis of the Indian Position on the doctrine of corporate veil reveals that the courts in India have generally adopted a narrow and conservative approach towards lifting the corporate veil. Furthermore, a major problem/lacuna in the Indian jurisprudence on corporate veil is that no conclusive grounds or clear guidelines/parameters have been laid down as to when the veil shall be pierced and when it shall not.

[24] *Tata Engineering and Locomotive Co. Ltd. v. State of Bihar*, AIR 1965 SC 40.

The United Kingdom, as the originating jurisdiction of the doctrine of corporate veil,[25] has historically championed and emphasized on the sanctity of the same. However, thereafter, the courts have developed limitations and nuanced doctrines to dilute the rigidity of the principle.

The most significant contemporary development in this regard can be seen in the decision of the Supreme Court of UK in the case of *Prest v Petrodel Resources Ltd*[26], wherein, dealing with the question of marital property rights of a person, the court observed that the corporate veil could be lifted when, the person in question is "*under an existing legal obligation or liability or is subject to an existing legal restriction*" and "*they deliberately evade the obligation/liability/restriction, or whose enforcement they deliberately frustrate by interposing a limited company under their control*". This test known as the Prest Test, has been consistently followed and applied by courts in the UK, since 2013. Notably, Lord Sumption in this decision, laid down the "evasion principle", and the "concealment principle", where he expounded that the corporate veil may be pierced in situations where a company or companies are interposed in a transaction so as to mask the true principles of the transaction,[27] or where the company or companies are interposed to prevent a right against a member of the company from being enforced.[28]

This principle, although on a standalone basis, yet again does not seem to very conclusively provide a clear parameter to guide courts on when to and when not to pierce the corporate veil;[29] it has been consistently applied by courts subsequently,[30] leading to a clear visible judicial trend in the UK, which is conspicuously absent in India. Furthermore, the UK approach also indicates and recognizes that strict adherence to *Salomon* can at times be counterproductive to the ends of justice.

As opposed to the Indian and British approaches to piercing the corporate veil, American courts have shown much more flexibility in piercing the veil. The "instrumentality" or "alter ego" doctrine has significantly shaped the development of the

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[25] *Supra* note 2.
[26] *Prest v Petrodel Resources Ltd* [2013] UKSC 34.
[27] Concealment Principle.
[28] Evasion Principle.
[29] The Road To Prest v Petrodel: An Analysis of the UK Judicial Approach to the Corporate Veil - Part 1, *available at:* https://repository.mdx.ac.uk/download/48460a54cbb363a8dc7820efbb565623b400f9714a07cd53668de2547f836afa/552981/The%20Road%20To%20Prest%20v%20Petrodel-accepted-inpress.pdf (last visited on Aug. 28, 2025).
[30] *Rossendale Borough Council v Hurstwood Properties Ltd*, [2019] EWCA Cov 364; *Inter Export LLC* v *Townley* [2019] EWCA Civ 2068.

law on corporate veil in the USA, and is used to impose liability on shareholders and directors, where the corporation in question has been created solely as a facade for individual operations.

Professor Frederick Powell, in his 1931 work, "Parent and Subsidiary Corporations", formulated what came to be known as the "Powell Rule"[31], and this includes three major aspects - the instrumentality rule, improper purpose (defendant's fraud or wrong), and unjust loss or injury. The instrumentality rule, often referred to as the "alter ego" doctrine, establishes that a subsidiary company or corporation does not function merely as an independent entity, but rather is an extension of the parent company and operates "*under the domination and control and for the purposes of*" the parent corporation.[32] Furthermore, to ensure predictability and consistency, Powell identified certain situations where the subsidiary shall be construed as an instrumentality of the parent company. Those situations include where ownership of all or most of the stock of the subsidiary is held by the parent; there is a common board and/or management and financing of the subsidiary; exclusive capital subscription by the parent or incorporation of the subsidiary by the parent; where subsidiary has grossly inadequate capital; where payment of expenses or losses, including salaries is managed by the parent; when subsidiary has no substantial, independent business except with the parent; when assets of subsidiary are wholly contributed by the parent; when in the parent's internal documentation subsidiary is defined as a unit thereof or description of its business or financial responsibilities as the parent's own; when subsidiary's property is used by the parent, as if, it is owned by the parent; when board or management of the subsidiary is not independent, and the subsidiary is merely executing organ for orders from and in the interest of the parent; and there is a lack of observance of formalities for constitution of the subsidiary.[33] The second and third aspects of Powell's Rule, namely the existence of an improper purpose, and the unjust loss or injury form equally important aspects of the rule, and are also qualified by multiple criteria laid down by Powell himself. For instance, Powell laid down 7 criteria to determine an improper purpose, including misrepresentation, violation of a statue, actual fraud, etc.[34] After Powell's Rule, other evolved rules such as Krendl's Theory, have also laid down selected and settled parameters to be

[31] *Cathy S. Krendl and James R. Krendl*, "Piercing the Corporate Veil: Focusing the Inquiry" 55 *Denver Law Journal* 1 (1978).
[32] *Ibid.*
[33] Dante Figueroa, "Comparative Aspects of Piercing the Corporate Veil in the United States and Latin America" 50 *Duquesne Law Review* 683 (2012).
[34] Mark S. Cohen, "Grounds for Disregarding the Corporate Entity and Piercing the Corporate Veil" 45 *American Jurisprudence Proof of Facts* 11 (1998).

applied by the courts.[35] Thus, the fundamental principle that is applied to pierce the corporate veil in American Jurisprudence has a higher degree of predictability, conclusiveness and certainty as opposed to the Indian approach.

Another aspect that seems to have been largely overlooked in the Indian jurisdiction is the question of whether a single director can be considered to be a co - conspirator with a company. This question was addressed in *Nagase Singapore Pte Ltd v. Ching Kai Huat* by the High Court of Singapore,[36] wherein, relying upon a judgement of the Irish Court of Appeal in *Taylor* v. *Smyth*,[37] it was held that nothing precluded a company from being a co - conspirator with a single director.

**4.2 Constitutional and Societal Impact of the Judiciary's Approach to Piercing of Corporate Veil in India**

As stated in previous sections, the doctrine of corporate veil, although rooted in private law, has acquired a significant constitutional dimension as well as societal dimension in India. Indian Constitutional Jurisprudence has extended the reasoning and purpose of the doctrine of corporate veil piercing into public law as well, and this can be most visibly seen in the interpretation of Article 12 of the Constitution of India which defines "state" for the purposes of Part III which lays down the fundamental rights of citizens.[38] The judiciary has, through various decisions, using a combination of purposive interpretation and innovation, used the corporate veil doctrine's reasoning to ensure that entities that are otherwise shielded under the corporate veil, do not escape liability and accountability when the actions performed by them are actually public functions. The Apex Court of the country has held at multiple instances that the determination and analysis of whether or not an entity shall fall under the meaning of "state" under Article 12 will require an examination beyond its legal form.[39] This reasoning can be compared as having echoed the metaphor of the corporate veil, wherein the separate juristic personality of the entity was disregarded.

This reasoning of the Supreme Court was further expanded in the case of *Ajay Hasia v. Khalid Mujib Sehravardi* where Justice Bhagwati expounded that the test to be seen was not the way/form of incorporation of the entity, but the degree of government control and the

[35] *Supra* note 30.
[36] *Nagase Singapore Pte Ltd v Ching Kai Huat and Others*, [2007] SGHC 169.
[37] *Taylor v. Smyth*, [1991] 1 IR 142.
[38] The Constitution of India, *art. 12*.
[39] *Rajasthan State Electricity Board v. Mohan Lal*, AIR 1967 SC 1857 – The Supreme Court held that the Rajasthan State Electricity Board, though a statutory corporation, would fall under the ambit of Article 12 since it exercised the power of statutory compulsion.

nature of functions discharged.[40] A similar approach has also been taken in other subsequent decisions.[41] This approach of the Supreme Court illustrates that the doctrine of piercing of corporate veil, although not expressly and explicitly invoked in the context of Article 12, underpins the judicial reasoning and methodology followed while deciding a question of the scope of Article 12.

Notably, the public law application of veil - piercing under Article 12, is grounded in the agency/instrumentality test, where courts have looked into various factors such as the extent of government funding, the nature of functions (public versus private), the existence of deep and pervasive control, and whether the body enjoys monopoly status conferred by law. This rationale and reasoning can be seen to be significantly similar to the private law instrumentality rule as highlighted above, but is tailored to constitutional goals. In the sphere of constitutional law, the purpose of piercing the veil is to prevent the State from evading its responsibility to uphold fundamental rights while in the private law sphere, the goal is to prevent – evasion of responsibilities under the law, fraud and misuse of corporate personality. Thus, while in private law, the doctrine operates to protect creditors and minority shareholders, in public law, it serves the objective of ensuring that the fundamental rights of citizens are not breached. Yet another judicial trend can be seen in decisions such as *State Trading Corporation v. CTO*, where the Apex Court held that corporations, even if state owned, would not be a citizen for the purposes of Article 19 of the Constitution which provides the fundamental right to *inter alia*, carry on profession freely.[42]

Another significant judicial ruling dealing with the public law aspect of piercing the corporate veil under Article 12 can be seen through the Bombay High Court's decision in *M. Yogeshwar Raj v. Air India Limited*,[43] wherein, it was held that Air India, by virtue of its privatisation, would no longer be amenable to writ jurisdiction for want of performing a public duty. However, it is pertinent to note that the aforesaid case, dealt with a situation wherein, the privatisation of Air India took place during the pendency of the writ petitions before the High Court. Thus, it follows that the implication of the judgement of the Bombay High Court, is that the privatisation of Air India, led automatically to its liabilities ceasing to exist, raising a question as to the larger societal impact of the same. This judgement further stands as a striking example of the inconsistent approach taken by the judiciary with respect

[40] *Ajay Hasia v. Khalid Mujib Sehravardi*, (1981) 1 SCC 722.
[41] *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, (2002) 5 SCC 111.
[42] *The State Trading Corporation of India Ltd. & Others v. The Commercial Tax Officer, Visakhapatnam & Others*, 1963 INSC 157.
[43] *M. Yogeshwar Raj v. Air India Limited*, 2025:BHC-OS:14229-DB.

to the piercing of the corporate veil in the public law context, wherein, a mere technicality was used by the court to absolve an entity of allegations of breach of fundamental rights.

From a societal perspective, the piercing of the corporate veil promotes accountability wherein citizens are not left remediless merely because of the corporate veil. From the point of view of Article 12, this ensures the fact that the entity violating their rights is a government body, and not the State in its formal sense, does not on its own render them remediless; while in the private law realm, it ensures that creditors and shareholders are not left remediless where their interests have been jeopardized. The doctrine also further strengthens the constitutional mandate of social justice, by ensuring that no discrimination takes place among one class of citizens as opposed to another, in the private as well as public realm. However, practically, it can be seen that the courts follow a largely inconsistent approach to piercing the corporate veil and remain reluctant in most cases to do the same as well, as observed in the case of Dhanush Vir.

The recognition of a company as a separate legal person, no doubt allows the concentration of economic power, encourages the accumulation of capital, and encourages and facilitates entrepreneurship in a much-needed manner. However, these benefits come at the cost of diluted responsibility, which enables actors in companies to externalize the harm caused by their operations onto weaker sections of the society. This can be seen not only in cases such as the Bhopal Gas Tragedy, but also in purely corporate law instances such as the case of *Tata Consultancy Services Limited* vs *Cyrus Investments Pvt. Ltd.*, where the interests of shareholders was impacted to such a high degree that the Supreme Court at the end, pierced the corporate veil.[44] The doctrine has also, it can be argued, contributed to widening economic disparities where companies by protecting members from liability can engage in dubious ventures with limited personal exposure, and where the veil is left intact, due to inconsistent judicial approach, companies may shield themselves from labor law obligations, environmental responsibilities and taxation duties, etc. The challenge therefore lies in laying down and designing a comprehensive corporate veil doctrine that safeguards legitimate business interests of corporations, while preventing their abuse at the same time. Judicial decisions reflect greatly this need of the hour. Illustratively, in *Vodafone International Holdings v. Union of India,* the Supreme Court refused to lift the veil in a taxation dispute on the ground that certainty was essential for foreign investors, yet, critics argue that such reluctance and restraint prioritizes capital flow as opposed to social and

[44] *Tata Consultancy Services Limited vs Cyrus Investments Pvt Ltd*, AIRONLINE 2021 SC 179.

distributive justice.[45] On the other hand, in *Life Insurance Corporation of India v. Escorts Ltd.*, the court recognized the need of transparency in corporate structures where public interest is at stake,[46] and this oscillatory approach of the judiciary is precisely what needs to be re-examined.

## 5. Conclusion

The Indian experience demonstrates that veil piercing cannot be treated as a purely private law remedy. When companies engage in activities with significant public ramifications and consequences, the doctrine leads to an impact in a constitutional and societal dimension. This requires the courts to employ an approach that takes into account the context of the situation, guided not only by corporate law principles but also by constitutional values.

For instance, environmental regulation offers a ground for a public law-oriented veil doctrine. With companies increasingly responsible for ecological degradation, courts ought to see if directors and parent entities are accountable. Similarly, in the domain of labor rights, piercing the veil could prevent employers from hiding behind corporate structures to avoid statutory obligations.

The constitutional and societal impact of the corporate veil thus lies in its capacity to balance autonomy with responsibility. The Indian judiciary has already begun to recognize this, though its approach remains fragmented. A more coherent doctrine—one that integrates constitutional principles with societal imperatives—would strengthen both the rule of law and public trust in corporate governance. However, the author would also like to state as a concluding note, that it is essential to ensure that the functioning of a company is not affected in any manner, and that the corporate veil is pierced only when sufficient reasons exist for the same, while simultaneously balancing societal and constitutional questions surrounding the same.

[45] *Vodafone International Holdings BV v. Union of India*, 2012 (6) SCC 757.

[46] *Supra* note 9.

# Loss of Profit or Loss of Profitability: Admissibility of Contractual Remedies in India

*Sairam Bhat*, Gayathri Gireesh** & Bhumika Raghavendra****

**ABSTRACT**

*In the landscape of contemporary commercial contractual disputes, the terms "loss of profit" and "loss of profitability" have not only become prevalent particularly in relation to claims for damages but are also one of the most contentious. Though seemingly interchangeable and often confused, it is crucial to understand that they not only connote to two different concepts but also carry distinct legal and financial implications for the parties. The authors in this paper analyse the evolving jurisprudence in India regarding these two types of claims, and the evidentiary burdens involved to substantiate them through the interpretation provided by Delhi High Court in the recent case M/s Plus91 Security Solutions v. NEC Corporation India Pvt Ltd, a decision that navigates the complex interplay of contract law, arbitration law, and judicial review in India. At its core, the case revolves around enforceability of a limitation of liability clause, that excluded consequential damages, including loss of profits, in a dispute arising from a Memorandum of Understanding (MOU). The case offers valuable insights regarding the court's interpretation of these two concepts, and the treatment of clauses limiting liability. This case also highlights the balanced approach taken by courts in the conflict between the court's duty to guarantee that arbitral awards are not unlawful and the principle of minimal judicial intervention in arbitration awards, particularly when those decisions conflict with the explicit provisions of the underlying contract. The Delhi High Court's Single Judge and Division Bench, both found the Arbitral Tribunal's decision to award loss of profit despite an express contractual clause limiting the same to be blatantly unlawful. The entire dispute that has traversed through arbitration and multiple levels of the Indian judicial system, and is now pending before the Supreme Court of India, not only emphasises the need for businesses to exercise due diligence and foresight but also the relevance and significance of preparatory agreements, like MOUs, in establishing the limits of liability between businesses, even early on in their partnership.*

***Keywords:*** *Loss of Profit, Loss of Profitability, Arbitration, Judicial Review, Limitation of Liability, Memorandum of Understanding.*

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## 1. Introduction

In the landscape of contemporary commercial disputes, claims for loss of profit and loss of profitability have become increasingly prevalent,[1] particularly in arbitral proceedings where contractual breakdowns are examined in detail.[2] These claims often emerge from complex commercial engagements, where one party claims consequential damages due to the other's breach of contract. While both of these terms are frequently used interchangeably, they differ significantly in meaning, scope, and evidentiary requirements. Their conflation not only creates ambiguity but also affects the manner in which arbitral tribunals and courts assess liability and damages under Indian law. Hence, it is imperative to understand and underscore that the distinction between "loss of profit" and "loss of profitability" is not merely semantic, but rather carries significant legal and financial implications.

A recent illustration of this evolving jurisprudence is found in the decision of the Delhi High Court in *M/s Plus91 Security Solutions v. NEC Corporation India Pvt. Ltd*.[3] The Delhi High Court reversed an arbitral verdict that had given M/s Plus91 Security Solutions ₹8,43,07,904 (i.e. 10% of the total value of works of Rs. 84,30,79,040) as damages for lost profits against NEC Corporation India Pvt Ltd. A limitation of liability clause contained in the Memorandum of Understanding (MOU), signed by both parties, which expressly excluded any liability for loss of profit, formed the basis for the High Court's ruling. The arbitral tribunal's decision to award such damages, notwithstanding the exclusion, was subjected to judicial scrutiny. The High Court's involvement underscores the importance of precise wording in business contracts, particularly with regard to liability-limiting provisions, and demonstrates the balanced approach adopted by the judiciary between respecting arbitral autonomy and upholding the contractual intent of the parties and integrity of contractual agreements. Currently, the Supreme Court of India is hearing an appeal filed by M/s Plus91 Security Solutions against this decision.[4]

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[1] See Kenneth M Kolaski & Mark Kuga, "Measuring Commercial Damages via Lost Profits or Loss of Business Value: Are These Measures Redundant or Distinguishable?" 18 *Journal of Law & Commerce* 1 (1998-99).

[2] See e.g. Gyanvi Khanna, "Awarding Claim for Loss of Profit Without Substantial Evidence is in Conflict with Public Policy of India: Supreme Court" *Live Law* (Oct. 23, 2023), *available at:* https://www.livelaw.in/supreme-court/supreme-court-judgment-claim-for-damages-substantial-evidence-arbitral-award-240832 (last visited on June 10, 2025); Raghav Bhatia, "Supreme Court on Grant of Loss of Profits Sans Evidence" *India Corp Law* (Apr. 24, 2024), *available at:* https://indiacorplaw.in/2024/04/supreme-court-on-grant-of-loss-of-profits-sans-evidence.html (last visited on June 10, 2025); Susshil Daga, *et.al.*, "Claim for Loss of Profit vis-à-vis Railway Contracts and Public Works Department Contracts" *Live Law* (Jan. 07, 2025), *available at:* https://www.livelaw.in/law-firms/law-firm-articles-/claim-for-loss-of-profit-vis-vis-railway-contracts-and-public-works-department-contracts-280177 (last visited on June 10, 2025); Rituparna Chand, "Unraveling the Complexities of Loss of Profit Versus Loss of Profitability in Construction Disputes" *Live Law* (May 21, 2025), *available at:* https://www.scconline.com/blog/post/2025/05/21/unravelling-the-complexities-of-loss-of-profit-versus-loss-of-profitability-in-construction-disputes/ (last visited on June 10, 2025).

[3] *M/s Plus91 Security Solutions* v. *NEC Corporation India Pvt Ltd*, 2024 LiveLaw (Del) 869.

[4] *M/s Plus91 Security Solutions* v. *NEC Corporation India Pvt Ltd.*, Civil Appeal No. 14131/2024 (before the Supreme Court).

The authors in this paper aim to analyse the legal nuances of this case, highlighting key aspects such as the principles governing claim of damages, the role of limitation of liability clauses, and the extent of judicial intervention in arbitration awards. Understanding these elements is essential for refining contract drafting practices and ensuring fair dispute resolution mechanisms. The paper is structured as follows: The next section provides the necessary background and an abridged procedural history of the *Plus91 case*. The third section explores the conceptual and legal differences between loss of profit and loss of profitability. The fourth section again delves into the *Plus91 case*, analysing the key elements that led to the judgement. The fifth section, contextualised the *Plus91 case* in the existing legal and jurisprudential discourse on loss of profits, evaluating the broader implications for contractual drafting, enforcement, and also on claiming interests. The last section of the paper concludes with a brief summary and key takeaways from the discussion.

## 2. Background and Procedural History of the Case

The genesis of the dispute can be traced back to an earlier collaboration between NEC Corporation India Pvt Ltd and M/s Plus91 Security Solutions in 2014, where NEC, a company renowned for its IT and biometric solutions, approached Plus91, a firm specializing in security-oriented IT solutions, for potential collaboration on projects involving Facial Recognition System (FRS) technology, leading to the signing of an initial Memorandum of Understanding (MOU). The specific MOU that triggered the current legal battle was signed on May 16, 2019, and pertained to an E-Boarding-Biometric Boarding System (BBS) project for the Airport Authority of India (AAI). Plus91 contended that NEC utilised their industry expertise and contacts to successfully secure the AAI project, with assurances of receiving purchase orders amounting to approximately ₹84 crores for their contribution. In contrast, NEC maintained that the MOU's sole purpose was to enable Plus91 to obtain vendor quotations. It did not establish any binding obligation on NEC to issue purchase orders to Plus91.[5]

Clause 1 of the 2019 MOU, stipulated that the parties would collaborate in the field of BBS, explore potential opportunities together, and subsequently enter into specific project-based agreements that would clearly define their respective roles and responsibilities. This clause was pivotal in the Delhi High Court's interpretation that the MOU was a preliminary agreement outlining the intent for future collaboration rather than a definitive contract for the execution of work. Furthermore, Annexure-A of the MOU, which detailed the scope of work for both parties and indicated a tentative value for Plus91's

[5] *Supra* note 3.

portion, remained unsigned by either party. This lack of a formal signature on a document, outlining key aspects of the proposed work, further bolstered NEC's argument that the MOU did not constitute a binding commitment for the award of work. NEC was eventually awarded the AAI contract on August 23, 2019.[6] Following this, Plus91 requested a project-specific agreement to formalise their role, but NEC did not enter into such an agreement. This led Plus91 to issue a legal notice in May 2020, alleging a breach of the MOU by NEC. NEC refuted these allegations, asserting that the MOU did not impose any obligation on them to issue purchase orders to Plus91. Consequently, Plus91 invoked the arbitration clause embedded within the MOU, initiating arbitration proceedings to resolve the dispute. The differing interpretations of the MOU by Plus91 and NEC underscore the inherent ambiguity that can arise from preliminary agreements, particularly concerning the crucial matter of do they create a binding obligation to enter into subsequent, more detailed contracts. The absence of a signed Annexure-A further suggests a lack of conclusive commitment regarding the specific terms and conditions of the work intended for Plus91.

The dispute resolution process began with Plus91 invoking the Arbitration Agreement embodied in clause 14 of the MOU. The Arbitral Tribunal comprised of three arbitrators, one arbitrator nominated by Plus91 and NEC each, and the presiding arbitrator chosen by the two arbitrators. The tribunal gave its award on March 17, 2023, in favour of Plus91 Security Solutions. The Tribunal awarded a significant sum of ₹8,43,07,904 as compensation for loss of profits, along with ₹1,27,30,625 for costs. This award was based on the Tribunal's finding that NEC had breached the MOU by failing to assign works valued at ₹84,30,79,040 to Plus91, estimating the loss of profits at 10% of this amount. Despite Clause 10 in the MOU, which seemingly excluded liability for loss of profit, the Arbitral Tribunal determined that Plus91 was entitled to damages. Subsequently, NEC Corporation India Pvt. Ltd. challenged this arbitral award by filing a petition under Section 34 of the Arbitration and Conciliation Act, 1996, before the Single Judge of the Delhi High Court. On December 18, 2023, the Single Judge issued a judgment that set aside the arbitral award. The primary reasoning behind this decision was the Single Judge's conclusion that the *Simplex Concrete Piles (India) Ltd. v. Union of India,*[7] precedent, relied upon by the Arbitral Tribunal, was inapplicable to the specific context of the Plus91-NEC MOU. The Single Judge further held that the Arbitral Tribunal's conclusions were patently illegal, considering the MOU as a mere statement of intent rather than a binding commitment for NEC to award work to

[6] Arunima, "Delhi High Court: Arbitral Tribunal Cannot Award Certain Types of Damages if They Are Specifically Excluded by Contractual Clauses" *SCC Online Web Edition* (Aug. 5, 2024), *available at:* https://www.scconline.com/blog/post/2024/08/05/delhi-high-court-arbitral-tribunal-cannot-award-certain-types-of-damages-if-they-are-specifically-excluded-by-contractual-clauses/ (last visited on June 10, 2025).

[7] *Simplex Concrete Piles (India) Ltd* v *Union of India* , 2010 SCC OnLine Del 821.

Plus91. Aggrieved by this decision, Plus91 Security Solutions filed an appeal before the Division Bench of the Delhi High Court under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996.[8] However, the Division Bench, in its judgment dated July 29, 2024, upheld the decision of the Single Judge and dismissed Plus91's appeal. The Division Bench explicitly concurred that the award of damages for loss of profit was contrary to the express terms of Clause 10 of the MOU and was therefore vitiated by patent illegality. Undeterred by these setbacks, M/s Plus91 Security Solutions has now approached the Supreme Court of India by filing a Civil Appeal (No. 14131 of 2024) against the Delhi High Court's judgment. As of May 7 2025, the Supreme Court proceedings indicate that NEC has entered an appearance in the matter and has been directed to file a counter-affidavit. The journey of this case, through multiple tiers of the judicial system, underscores the intricate legal and financial considerations at play.

## 3. Distinguishing "Loss of Profit" and "Loss of Profitability”

In the assessment of economic damages arising from breaches of contract, tortious conduct, or other forms of misconduct, the terms "loss of profit" and "loss of profitability" frequently emerge within the realm of business disputes. Although the terms may seem synonymous and are often used interchangeably in informal business discussions, it is essential to distinguish their precise legal meanings. Clear differentiation between "loss of profit" and "loss of profitability" is crucial for accurately assessing and recovering damages. A thorough legal analysis should explore their definitions, contextual applications, and the legal standards used to determine each.

### 3.1 Loss of Profit

This refers to the specific profit a party would have earned from a particular transaction but for the breach. It is usually a direct consequence of the breach and can be substantiated with financial projections and past performance records. To understand "loss of profit," it is first necessary to define "profit" within a business and legal context. Profit is fundamentally the residual income remaining after all expenses –including the cost of goods sold, operating expenses, taxes, and interest– have been deducted from the total revenue generated by a business. In essence, it represents the net financial gain from a business activity.

> "Loss of profit," as a legal concept, refers to the financial detriment suffered by a business or individual due to an inability to earn the expected revenue or income. This inability is often a direct consequence of a breach of contract, a tortious act, such as negligence that disrupts

[8] The Arbitration and Conciliation Act, 1996, s. 37 (1)(c).

business operations, or other forms of wrongful conduct.[9] Several key elements are integral to the legal understanding and recovery of loss of profit.

Firstly, causation is paramount. The plaintiff must demonstrate that the loss of profit was directly caused by the defendant's specific actions or omissions.[10] Without establishing this direct link, a claim for loss of profit will likely fail. Secondly, in the context of contract law, foreseeability plays a significant role. The loss of profit must have been reasonably foreseeable to the breaching party at the time the contract was entered into as a probable result of the breach.[11] This principle, stemming from the landmark case of *Hadley v. Baxendale*,[12] ensures that parties are only liable for losses they could have reasonably anticipated. Thirdly, the amount of the loss must be proven with reasonable certainty. Courts are reluctant to award damages based on speculation or conjecture; the plaintiff must provide sufficient evidence, such as financial statements, past performance, and expert testimony, to establish a reasonable estimate of the lost profits. Furthermore, "loss of profit" often refers to reduced income for a finite period. The damages are typically measured for the period until the business can reasonably be expected to recover the position it would have been in had the damaging act not occurred. In contrast to the well-defined legal concept of "loss of profit", and "profitability" from a business perspective is a measure of a business's efficiency in generating profits relative to its revenue, assets, or equity.[13] It is an indicator of how well a company utilises its resources to produce profit and is often expressed as a ratio or percentage, such as profit margin or return on investment.

### 3.2 Loss of Profitability

It refers to a decline in these profitability metrics over a period. This could manifest as a decrease in profit margin (profit as a percentage of revenue), a lower return on assets, or a reduced return on equity. However, a decrease in profitability can have significant legal implications. It can serve as crucial evidence in substantiating a claim for "loss of profit." If a defendant's actions cause a business to become less efficient in generating profit, this reduced

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[9] Founder Shield, "Loss of Profit" *Insurance Terms & Definitions* (2024), *available at:* https://foundershield.com/insurance-terms/definition/loss-of-profit/ (last visited on June 10, 2025).

[10] The Knowles Group, "Calculating Lost Profits" *The Knowles Group Blog* (2025), *available at:* https://www.theknowlesgroup.org/blog/calculating-lost-profits/ (last visited on June 10, 2025).

[11] Freiberger Haber LLP, "Lost Profit Damages: It Makes a Difference in Proof Whether the Damages Alleged Are General or Special" *Freiberger Haber LLP* (2025), *available at:* https://fhnylaw.com/lost-profit-damages-it-makes-a-difference-in-proof-whether-the-damages-alleged-are-general-or-special/ (last visited on June 10, 2025).

[12] *Hadley* v. *Baxendale*, (1854) 9 Exch 341.

[13] Rachel Blakely-Gray, "The Difference Between Profit and Profitability," *Patriot Software Blog* (2025), *available at:* https://www.patriotsoftware.com/blog/accounting/difference-between-profit-profitability (last visited on June 10, 2025).

efficiency will likely result in a lower net income than expected. For example, increased costs or operational inefficiencies caused by a breach of contract or a tortious act could lead to a decline in profit margins, directly impacting the bottom line and resulting in a "loss of profit."

Furthermore, a significant and sustained "loss of profitability" might indicate a longer-term decline in the business's financial health, potentially leading to a claim for "loss of business value", if the business is severely impaired or ultimately destroyed.[14] In such cases, the reduced profitability might be a key factor in the valuation of the business before and after the damaging event, helping to determine the extent of the loss in its overall worth. Therefore, while "loss of profitability" itself may not be a direct legal claim, it is a vital economic indicator that can significantly influence the assessment of damages under recognised legal principles like "loss of profit" and "loss of business value". This distinction is crucial because it affects how damages are calculated and awarded. Loss of profit is often more readily quantifiable, while loss of profitability can be more complex and speculative.

From a legal standing perspective, "loss of profit" is a well-established and recognised basis for claiming damages in legal proceedings, particularly in cases of breach of contract and tortious interference with business operations. Claims for "loss of profit" are subject to stringent legal tests of causation, foreseeability (in contract), and reasonable certainty. "Loss of profitability", on its own, does not appear to be a direct legal claim for damages. Instead, it functions more as a condition or evidence that can support claims for "loss of profit", or in more severe cases, "loss of business value".

The measurement of these two concepts also differs. "Loss of profit" is usually calculated by comparing the actual net profits earned during the period affected by the damaging event with the net profits that would have been reasonably expected had the event not occurred. This often involves analysing historical financial data, market trends, and expert projections. "Loss of profitability," on the other hand, is assessed by analysing changes in key profitability ratios and metrics, such as gross profit margin, net profit margin, operating profit margin, and return on investment.[15] A decline in these ratios indicates a decrease in the business's efficiency in generating profit.

Finally, regarding duration, "loss of profit" is often associated with a finite period during which the business suffers reduced earnings. While it can be temporary or, in cases of

[14] Kathryn Solomon, Differentiating between Lost Profits and Lost Business Value, *Berkowitz Pollack Brant Advisors*, *available at*: https://www.bpbcpa.com/differentiating-between-lost-profits-and-lost-business-value-by-kathryn-solomon-cpa/ (last visited on June 10, 2025).

[15] *Supra* note 13.

permanent business destruction, indefinite, the focus is usually on a specific timeframe. A significant and sustained "loss of profitability", over time, however, can be an indicator of a more fundamental problem that might lead to a permanent impairment of the business's value.[16]

## 4. Analysis of the Delhi High Court's Judgment

The Delhi High Court's ruling emphasises the need for clear distinctions between these two categories when assessing damages, as their evidentiary standards and legal treatment differ significantly. The Delhi High Court, in its deliberations, grappled with several key legal issues. A central point of contention was the interpretation of the Memorandum of Understanding (MOU) itself, with specific focus on Clause 1, which outlined the proposed collaboration, and Clause 10, which contained the exclusion of liability. The court had to determine whether the MOU constituted a binding contract that legally obligated NEC to issue purchase orders to Plus91 for the AAI project. Furthermore, the High Court needed to interpret the scope and applicability of Clause 10, particularly whether it effectively precluded Plus91's claim for loss of profit arising from the alleged breach of the MOU. Another significant legal issue considered by the High Court was the relevance and applicability of the *Simplex Concrete Piles (India) Ltd. v. Union of India,*[17] precedent. The court examined whether this case provided a valid legal basis for the Arbitral Tribunal to award damages for loss of profit to Plus91, notwithstanding the explicit exclusion clause present in the MOU. Ultimately, the overarching legal issue before the High Court was whether the arbitral award, in granting damages for loss of profit, was so fundamentally flawed that it amounted to patent illegality on the face of the record. This required the court to assess whether the Arbitral Tribunal's decision contravened the express terms of the contract agreed upon by the parties. The primary legal challenge, therefore, centred on the correct interpretation of the contractual language and the extent to which an arbitral tribunal could deviate from those agreed-upon terms when rendering its award.

In its judgment, the Single Judge of the Delhi High Court explicitly found the *Simplex Concrete Piles* case to be inapplicable to the facts of the Plus91-NEC dispute, reasoning that it was decided within a different factual and contractual context. The Single Judge concluded that the MOU between Plus91 and NEC should be interpreted as a preliminary statement of intent, outlining the parties' desire to collaborate and potentially

[16] *Supra* note 14.
[17] *Supra* note 7.

enter into definitive agreements on a project-by-project basis, rather than a binding commitment on NEC's part to award work to Plus91. Subsequently, the Division Bench of the Delhi High Court affirmed this view, placing strong emphasis on the express terms of Clause 10 of the MOU. The Division Bench concurred that Clause 10 clearly stated that neither party would be held liable for any loss of profit arising from or in connection with the MOU. Both the Single Judge and the Division Bench underscored the fundamental principle of upholding the contractual bargain freely entered into by the parties, including clauses that explicitly limit liability for certain types of damages, such as loss of profit. The High Court also noted that Clause 10 did not entirely preclude Plus91 from seeking any form of compensation, as it did not bar claims for direct expenditure or costs that might have been incurred by Plus91 in furtherance of the MOU. To support its stance, the High Court referred to several precedents set by the Supreme Court of India, including cases like *Bharathi Knitting Company v. DHL Worldwide Express Courier Division of Airfreight Ltd,*[18] and *Oil and Natural Gas Corporation v. Wig Brothers Builders and Engineers Private Limited*,[19] which affirm the binding nature and enforceability of contractual clauses that limit liability. The High Court's judgment strongly reinforces the legal principle that exclusion clauses in commercial contracts are generally considered valid and will be upheld by the courts unless they are found to be against public policy or were procured through fraudulent means or coercion. Furthermore, the distinction made by the High Court between the MOU as a preliminary agreement and a definitive, project-specific contract is crucial, as it clarifies that MOUs, while serving an important purpose in outlining the initial intentions of parties, do not automatically translate into binding obligations for the execution of future work, especially when the language suggests the need for further specific agreements.

The central point of contention in this case, particularly concerning the arbitral award, was the compensation granted to Plus91 Security Solutions for "loss of profits", amounting to ₹8,43,07,904. This amount, calculated by the Arbitral Tribunal as 10% of the value of the works that were allegedly not awarded to Plus91, was awarded despite the clear language of Clause 10 of the MOU. Clause 10 explicitly stated that neither party would be liable for "any loss or damage due to loss of goodwill or loss of revenue or profit arising from or in connection with this MOU". The Delhi High Court, in both its Single Judge and Division Bench decisions, specifically overturned this award of loss of profit, directly citing Clause 10 as the primary reason. The High Court firmly held that awarding damages for loss of profit was in direct contravention of the explicitly agreed-upon terms of the MOU. This

[18] *Bharathi Knitting Company* v. *DHL Worldwide Express Courier Division of Airfreight Ltd.*, AIR 1996 SC 2508.

[19] *Oil and Natural Gas Corporation* v. *Wig Brothers Builders and Engineers Private Limited*, (2010) 13 SCC 377.

judicial stance underscores the fundamental legal principle that parties to a contract have the autonomy to exclude liability for certain types of damages, including loss of profit, through unambiguous contractual provisions. Legal definitions of "loss of profit" consistently refer to the financial detriment a business experiences when it is unable to generate expected revenue due to a breach of contract or other disruptive events. In this context, Plus91's claim for loss of profit was based on the premise that NEC's failure to award them the project work constituted a breach of the MOU, leading to a loss of anticipated earnings. While "profit" refers to a specific financial gain, "profitability" is a broader measure of a business's efficiency in generating profit relative to its resources. The MOU in this case specifically used the term "loss of profit", and the High Court's judgment focused on the direct exclusion of this type of damage. This case serves as a significant reminder for businesses to meticulously negotiate and thoroughly understand clauses within their contracts that limit or exclude liability for specific types of losses, including loss of profit, as these clauses are highly likely to be upheld by the courts, particularly in arbitration proceedings. The Arbitral Tribunal's attempt to rely on the *Simplex Concrete Piles,*[20] precedent to circumvent the exclusion clause was rejected by the High Court, emphasizing the crucial need for arbitrators to strictly adhere to the specific contractual terms agreed upon by the parties and to avoid overriding them based on general legal principles or seemingly analogous cases without a careful consideration of the distinct context of the contract in question.

## 5. Contextualizing the Plus91-NEC Judgement in Broader Jurisprudential Discourse

The legal distinction between "loss of profit" and "loss of profitability" in Indian contract and arbitration law is substantial both in theory and actual application, going beyond mere semantic differentiation. The form of claims, the high standards of proof that must be met, and the range of damages that can be awarded are all governed by this distinction, which has been meticulously described in several important court decisions. In this case, the expected revenue sources are directly and quantitatively disrupted, resulting in a discernible decline in net income. In *Bharat Coking Coal Ltd. v. L.K. Ahuja*,[21] the Supreme Court set a high standard for such claims, requiring verifiable evidence of a causal connection between the alleged losses and the violation. The court in Ahuja unequivocally dismissed allegations that were based just on assumptions or conjectural predictions, requiring the presentation of thorough documentation and proof of missed opportunities. The need for claimants to carefully demonstrate a direct and proximate causal relationship

[20] *Supra* note 7.

[21] *Bharat Coking Coal Ltd* v. *LK Ahuja*, (2004) 5 SCC 109.

between the breach and the alleged pecuniary harm is highlighted by the court's emphasis on concrete evidence.

On the contrary, claims regarding "loss of profitability" are inherently linked to the idea of delays and strive to compensate for missed opportunities. These assertions explore the systematic decline in a company's profitability-generating efficiency, which is frequently assessed using complex financial measures and measurements. This type of loss affects a company's long-term financial stability and viability by reflecting a significant deterioration of its core ability to turn revenue into profit. In *M/S UNIBROS v. All India Radio*,[22] the Supreme Court recognised the particular difficulties in calculating losses resulting from delays. According to the *UNIBROS* ruling, claimants must carefully record the precise effects of delays on the profitability of their company. This requires in-depth financial analyses, expert testimony, and comparative data that shows the company's performance both before and after the delay. The judiciary's acknowledgement of the intricate and frequently speculative character of opportunity cost arguments is demonstrated by this increased burden of proof.

Furthermore, the necessity of establishing a clear and unambiguous nexus between the alleged breach and the claimed losses, regardless of whether they relate to loss of profit or profitability, has been repeatedly emphasised by seminal cases such *as Dwaraka Das v. State of Madhya Pradesh*[23] and *A.T. Brij Paul Singh v. State of Gujarat*.[24] In order to prevent damages from being granted based solely on guesswork or unsupported supposition, the courts have continuously required a high bar of proof. The recovery of remote or indirect losses is prohibited under the reasonable certainty criterion, which is stated in *Dwaraka Das* and requires that damages be precisely calculable. This rule protects against speculative claims and guarantees that damages are supported by verifiable facts and prudent financial analysis.

Cases involving large-scale infrastructure projects, where calculating damages due to delays requires complex financial models and estimates, make these claims even more complicated. The courts in *National Highways Authority of India v. Hindustan Construction Co. Ltd,*[25] and *MSK Projects India (JV) Limited v. State of Rajasthan*,[26] struggled with the particular difficulties of determining opportunity costs in such intricate situations. Given the

[22] *M/s Unibros* v. *All India Radio, 2023 SCC* OnLine SC 1366.

[23] *Dwaraka Das* v. *State of Madhya Pradesh and Ors,* (1999) 3 SCC 500.

[24] *A T Brij Paul Singh* v. *State of Gujarat, (1984) 4 SCC 59.*

[25] *National Highways Authority of India* v. *Hindustan Construction Co Ltd,* Civil Appeal No. 4702 of 2023.

[26] *MSK Projects India (JV) Limited* v. *State of Rajasthan,* (2011) 10 SCC 573.

inherent challenges in estimating the financial impact of project delays, these instances demonstrated the need for expert testimony and thorough financial research to support claims for loss of profitability. Given the distinct financial dynamics of major infrastructure projects, the courts recognised the necessity for a nuanced and context-specific approach to damage assessment.

The boundaries of judicial review in arbitration cases involving loss of profit and profitability have also been clarified by the Supreme Court's rulings in *McDermott International Ltd. v. Burn Standard Co. Ltd,*[27] and *Batliboi Environmental Engineers Ltd. v. Hindustan Petroleum Corporation Ltd.*[28] These decisions have emphasised how crucial it is to enforce the terms of contracts and make sure arbitral awards are supported by reliable legal precedents and factual data. The courts have repeatedly reaffirmed that arbitrators cannot ignore clear contractual restrictions or grant damages based on conjecture or unsupported allegations. In addition to ensuring that awards are in line with accepted legal norms and commercial agreements, this judicial review helps to preserve the integrity of the arbitration process.

The need to establish a direct and unambiguous causal link between the alleged loss of profit and the contract violation was further illustrated by the case of *Mohd. Salamatullah v. Government of Andhra Pradesh*.[29] The court stressed that rather than being a distant or indirect result, the loss must be a natural and likely consequence of the breach. The judiciary's dedication to guaranteeing that damages are only granted for losses that can be closely linked to the defendant's wrongdoing is emphasised by the proximate causation principle.

The Indian judiciary has meticulously established a distinctive legal framework for addressing claims related to "loss of profit" and "loss of profitability", recognizing their unique characteristics and the differing levels of evidentiary requirements they entail. Claims for "loss of profitability" necessitate a thorough examination of opportunity costs and the broader financial implications, whereas "loss of profit" claims demand concrete evidence of a reduction in direct revenue. Collectively, these judicial determinations underscore the importance of precise contract drafting, comprehensive evidence gathering, and an advanced understanding of financial metrics in effectively navigating the complex landscape of damages claims within the context of Indian contract law. The courts' unwavering commitment to upholding contractual terms and ensuring just and equitable compensation reinforces the principles of legal predictability and commercial certainty, thereby fostering a stable and reliable legal framework for commercial transactions.

[27] *McDermott International Ltd* v. *Burn Standard Co Ltd,* (2006) 11 SCC 181.

[28] *Batliboi Environmental Engineers Ltd* v. *Hindustan Petroleum Corporation Ltd*, 2023 SCC OnLine SC 1208.

[29] *Mohd Salamatullah* v. *Government of Andhra Pradesh*, (1977) 3 SCC 590.

### 5.1 The Test for Loss of Profit and Evidentiary Requirements

Substantiating a claim for loss of profit under Section 73 of the Indian Contract Act, 1872, ("ICA") requires proof that the loss arose naturally from the breach. In *AT Brij Paul v. State of Gujarat*,[30] the Supreme Court confirmed that a contractor is entitled to claim damages for the expected profits from a work contract when the contract is breached. The Court emphasised that while the exact measure of profit and the proof required are distinct issues, the claim itself is valid. Similarly, in *Dwarka Das v. State of Madhya Pradesh*,[31] where a contract was rescinded after only 10% of the work was completed, the Court upheld that a contractor could claim damages for lost profits. It also ruled that a broad evaluation of damages should be applied rather than focusing on minute details, acknowledging that expected profit is a legally admissible claim when a breach occurs.

In *NHAI v. IJM Gayatri Joint Venture,*[32] the Delhi High Court clarified that to claim damages for lost profitability, the claimant must prove an existing opportunity that was missed due to contract delays, resulting in quantifiable loss. Once a contractor demonstrates that they lost an opportunity, quantifying the damage becomes critical. In *McDermott International Inc. vs Burn Standard Ltd.*, the Supreme Court clarified that Sections 55[33] and 73 of the ICA do not prescribe a specific mode for calculating damages. The arbitrator has discretion to choose the appropriate formula. The *Hudson Formula*, *Emden Formula*, and *Eichleay Formula* are commonly employed depending on the case specifics. However, disputes often arise over both the calculation and the method chosen by the arbitral tribunal.

In *Batliboi Environmental Engineers Limited v. Hindustan Petroleum Corporation Limited,*[34] the complexities of quantifying the loss of profit were highlighted. In this case, BEEL sought compensation for loss of profit due to delays in a sewage water reclamation project. The arbitrator awarded 10% of the contract value for overheads and 10% for lost profits. HPCL contested the method and computation, underscoring the challenges in assessing loss of profitability in commercial disputes.

The complexities surrounding the quantification of loss of profit and profitability often lead to disputes, as highlighted in the case of *Batliboi Environmental Engineers*

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[30] *A T Brij Paul Singh* v. *State of Gujarat*, (1984) 4 SCC 59.

[31] *Dwaraka Das* v. *State of Madhya Pradesh and Ors*, (1999) 3 SCC 500.

[32] *NHAI* v. *IJM Gayatri Joint Venture*, AIR 2021 (NOC) 27 (Del).

[33] The Indian Contract Act, 1872, s. 55.

[34] *Batliboi Environmental Engineers Limited* v. *Hindustan Petroleum Corporation Limited*, Civil Appeal No. 1968 of 2012, decided on Sept. 21, 2023 (SC).

*Limited vs Hindustan Petroleum Corporation Limited*. In this case, HPCL challenged the arbitrator's method and computation in awarding the claim for loss of profit and profitability.

The case involved an agreement between HPCL and Batliboi Environmental Engineers Limited (BEEL) for the construction of a sewage water reclamation plant. The project, initially slated for completion within 18 months, faced significant delays, with multiple time extensions granted at BEEL's request. Eventually, BEEL abandoned the project after completing only 80%, attributing the delays to HPCL. BEEL then sought compensation through arbitration, claiming "loss of profit and profitability" due to the delay. The arbitrator partially allowed BEEL's claim, awarding 10% of the contract value for overheads and another 10% for lost profits.

HPCL challenged the award on several grounds, particularly criticising the lack of clarity in the arbitrator's method for computing the awarded amounts for overheads and profits. In response, BEEL justified the computation by referencing *Hudson's formula*. This prompted the Supreme Court to examine the circumstances under which the Hudson formula could be applied by an arbitral tribunal.

The Court reaffirmed that the arbitrator has the authority to determine damages but cautioned that the computation must not be arbitrary or result in a disproportionate award. The Court stressed that damages should be commensurate with the actual loss sustained, with money acting as compensation for the loss caused by the breach. The Supreme Court also discussed the arbitral tribunal's discretion in choosing a method for calculating damages, noting that formulas like the *Hudson*, *Emden*, and *Eichleay* formulas are based on assumptions that could lead to different results. Therefore, the Court emphasized that the assumptions underlying any formula must be carefully examined and validated against the facts of the case.

In relation to the Hudson formula, the Court outlined three assumptions: (1) the contractor did not habitually underestimate costs when pricing; (2) the profit element was realistic; and (3) there were no market fluctuations, and work of comparable profitability would have been available once the contract was completed. The Court further clarified that the burden of proof lies with the contractor to provide evidence that these assumptions were met, and they must also prove that alternative opportunities were missed due to the delay.[35]

In this case, the Court found that the arbitral award lacked justification or a detailed computation of the loss. It held that the award was based solely on the authority of the

[35] *Ibid.*

arbitrator without any explanation for the figures used. As a result, the Supreme Court upheld the High Court's decision and set aside the arbitral award. The ruling in *Batliboi* is a significant directive for arbitral tribunals, advising them to exercise caution when using formulas to calculate loss of profit or profitability. The judgment highlights the need for careful computation and the provision of a well-reasoned justification for such awards. It also solidifies the contractor's responsibility to present substantial evidence to support their claim, emphasizing that mere demonstration of an alternative opportunity is insufficient. Concrete proof of the quantification of the alleged loss is essential.

**5.2 The Interest Act, 1978 and its Implications for Loss of Profit Claims**

India's increasingly globalised economy has made disputes over loss of profit more prominent, especially with the interplay of Section 73 of the Indian Contract Act, 1872,[36] and the Interest Act, 1978. The latter refines financial justice by outlining when interest can be levied on compensatory amounts for contractual breaches. As a more modern response to the outdated 1839 legislation, the Interest Act expanded the definition of "court" to include tribunals and arbitrators, reflecting the rise of arbitration in commercial disputes.

The Act's key feature is its definition of "current rate of interest", tied to the Reserve Bank of India's policies, ensuring rates remain relevant to economic realities. It also broadens the scope of "debt" to include obligations beyond monetary liabilities, making the Act applicable across a range of commercial dealings. Section 3[3.7] grants courts discretion to award interest on debts and damages, including lost profits, based on clear conditions, either from the due date or from the date of notice. However, it prevents interest on amounts already repaid or settled and bans the compounding of interest, ensuring a fair balance in compensation.

Section 4 of the Interest Act, 1978[38] ensures clarity in its application by prioritising its provisions under Section 3, except where interest is already mandated by other laws or consistent contractual practices. This prevents conflicts and guarantees uniformity across legal domains. The section also mandates interest for breaches of fiduciary duty or fraudulent retention of property, unless compelling reasons suggest otherwise, reflecting the Act's commitment to addressing financial misconduct.

Section 5[39] establishes a clear relationship between the Interest Act and Section 34 of the Code of Civil Procedure, 1908,[40] ensuring a logical progression of interest

[36] The Indian Contract Act, 1872, s. 73.
[37] The Interest Act, 1978, s. 3.
[38] *Id.*, s. 4.
[39] *Id.*, s. 5.
[40] Code of Civil Procedure, 1908, s. 34.

calculation—pre-suit interest is governed by the Interest Act, while post-suit interest falls under Section 34. This division ensures a coherent framework for interest throughout a dispute's lifecycle.

The Commercial Courts Act doesn't specifically or explicitly define the loss of profit or profitability. However, the Act does provide for resolving commercial disputes, including those related to contracts, which can include claims for loss of profit. Section 73 of the Indian Contract Act, 1872, makes lost profits compensable if they arise directly from a breach or were foreseeable at the time of contract formation, following the Hadley v. Baxendale principle. Indian courts are cautious about speculative losses and require claimants to mitigate damages.

While the Interest Act doesn't specifically define "loss of profit" for interest awards, the judiciary has interpreted "damages" to include economic losses like profit loss. Interest can be awarded on substantiated loss-of-profit claims, provided the loss is clear and notice has been served. Courts distinguish between interest on the amount of damages and interest as part of the damages themselves, ensuring it compensates for delay and loss of the time value of money, not as unjust enrichment.

Payment of Interests under the MSMED Act, 2006**:** The Micro, Small and Medium Enterprise Development (MSMED) Act, 2006 contains provisions on Delayed Payment to Micro and Small Enterprise (MSEs).[41] As per the provisions of the Act, the buyer shall be liable to pay “compound interest with the monthly rests” to the supplier on the amount at three times the bank rate notified by RBI in such circumstances where he does not make payment to the supplier for his supplies of goods or services within 45 days of the acceptance of the goods/service rendered.[42] The Finance Act, 2023 included the MSME 45-day payment rule under the Section 43B(h) which is in effect from April 1, 2024.

Ultimately, judicial discretion to award interest depends on the contract's terms, timely notice of the claim, and principles of reasonableness and equity. The Interest Act, in conjunction with Section 73 of the Indian Contract Act, provides a nuanced framework that ensures legitimate economic losses are fairly compensated without unjust enrichment.

### 5.3 When is Interest Due from and Entitlement to Interest on Delayed Payments

When a breach of contract results in a loss of profit or profitability, determining when interest on these losses becomes due is a significant legal issue. The prevailing principle dictates that interest generally starts to accrue from the date the breach occurred, rather than

[41] The Micro, Small and Medium Enterprises Development Act, 2006, s. 15- 24.

[42] *Id.,* s. 16.

from the date the lawsuit is filed. This approach is in line with the primary objective of awarding damages, which is to compensate the injured party and place them in the same position they would have been in had the contract been properly performed. As a result, the claimant is deprived of prospective profits from the moment the breach happens, and any interest paid on these lost earnings compensates for the period of denial.

Section 73 of the Indian Contract Act, 1872, authorises courts to award compensation for losses directly resulting from a breach, including lost profits calculated from the date of the breach. While Section 34 of the Civil Procedure Code, 1908, governs the award of interest from the date of the suit, the authority to grant pre-suit interest on damages lies within the substantive law, particularly the principles of compensation established in the Contract Act and related statutes. Moreover, the Explanation to Section 74 of the Indian Contract Act,[43] which addresses stipulated penalties, implicitly connects the date of default (often coinciding with the breach) to the imposition of interest. Judicial interpretations consistently support this view, affirming that interest on damages for lost profit is typically calculated from the date the loss was incurred, which is directly tied to the breach date. Thus, while procedural law covers interest during litigation, the substantive entitlement to interest on profit loss begins from the breach itself.

In addition to the Indian Contract Act and the Civil Procedure Code, other statutes, such as the Interest Act, 1978, also influence pre-suit interest on profit loss damages. Specifically, Section 3(1)(a)[44] of this Act allows courts to award interest at a reasonable rate (not exceeding the prevailing current rate) on debts or damages payable under a written agreement, calculated from the date specified in the agreement until the payment date. Section 3(1)(b)[45] further extends this to other forms of debt or damages, permitting interest from the date a formal written demand for payment is made until actual payment.

Various commercial legislations may also provide relevant provisions regarding interest in the case of a breach. For example, the Sale of Goods Act, 1930, while not explicitly mandating pre-suit interest, can be used in conjunction with the Interest Act's provisions to support an award of interest. Similarly, the Negotiable Instruments Act, 1881, which governs financial instruments like promissory notes, bills of exchange, and cheques, includes stipulations regarding interest payable on these instruments, potentially applicable in breach of contract cases involving these financial tools. Additionally, sector-specific laws in industries like banking, insurance, or infrastructure may contain provisions dealing with

[43] The Indian Contract Act, 1872, s. 74.
[44] The Interest Act, 1978, s. 3(1)(a).
[45] *Id.,* s. 3(1)(b).

interest on delayed payments or losses, reinforcing the view that interest accrues from the moment of breach or default.

## 6. Conclusion

The *Plus91-NEC case* presents a valuable illustration for understanding the intersection of contract law, arbitration law, and judicial review in India. At the heart of the dispute lies the distinction between "loss of profit" and "loss of profitability", two terms that, while seemingly synonymous, but as discussed in the paper, carry distinct legal and financial implications. The Delhi High Court's interpretation of these concepts, its stance on contractual clauses limiting liability, and its approach to reviewing arbitral awards offer invaluable insights for legal professionals and businesses alike.

The decision of the Supreme Court in the pending appeal will be of paramount importance as it will ultimately determine the outcome of this protracted dispute. Furthermore, the judgment delivered by the apex court is expected to provide significant clarity on the crucial issue of the enforceability of exclusion clauses, particularly those about loss of profit, within the context of arbitral awards in India. The very fact that the Supreme Court has admitted this appeal for hearing suggests that the court perceives the presence of substantial questions of law or public interest that warrant a more detailed and authoritative consideration at the highest judicial level. The legal and business communities will be keenly observing the proceedings and the eventual judgment, as it is likely to have far-reaching implications for the interpretation and enforcement of commercial contracts, and the scope of judicial review over arbitral awards in India.

This case is a powerful reminder of the crucial significance of clearly drafting all contractual clauses, particularly those meant to limit or exclude liability for particular types of losses, for companies entering into business partnerships and choosing arbitration as a dispute resolution procedure. The readiness of the judge to enforce such provisions serves as further evidence that careful attention to detail is necessary when negotiating and drafting contracts in order to control potential risks and liabilities. Whether the Court awards Loss of Profit or Profitability depends upon the proof of loss with credible evidence. Arbitrators must also be aware of the specific provisions of the parties' agreement and use caution when granting damages that are expressly prohibited by those provisions. A difficult balance between arbitral autonomy and respect for the law is highlighted by the possibility of court intervention in arbitral judgements that are shown to be blatantly unlawful by violating specific contractual obligations. The Supreme Court's ultimate ruling in this case will surely offer further important direction on these intricate matters, influencing business dealings and conflict settlement in India for some time to come.

# Constitutional Perspectives of *Viksit Bharat* @ 2047 Mission

*Anuj Kumar Vaksha* & Ms. Shivani Pundir***


## ABSTRACT

*The "Viksit Bharat @2047" Mission envisions India as a developed nation by its centenary year of independence, emphasizing economic transformation and inclusive growth. This article examines the constitutional imperatives underpinning this vision, with a specific focus on the mandate of economic justice. While the mission targets a $35–40 trillion economy and a high per capita GDP by 2047, the authors argue that mere economic metrics are insufficient without constitutional alignment. The paper highlights how the Indian Constitution, through its Preamble and Directive Principles, commits to both welfare-driven and opportunity-oriented dimensions of economic justice. The article critically analyzes the evolution from Nehruvian socialism to liberalization in 1991 and explores whether a market-driven economy conflicts with the constitutional term "socialist." Through jurisprudential developments, including a landmark 2024 nine-judge bench decision, the paper demonstrates that the term "socialist" in the Indian context signifies a welfare-oriented state rather than a rigid economic dogma. It argues that liberalization, privatization, and globalization (LPG)—core to the Viksit Bharat vision—are constitutionally valid as long as they serve the welfare and upliftment of all citizens. The article thus posits that the Viksit Bharat Mission is not only economically ambitious but constitutionally consistent. It offers a pathway to fulfill the constitutional promise of economic justice through a synergistic model that balances market efficiency with state-led welfare mechanisms, ensuring equitable development across socio-economic strata.*


**Keywords:** *Viksit Bharat, Constitution, Economic Justice, Socialism, Equitable Development.*

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## 1. Introduction

*Viksit Bharat* @ 2047 Mission is a solemn national resolve to work in a mission mode to make India a developed country by 2047, the centenary year of India's independence. The ambitious mission was launched by the Hon'ble Prime Minister in December 2023 and since then it has been endeavor of all stakeholders in the country to work in mission mode to realize the dream of *Viksit Bharat* i.e. Developed India in a time bound manner by 2047.

What does Developed India mean? In the most obvious and statistical terms, Developed India means transforming India into a 35 to 40 trillion USD economy by 2047.[1] Given the size of the economy, it is expected that the per capita GDP of India, would be higher than 12616 USD;[2] which is the present norm of institutions like the World Bank to classify a nation as a high-income country and thus a developed country. This GDP size and per capita GDP figures are only statistical reference points to indicate the bare minimum economic conditions required to be classified as a developed nation; otherwise, development is a far more complex, ambitious, multi-pronged, multi-dimensional, change-driven, result-oriented and sophisticated process, which the *Viksit Bharat* mission aspires to realize with a mission mode in a time bound manner. In its most obvious form and features, the *Viksit Bharat* mission seeks to provide for all its citizens a living standard which matches with that of the developed economies. It is a humungous task from the point where India stands today. Though India is the fourth largest economy in the world, with only three countries, being ahead of it – the United States of America (USA), China and Germany[3]; the per capita Gross Domestic Product (GDP) is far behind the benchmark for the developed countries. The size of India's economy[5] is 4.19 trillion USD[4], as against China which is roughly around 19.2 trillion economy and USA which is around 30.5 trillion economy.[6] In terms of per capita GDP which is a better reflection of developmental status of any country, India's GDP per capita is just around 2500 USD.[7] In terms of the per capita GDP, India is still among the Lower Middle-Income Countries; with 140 countries ahead of it in terms of per

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[1] NITI Aayog, "PM to Chair 9th Governing Council Meeting of NITI Aayog to Propel 'Viksit Bharat@2047' Vision" *Press Information Bureau* (Jul. 26, 2024), *available at:* https://www.pib.gov.in/PressReleaseIframePage.aspx?PRID=2037478 (last visited on June 15, 2025).

[2] Eric Metreau, *et.al.*, "World Bank Country Classifications by Income Level for 2024-2025" *World Bank Blogs* (Jul. 01, 2024), *available at:* https://blogs.worldbank.org/en/opendata/world-bank-country-classifications-by-income-level-for-2024-2025 (last visited on June 15, 2025).

[3] Forbes India, "The Top 10 Largest Economies In The World In 2025" *Forbes* (Apr. 28, 2025), *available at:* https://www.forbesindia.com/article/explainers/top-10-largest-economies-in-the-world/86159/1?utm (last visited on June 15, 2025).

[4] *Ibid.*

[5] *Supra* note 3.

[6] *Ibid.*

[7] World Bank, "GDP Per Capita (Current US$)" *World Bank Group* (May 31, 2025), *available at:* https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?utm (last visited on June 15, 2025).

capita GDP.[8] Luxembourg with 1,54, 900 USD has the highest per capita GDP in 2025.[9] The low per capita GDP vis-à-vis the economically advanced countries, *inter alia,* underscores the enormity and complexity of the realizing the vision of *Viksit Bharat* by 2047, when the nation stands to celebrate the centenary year of its independence day. There are several strong examples showing that countries with economic backgrounds similar to India's in the 1950s have become developed nations today by implementing effective economic policies. For instance, India's per capita GDP in 1960 was $84,[10] and China was marginally ahead with a per capita GDP of $89.5 then.[11] Today, India is struggling with a per capita GDP of around $2500;[12] China's per capita GDP has jumped five times higher than India's to nearly $13000.[13] China being a communist state may not be an apt example for democratic republic as India. Countries with similar political structure as that of India, say, South Korea, the per capita GDP in 1960 was just 158 USD;[14] which has surged to over 33000 USD today,[15] far ahead of even China, with appropriate economic policies. Similarly, Germany's per capita GDP in 1960 was around 1100 USD;[16] which has jumped to around 55000 USD.[17] All these illustrations indicate that the task is doable with appropriate economic policies. It is this premise of do-ability that allows India to dream of *Viksit Bharat* by 2047.

Thereby, this paper primarily discusses the appropriate economic policy for *Viksit Bharat* Mission, tracing the evolution of government policies, since independence. Thereafter, the constitutional imperatives of economic justice are examined in the light of the *Viksit Bharat* Mission. Additionally, the preambular stipulations for socialist is discussed, delving upon the paradigm shift in the interpretation of 'socialism', by the apex court, in the context of private property.

## 2. Appropriate Economic Policy for *Viksit Bharat* Mission

What is this appropriate economic policy that can provide economic development at least in terms of statistical and economic terms, facts and figures? In the opinion of authors,

[8] *Ibid*.
[9] *Supra* note 7.
[10] World Bank, "GDP Per Capita (Current US$) - India" *World Bank Group* (May 29, 2025), *available at:* https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=CN&utm (last visited on June 15, 2025).
[11] World Bank, "GDP Per Capita (Current US$) - China" *World Bank Group* (last visited on May 29, 2025), *available at:* https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=CN&utm (last visited on June 15, 2025).
[12] *Supra* note 10.
[13] *Supra* note 11.
[14] World Bank, "GDP Per Capita (Current US$) – South Korea" *World Bank Group* (last visited on May 29, 2025), *available at:* https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=CN&utm (last visited on June 15, 2025).
[15] *Ibid.*
[16] World Bank, "GDP Per Capita (Current US$) – Germany" *World Bank Group* (last visited on May 30, 2025), *available at:* https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=CN&utm (last visited on June 15, 2025).
[17] *Ibid.*

the appropriate economic policy is one that would help to create in India, a sea of efficient and globally competitive enterprises engaged in the production of goods and services which can fetch best acceptability and prices in global markets. Such efficient and globally competitive enterprises would thrive in societies that are friendly to business successes and industrial establishments and not averse to them. The social processes and institutions should foster an amicable and encouraging ecosystem for businesses and corporate enterprises on the assumption that they are there to serve the society by their innovation, productivity, efficiency and honest business practices.

Since 1950, India experimented with what is often called the Nehruvian Socialism; broadly deriving its inspiration from the ideals of socialism. The political motivation for socialism was so strong that in 1974, socialism was inserted in the Preamble to the Constitution as one of the constitutional ideals by the 42nd Constitutional Amendment Act.[18] During those years of Nehruvian Socialism, India's per capita GDP merely increased roughly 6 times from 49 USD in 1950 to 305 USD in 1991.[19]

In 1991, liberalization, privatization and globalization (LPG)[20] emerged as the core guiding principles for our economic programmes, policies and processes. These economic reforms led to substantive changes in legal, institutional and policy frameworks[21] with the objectives of creating efficient and globally competitive enterprises in an open economy which would deliver development for our general population struggling in economically desperate conditions. In about three and half decades since when the economic reforms were launched in India; India has progressed to become the fourth-largest economy in the world; its per capita GDP has multiplied over 8 times from 305.6 USD in 1991 to around 2500 USD in 2025.[22] Beyond this growth, India now has a path outlined for its economic growth in the form of *Viksit Bharat* Mission to become a developed country by 2047.

## 3. Constitutional Imperative of Economic Justice and *Viksit Bharat* Mission

The *Viksit Bharat* Mission is particularly significant from the perspective of constitutional mandate of economic justice for the citizens of India. The Preamble to the Constitution promises, *inter alia,* economic justice for the citizens. Like justice, economic justice is a very compendious term encompassing multitude of things to millions of people; nonetheless, minimally it means liberating citizens from economic deprivations, destitutions, impoverishment, oppressions, or enslavement of every kind because of

[18] The Constitution (Forty – Second Amendment) Act, 1976, The Constitution of India, pmbl.
[19] *Supra* note 10.
[20] See generally, Liberalization, Privatization, and Globalization (LPG).
[21] See generally, Government of India, *Economic Reforms and Liberalization,* Policy Document (1991).
[22] *Supra* note 10.

economic reasons. For the citizens liberated from the state of abject impoverishment, the other essential component of economic justice is to provide them equal opportunities to aspire and grow economically in terms of open, abundant and competitive avenues for trade, business and for ownership to private properties earned by legitimate means. The two components of economic justice would require two different kinds of approaches, programmes and policies for the State. The first component requires welfare spirit of the State; the second component would require ambitious and apt regulatory instinct of the State. These two components are not necessarily in conflict to each other; rather they are sequential for the citizens concerned; and co-existing in constantly dynamic proportion for the country as a whole. The Constitution of India encapsulates provisions for both of these components of economic justice. The constitutional provisions like Articles 38 (1 & 2), 39 (b & c), 39 A, 41, 42, 43, 45, 46 and 47 of the Constitution are guided towards realizing the first component of economic justice. Article 38 (1) obligates the State to undertake welfare measures to secure a social order in which justice, social, economic and political informs all institutions of national life. Similarly, Article 39 (b) mandates the State to adopt policies to secure the ownership and control of material resources of the community to serve the common good.[23] Other provisions of the Constitution like 39 A, 41, 42, 43, 45, 46, and 47 broadly mandate the state to undertake economic welfare measures of one or another kind for the overall well-being of all citizens, particularly the needy ones.[24] Articles 19(1)(g) and 300A, on the other hand secure the second component of economic justice. Article 19(1)(g) guarantees to all citizens the right to business and trade[25] and Article 300 A protects the right to property of all citizens.[26] As the citizens competitively exercise their rights under Articles 19(1)(g) and 300A, correspondingly the State is mandated under Article 38 (2) to minimize inequalities to income and to eliminate inequalities in status, facilities and opportunities. The in tandem working of these imperatives as provided under Articles 19(1)(g), 300A and 38 (2) *inter alia,* particularly serves the imperatives of Article 39 (c) that obligates States to undertake policies which ensure that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.[27] Realization of *Viksit Bharat* Mission within the existing constitutional framework of economic justice thus ensures that fruits of developed India is shared, if not equally, but definitely beneficially and equitably, among all the citizens of the country.

[23] The Constitution of India, art. 39, cl. (b).
[24] The Constitution of India, arts. 39 A, 41, 42, 43, 45, 46, and 47.
[25] The Constitution of India, art. 19, cl. 1 (g).
[26] The Constitution of India, art. 300 A.
[27] The Constitution of India, art. 39, cl. (c).

The recently published World Bank's Spring 2025 Poverty and Equity Brief [28] highlights some heartening trend in the realization of inclusive development for all the citizens of the country. It finds that India is the fourth most equal country globally, in terms of consumption distribution, trailing only Slovakia, Slovenia, and Belarus – all of which are much smaller economies with strong welfare states principles. The consumption-based Gini Index is a standard measure of inequality, where 0 represents perfect equality and 100 represents perfect inequality. A lower score, therefore, indicates a more equal distribution. India's consumption-based Gini Index has shown a considerable decline – from 28.8 in 2011-12 to 25.5 in 2022-23.[29] The substantial reduction in India's consumption Gini coefficient suggests that inequality in household consumption expenditure has declined over the past decade. It reflects a situation where consumption levels are becoming more balanced, particularly among the lower and middle-income households, even if income or wealth disparities still persist.

Many attribute such declining consumption inequality to large-scale welfare interventions and schemes, aimed at uplifting the poor and reducing disparities in access to basic goods and services. Over the past decade, flagship programs such as the Public Distribution System (PDS), Right to Education, MGNREGA, Jan Dhan Yojna, Direct Benefit Transfers (DBT), PM Awas Yojna, Ujjwala Yojna (for subsidized gas), Jan Aushadhi Yojna (for Generic medicines) and Atal Pension Yojna, have significantly improved the material conditions of low-income households. For instance, DBT has ensured more efficient cash transfers directly into beneficiaries' bank accounts, reducing leakage and corruption. These schemes, have collectively reduced out-of-pocket expenses on basic needs and have left poorer households with greater disposable income, leading to more equitable consumption patterns across the country.

In a world where inequality is rising in many developed nations – driven by automation and capital concentration, India's relative ranking appears optimistic. Countries, like the United States and China, often seen as economic powerhouses, rank much lower on this measure due to far greater consumption disparities among their populations. This report positions India not only as a fast-growing economy but also as one where developmental benefits may be more evenly spread than previously acknowledged. Although, this decline in consumption inequality may not fully capture structural inequalities in employment, education, asset ownership, and healthcare access. Further, the data is drawn from sample-

[28] World Bank, "India Poverty and Equity Brief : April 2025 (English)" *World Bank Group*, *available at:* http://documents.worldbank.org/curated/en/099722104222534584 (last visited on June 15, 2025).

[29] *Ibid.*

based surveys that may exclude certain high-net-worth individuals or underreport informal sector dynamics, leading to an incomplete picture. Policymakers, researchers, and commentators must view such rankings as part of a larger narrative that also includes enduring disparities in income, wealth, social mobility.

In fact, this obsession with GDPs, Income and Consumption misses a crucial factor – 'Opportunity'.[30] People in general, constantly express their preference for opportunity, and disdain for equality, by moving out of places that are havens of equality to places that have high levels of inequality and provide greater opportunity.[31] For instance, Bihar and Assam, are the most equal states as per the Gini coefficient, yet every year a number of people from these States move to states with higher opportunity and inequality like Haryana, Kerala, Maharashtra which have significantly high Gini coefficient reflecting high high inequality.[32] The USA is one of the most unequal societies in terms of income distribution (amongst developed nations),[33] yet it attracts 20% of all international migrants annually – because it offers enormous opportunities.[34] Interestingly, people avoid migrating to communist countries that pride themselves on income and consumption equality, choking opportunity. Similarly, South Africa, is the most unequal nation in Africa, yet receives the most migrants, from other African nations.[35]

Globally, rural societies are more equal and offer fewer opportunities for growth while urbanization is a sign of growth and progress. Income is ultimately a product of opportunity, whether of education, employment, health care and skills. Given that, people are born unequal, it is the duty of the modern states, to provide equality of opportunity, so that all its citizens may reach their optimum potential. The road to *Viksit Bharat* must to be paved with equality of opportunity for all; which can be realised only when the nation creates avenues of extensive opportunities for its citizens. The equality of opportunities is important, but creation of abundance of opportunities is equally important; as unless there are opportunities, nothing can be shared equally. This creation of boundless opportunities

[30] Neeraj Kaushal, "Why People Leave Equal Bihar For Unequal Mumbai" *The Times of India* (August 08, 2025).

[31] *Ibid.*

[32] Soumya Kanti Ghosh, "Inequality Declined Between 2011-12 & 2022-23: Government Data" *Times of India* (June 9, 2024),

[33] OECD, Income Inequality (Indicator) (2024), *available at:* https://www.oecd.org/en/data/indicators/income-inequality.html (last visited on June 15, 2025).

[34] United Nations Department of Economics and Social Affairs, "International Migration 2024 Highlights" *United Nations* (Mar. 15, 2024), *available at:* https://www.un.org/en/desa/international-migration-2020-highlights/?utm (last visited on June 10, 2025).

[35] *Ibid.*

for aspiring citizens is central to the idea of *Viksit Bharat* Mission @2047.

For creation of such boundless opportunities for every citizens of the country, the concept of 'Ease of Doing Business' (EoDB) acquires particular significance in the realization of the goal of *Viksit Bharat* by 2047. As the name suggests, EoDB measures the regulatory environment and conditions that affect business operations across countries, providing insights into how conducive a country is for starting and running a business.[36] If a country has clear rules, minimal bureaucratic hurdles, efficient government services, reliable infrastructure, fair and timely dispute resolution, then businesses can focus on growth and create more opportunities rather than navigating unnecessary compliances and red-tape. As businesses grow and investment flows increase and tax collection rise. This in turn gives the government more capital to invest in health, education, renewable resources, and welfare- the social pillars of a truly developed nation. By fostering competitiveness, innovation, and inclusivity, they create the economic backbone needed for India to emerge as a high-income, and equitable, nation by 2047.

Another milestone for *Viksit Bharat*, should be the nurturing of home grown brands and industries. Interestingly, better EoDB, not only aide corporate giants, but also helps start-ups, Medium & Small Enterprises (MSMEs), rural entrepreneurs, and women-led enterprises by lowering entry barriers, improving access to credit, and providing market linkages. When it becomes easier to start and grow businesses, more enterprises are set up, manufacturing expands, and service industries flourish. This generates large-scale employment opportunities and fosters skill development, especially for India's young workforce – aligning with the inclusive development agenda of *Viksit Bharat*. It is high-time that entrepreneurship, basics of business & finance are made mandatory in the course curriculum, across all the undergraduate programs. Additionally, all A-grade accredited universities must have an operational Social Entrepreneurship Centre, where students & faculty from multiple disciplines, may collaborate and cater to challenges at local level. Additionally, there is a need to tap into the immense potential of women in workforce. As of now only 37% women are part of the labour force in India.[37] Despite strict gender roles and high cost of living, women's participation in workforce stands at 55% in Japan, 60% in China and 63% in Vietnam.[38] It is high time that the government should incentivise organisations

[36] World Bank, "Ease of Doing Business Rankings (2025)" *World Bank Group*, *available at:* https://archive.doingbusiness.org/en/rankings (last visited on June 15, 2025).

[37] Ministry of Women and Child Development, "Nari Shakti Surges Ahead" *Press Information Bureau* (Oct. 13, 2023), *available at:* https://www.pib.gov.in/PressReleasePage.aspx?PRID=1967291&utm. (last visited on June 15, 2025).

for hiring women workers and also put in herculean effort in ensuring their safety in public and at workplace.

*Viksit Bharat* Mission steadfastly moving on the wheels of economic reforms and people's welfare thus seeks to create such developmental prospects and opportunities to fulfill the constitutional promise of economic justice for every citizen of the country. Apart from the economic prosperity in terms of statistical facts and figures, an integral component of the *Viksit Bharat* Mission is the 'Ease of Living', for 'We the People'.[39] [1]The 'Ease of Living', focuses on five critical areas aimed at improving public service delivery and quality of life. These include ensuring access, quantity and quality of drinking water; enhancing the quality, efficacy and reliability of electricity; improving healthcare accessibility, affordability and quality; strengthening school education in terms of access and learning outcomes; and streamlining land and property systems through better accessibility, digitization, registration and mutation processes.

### 4. Preambular Stipulation of Socialist and *Viksit Bharat* Mission

As India straddles forward on its mission to *Viksit Bharat*, issues have often been raised how does the word 'Socialist' impacts the contemporary *Viksit Bharat* Mission framework. Often it seems that the economic reforms processes initiated in 1991 through which India aspires to attain the *Viksit Bharat* @2047 Mission conflicts with the idea of socialist as enshrined in the preamble to the Constitution. In over three and half decades, India has seen the benefits of the economic reform processes reaching over to people. In the year 1960 the size of India's GDP was around 36536 Million USD and had the tenth position; which by 1991 moved down to 18th position with the GDP size of 287316 Million USD. Since 1991 when the economic reforms were initiated by abandoning the Nehru era socialism, the India economy has grown to become a 4.19 Trillion USD economy in 2025 and stands elevated to fourth largest economy of the world. Thus in terms of economic development, the market economy model has given better results than the socialist model of economy. As late as April 30, 2025, the World Bank has reported that India has lifted 171 million people out of extreme poverty between the period 2011-12 to 2022-23.[40] According to this recently released World Bank report, the proportion of people living on less than 2.15 US dollars a

[38] Editorial, "For Tomorrow's Sake" *Times of India*, May 31, 2025, at 20.

[39] Niti Aayog, "Focus on Shaping Future Development with Emphasis on Ease of Living" *Press Information Bureau* (Jul. 26, 2024, 3:41 PM), *available at:* https://www.pib.gov.in/PressReleaseIframePage.aspx?PRID=2037478 (last visited on June 15, 2025).

[40] World Bank, "India Poverty and Equity Brief : April 2025 (English)" *World Bank Group*, *available at:* http://documents.worldbank.org/curated/en/099722104222534584 (last visited on June 15, 2025).

day, which is the international benchmark for extreme poverty, fell sharply from 16.2 per cent in 2011-12 to just 2.3 per cent in 2022-23.[41] This commendable success in reducing extreme poverty has been possible because of the economic welfare measures for the needy citizens running parallel to the economic reforms measures for creating a globally competitive and open market economy in India. Whereas the welfare measures serves the needy, economic reform measures bring competitiveness in the national economy which enhances our economic capabilities and prowess as a nation.

So even if market-driven economic reform processes are better in terms of rendering economic development; they may seem oblique to the idea of 'socialist' as incorporated in the preamble vide the 42nd Constitutional Amendment Act. However, beneficial the economic reforms processes may be, can they be defended on the touchstone of socialist idea as incorporated in the Preamble to the Constitution? If one relies on the opinion of Justice Krishna Iyer in *Ranganata Reddy* case of 1977, the economic reform processes to the extent they are contrary to the socialist idea and ideals, they may not be constitutional. In this case Justice Krishna Iyer observed the following:

"Though the word "socialist" was introduced into the Preamble by a late amendment of the Constitution, that socialism has always been the goal is evident from the Directive Principles of State Policy. The amendment was only to emphasise the urgency. Ownership, control and distribution of national productive wealth for the benefit and use of the community and the rejection of a system of misuse of its resources for selfish ends is what socialism is about and the words and thought of Article 39(b) but echo the familiar language and philosophy of socialism as expounded generally by all socialist writers."[42]

Justice Krishna Iyer's view clearly indicated a constitutionally mandated economic governance that was necessarily aligned to the ideals and philosophy of socialism. This view of Justice Krishna Iyer was incorrectly construed as reflecting the concurrence of majority judgment and the same was adopted by five judge bench of the Supreme Court in *Sanjeev Coke Manufacturing Co vs. Bharat Coking Coal Ltd* case.[43] In a recent judgment of 2024, a nine judge bench of the Supreme Court in the case of *Property Owners Association and Ors. v. State of Maharashtra and Ors.*[44] found that the majority judgment in *Ranganatha Reddy* case expressly distanced itself from the observations made by Justice Krishna Iyer (speaking on behalf of the minority of judges) on the interpretation of Article 39(b). It further

[41] *Ibid.*
[42] S*tate of Karnataka* v. *Ranganatha Reddy* (1977) 4 SCC 471.
[43] *Sanjeev Coke Manufacturing Co* vs. *Bharat Coking Coal Ltd.* (1983) 1 SCC 147.
[44] *Property Owners Association and Ors.* v. *State of Maharashtra and Ors*. (2024 INSC 835).

held that a coequal bench of this Court in *Sanjeev Coke* case erred by relying on the minority opinion of Justice Krishna Iyer. Reflecting on the context of the word socialist as incorporated in the preamble vis-à-vis the choice of economic policies of the government, seven judges out of the nine judge bench in *Property Owners Association and Ors. v. State of Maharashtra and Ors.* case unanimously observed as follows:

"the vision of the framers while drafting the Constitution was not to lay down a particular form of social structure or economic policy for future governments. The debates in the Constituent Assembly reflect the foresight of Dr. B. R. Ambedkar. He was categorical in his constitutional vision. The Constitution and the Directive Principles, as he expounded their fundamental principles, rejected the prevalence of one dogma. The Constitution was framed in broad terms to allow succeeding governments to experiment with and adopt a structure for economic governance which would subserve the policies for which it owes accountability to the electorate. According to Dr. Ambedkar, if the Constitution laid down a particular form of economic and social organisation, it would amount to taking away the liberty of people to decide the social organisation in which they wish to live. He opined on several occasions that economic democracy is not tied to one economic structure, such as socialism or capitalism, but to the aspiration for a 'welfare state'."[45]

These judges rejected the view expressed by Justice Krishna Iyer in the judgment of *Ranganatha Reddy* case of 1977. The recent nine judge bench judgment of the Supreme Court clearly settles that in the context of Indian constitution, the word 'socialist' only refers to aspiration for a 'welfare state' and it does not tie the economic policies of the government to the dogmatic ideal and philosophy of socialism. In the subsequent case of *Dr. Balram Singh and Ors. v. Union of India and Anr.*[46], the Supreme Court in its order dated November 25, 2024 explicitly reiterated that "the word 'socialism', in the Indian context should not be interpreted as restricting the economic policies of an elected government of the people's choice at a given time." It observed:

"Neither the Constitution nor the Preamble mandates a specific economic policy or structure, whether left or right. Rather, 'socialist' denotes the State's commitment to be a welfare State and its commitment to ensuring equality of opportunity. India has consistently embraced a mixed economy model, where the private sector has flourished, expanded, and grown over the years, contributing significantly to the upliftment of marginalized and underprivileged sections in different ways. In the Indian framework, socialism embodies

[45] *Ibid.*

[46] *Dr. Balram Singh and Ors.* v. *Union of India and Anr.* (2024 INSC 893).

the principle of economic and social justice, wherein the State ensures that no citizen is disadvantaged due to economic or social circumstances. The word 'socialism' reflects the goal of economic and social upliftment and does not restrict private entrepreneurship and the right to business and trade, a fundamental right under Article 19(1)(g).”[47]

Thus the recent decisions of the Supreme Court reflects an emphatic departure from the *Sanjeev Coke case.* India competes globally for capital inflows – legal certainty and property rights protection are important signals for foreign and domestic investors. These recent judgments/orders of the Supreme Court as in the case of *Property Owners Association* and *Dr. Balram Singh* mirror India's economic transformation – from a heavy reliance on state control socialist model to a mixed-economy model, emphasizing both public interest and private investment. It places clear limitations on ideologically guided interpretation of socialism in realizing constitutional goal of social and economic justice; aligning legal theory with contemporary socio-economic realities. Further, the court openly acknowledged that doctrines forged in the era of shortages and State-led redistribution cannot be mechanically applied in an economy integrated with global supply chains, technology and private capital flows. In essence, these cases are instances of recalibration of how India's Constitution is read and given effect to in light of – liberalization, globalization, urban property dynamics, private investment requirements and modern socio-economic welfare tools and people's aspiration for development. Thus, there is no constitutional hitch in India's march towards the time bound realisation of the goal of *Viksit Bharat* based on the economic principles of liberalisation, privatization and globalisation; so long the fruits of economic reforms and economic development reach to all citizens, either through direct economic welfare measures; or through expansion of the economy to include even the most depressed ones in economic activities or through the trickle-down effect of economic development.

## 5. Conclusion

The *Viksit Bharat* Mission is a national resolve to make India a developed nation by 2047. It is stipulated that India’s economy should be such structured, synergized, managed and efficiently guided that it grows to around 35 Trillion to 40 Trillion economy by 2047. Whereas the management and progression of the national economy is largely an executive exercise it has serious constitutional implications. From the constitutional perspective, the *Viksit Bharat* mission is a tool for realization of constitutional commitment of economic justice for all its citizens. The present paper argues that the scheme of economic justice as enshrined in the Constitution has two components; both these components of economic

[47] *Ibid.*

justice stands sub-served by the *Viksit Bharat* Mission wheeled upon the principles of market economy, so long the Indian state remains committed to welfare of the citizens. The reliance of *Viksit Bharat* Mission on market economy is largely due to its efficacy in giving better results for economic development, which is central for achieving the goal of economic justice for all the citizens. Thereby through this paper it is examined, if the market economy principles as adopted in 1991 conflicts with the preambular stipulation of socialist as incorporated in the Preamble to the Constitution of India by the 42nd Constitutional Amendment Act? On a survey of recent decisions of the Supreme Court of India, it finds that there is no conflict between the principles of market economy adopted for realization of *Viksit Bharat* Mission and the socialist idea stated in the Preamble to the Constitution.

# IPR, Sustainable Development and SDGs: Examining the Intersection from Legal and Policy Perspectives

*Kshitij Kumar Singh**

**ABSTRACT**

*The dynamic intersection of Intellectual Property Rights (IPR), sustainable innovation, and the UN's Sustainable Development Goals (SDGs) demands close examination, especially in the face of grand challenges such as climate change. Contemporary issues like clean and renewable energy require multidimensional and creative approaches grounded in sustainable development, corporate sustainability, and systems thinking. Sustainable innovation, positioned on the triple helix of people, planet, and profit, involves deliberate modifications to products, processes, and services to generate long-term value while balancing economic, social, and environmental priorities. Its inclusive and collaborative nature enables co-creation among diverse actors and extends to fair labor practices, inclusive design, and accessible solutions. While IPR has traditionally propelled innovation, current practices must evolve to fully support sustainable innovation. The dominant profit-driven logic of IPR often conflicts with the moral and societal imperatives of sustainability, raising questions about alternative protection mechanisms or revised IP strategies that enhance access and ensure responsible use of inventions. Patents, trade secrets, design rights, and trademarks can be strategically deployed to advance climate-friendly and green solutions. Experiences from the COVID-19 pandemic demonstrate how open licensing, shared knowledge pools, and coordinated efforts—such as the WIPO-WTO-WHO collaboration and initiatives like WIPO GREEN—can generate impactful, sustainable outcomes. Against this backdrop, the paper analyses the legal and policy dimensions shaping the interaction between IPR, sustainable innovation, and SDGs.*

**Keywords:** *Intellectual Property Rights (IPR), Patents, Sustainable Innovation, Sustainable Development Goals (SDGs), World Intellectual Property Organisation (WIPO).*

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## 1. Introduction

Contemporary challenges like climate change need creative and innovative solutions secured through intellectual property rights (IPR). IPR is conventionally considered the prime driver of innovation, but its applicability to sustainable innovation remains contentious. It raises the question whether the profit-driven IPR imbibe the value-driven concept of sustainability. Sustainability lies at the intersection of 'people, planet, and profit', establishing a harmonious relationship between social, environmental, and economic considerations. Intellectual property (IP) protection incentivizes sustainable innovation, similar to other innovations; however, IP practices (e.g., exclusive licensing and monopoly over platform technologies) may not align with sustainability. Sustainable innovators have two options: either to resort to alternative protections/solutions that do not rely on IPR or to approach IPR with different strategies to improve access and control of innovation. It also led to the inquiry into different IPR frameworks, such as patents, trademarks, trade secrets, copyright, and industrial design, regarding the adaptability and compatibility of sustainable innovation.

IPR can provide creative and innovative solutions to grand challenges such as poverty, hunger, climate change, and food security, and therefore, it can help achieve the SDGs. However, whether it needs government support, policy interventions, and the participation of all the stakeholders, including national and international institutions, needs a comprehensive analysis. The COVID-19 pandemic exemplifies collaborative strategies, including IP licensing strategies that worked well during the pandemic. Though many IP issues (e.g., IP waiver) remained contentious, practices like collaborative agreements, patent pledges, and non-exclusive licensing in the IP domain exhibited great promise. However, the pertinent question is how these practices can be extended to non-pandemic situations, such as climate change, as sustainable solutions? Against this backdrop, the research article examines the intersection of IPR, sustainable innovation, and SDGs from a legal and policy perspective. It examines the viability of different IP strategies and collaborative agreements, as well as the role of international organisations, especially the World Intellectual Property Organisation (WIPO), in promoting sustainable innovation and achieving SDGs, considering current practices and practical intricacies.

## 2. Sustainability Gaze into IPR and Innovation

Sustainability is an evolving concept that has passed through various stages and has been shaped and reshaped by 'economic, social, political, and cultural influences'.[1] The

[1] See generally, Jeremy L. Caradonna, *Sustainability-A History* 22-53 (Oxford University Press, New York, 2022).

current thrust on sustainable development goals, as defined by the United Nations, recognizes the interdependence of environmental, economic, and social sustainability.[2] This interdependence resulted from the growing realization of economic and social determinants of development. Technological development has challenged the approaches to sustainability. The disruption caused by technological innovation brings new solutions to the world that may improve economic and social conditions. Yet, it may not be sustainable in its broadest sense. How to make technological innovation sustainable needs pre- and post-innovation policy. Laws and policies are essential in making innovation sustainable by prioritizing and streamlining it with social and economic necessity.

Intellectual Property Rights and sustainability can be considered friends and foes depending on various perspectives in a contextual setting.[3] The long interaction between IPR and innovation has been contentious. However, there is a general perception that IPR is a prime driver of innovation. Yet, in many cases, the conventional approach and existing mechanism of IPR are not yielding the desired results (for example, in the cases of antimicrobial drugs and drugs for neglected diseases, IPR is not rewarding, and the R&D investments are going down). In these sectors, policymakers opt for alternative models for research and innovation (e.g., the UK subscription model).[4] Further, innovators have a short-sighted vision that focuses on short-term economic profit.

The United Nations came up with 17 Sustainable Development Goals (SDGs), which are interdependent, and promoting one promotes others too. These goals require sustainable development that demands a harmonized approach focusing on economic, social, and environmental considerations. A report in the science magazine Nature reflects a meager progression of sustainable development, as only 20 percent of targets are on track against the target of achieving all 17 SDGs by 2030. The underlying reason cited for the slow progress is the inadequate efforts by the nations to achieve these goals. The report creates hope that if adequate financial and governance reforms occur, we can achieve the SDGs by 2050.[5]

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[2] United Nations Department of Economic and Social Affairs: "Sustainability", *available at:* https://sdgs.un.org/goals (last visited on April 21, 2025).

[3] Carolina Castaldi, "Sustainable Innovation and Intellectual Property Rights: Friends, Foes or Perfect Strangers?" in Cosmina L. Voinea, Nadine Roijakkers & Ward Ooms (eds.), *Sustainable Innovation: Strategy, Process and Impact* 229–238 (Routledge, New York, 2021).

[4] See Kshitij Kumar Singh, "Innovation Conundrum in Antimicrobial Sector: A Curious Case for Intellectual Property Rights" 29(6) *Journal of Intellectual Property Rights* 507-515 (2024); Andrea Morales, Kshitij Kumar Singh, *et.al.* (2022) "Using the International Pandemic Instrument to Revitalize the Innovation Ecosystem for Antimicrobial R&D" 50(S2) *Journal of Law, Medicine & Ethics* 47-54 (2022).

[5] Francesco Fuso Nerini, Mariana Mazzucato, *et.al*, "Extending the Sustainable Development Goals to 2050- a road map" 630 *Nature* 555-558 (2024) *available at:* https://www.nature.com/articles/d41586-024-01754-6 (last visited on April 21, 2025).

## 3. Sustainable Development and Sustainability

Sustainable development has its roots in forest conservation.[6] Still, it became explicit in the Brundtland Report 1987, which defines it as a development that aimed "to meet the needs of the present without compromising the ability of future generations to meet their own needs".[7] Sustainable development is based on realizing planetary integrity and catering to the needs of the economy, environment, and social well-being. Sustainability and sustainable development are two distinct concepts, as the former is a situation/goal that SD is aimed to achieve through various principles and tools: "*Sustainability* is often thought of as a long-term goal (i.e. a more sustainable world), while *sustainable development* refers to the many processes and pathways to achieve it."[8] Sustainability sets for people "a social goal to exist on Earth over a long time and can guide global, national, and individual decisions."[9]

Many allege that sustainable development is a utopian and contradictory concept as sustaining infinite economic growth on a limited planet is impossible. However, it is a premature understanding; it must be understood in a purposive context. As mentioned earlier, sustainability lies at the intersection of economy, society, and environment, carrying all three dimensions. The basis of sustainability is an environment that ensures the existence of society and the economy. This basis led us to prioritize the environment and to ensure that no compromise should be allowed at the cost of environmental protection. Since sustainability lies on the three pillars: social, environmental, and economic, it necessitates strengthening all three pillars. If any of them remain weak, the sustainability structure falls apart.[10] Policymakers are duty-bound to strategize policies that harmonize and maintain all three pillars.

## 4. Sustainable Innovation- The Conceptual Framework

Innovation brings something new to the concerned field, whether a useful product or process, focusing on problem-solving. We encounter problems that an individual effort cannot solve in the contemporary world. Instead, they demand cumulative and collaborative efforts. These are termed wicked problems with broad impacts, such as climate change, pandemics, and water and air crises. These problems require creative and innovative

[6] *Supra* note 1.
[7] United Nations, "Sustainability" *available at:* https://www.un.org/en/academic-impact/sustainability (last visited on April 21, 2025).
[8] UNESCO, Education for Sustainable Development-Source Book, UNESCO, Paris France, 2012, *available at:* https://sustainabledevelopment.un.org/content/documents/926unesco9.pdf (last visited on April 21, 2025).
[9] See Purvis, Ben; Mao, Yong; Robinson, Darren, "Three Pillars of Sustainability: in Search of Conceptual Origins" 14 (3) *Sustainability Science* 681–695 (2019); Ramsey, Jeffry L., "On Not Defining Sustainability" 28 (6) J*ournal of Agricultural and Environmental Ethics* 1075–1087 (2015).
[10] *Ibid.*

solutions, making sustainable innovation increasingly important. Sustainable innovation depends on "sustainable development, corporate sustainability, and system thinking and resides on the triple helix of 'people, planet, and profit'."[11] Sustainable innovation requires intentional changes in companies about their products, services, or processes "to create long-term value by balancing economic, social and environmental considerations."[12] Given its focus on social sustainability and value creation, sustainable innovation also requires fair labour practices, inclusive design, and cost-effective solutions.[13] Co-creation is a prominent modality through which sustainable innovation could be triggered, along with inclusive and collaborative approaches involving diverse individuals and groups.[14] There is a growing market for sustainable products and services, given the consumer demands for the same. Consumers are ready to pay the price to manage their lifestyles and stay committed to and supportsustainable development. We have a general perception that innovation, in any case, is good. This perception is the outcome of our avoidance of the impact assessment of the concerned innovation.[15]

## 5. IPR and Sustainable Innovation- The Interplay

IPR is conventionally considered an indicator of innovation (e.g., the status of the IPR of a company may attract investment, reflecting that it is an innovative company). However, it raises the question of whether it could also be considered an indicator of sustainable innovation. It involves some apparent contradictions as the 'profit logic of IPR with appropriation strategies contrasts the moral or societal value logic emanating from sustainability,'[16] which is the core of sustainable innovation. Policymakers suggest two options in this regard: first, should we replace IPR with alternative strategies to find alternative solutions/protections that do not rely on IPR (as discussed earlier), and second, do we need to reframe our IP strategies to improve access and control the invention's responsible use?[17]

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[11] Kaisa Oksanen and Antti Hautamaki, "Sustainable Innovation: A Competitive Advantage for Innovation Ecosystems" 5(10) *Technology Innovation Management Review* 24-30 (2015), *available at:* https://timreview.ca/article/934 (last visited on April 22, 2025).

[12] Ju Young Lee, "What is Sustainable Innovation" *Network for Business Sustainability October* 19, 2021, *available at:* https://nbs.net/what-is-sustainable-innovation-and-how-to-make-innovation-sustainable/ (last visited on April 22, 2025).

[13] Elizabeth Green, "Sustainable Innovation & Its Principles" *Sigma Earth* (December 5, 2023) *available at:* https://sigmaearth.com/sustainable-innovation-its-principles/#:~:text=Reduce%2C%20Reuse%2C%20Recycle%3A%20The,to%20reduce%20the%20carbon%20footprint (last visited on April 22, 2025).

[14] *Supra* note 11.

[15] *Ibid.*

[16] *Supra* note 3 at 229.

[17] *Ibid.*

IPRs, such as patents, trademarks, copyrights, and industrial designs, form an organisation's "structural capital, enhancing an organization's sustainable innovation process and environment-related activities."[18] IPR provides an economic incentive to the inventors and creators to reward their efforts. However, every IPR is also destined for well-defined policy goals. Despite having a proprietary element, IP is an artificial creation of states that works through states' policy levers. Even if it is exercised in the private domain, it does not make the IP owners immune to their irresponsible behaviour. The obligation of the patentee is earmarked in the IP laws that contain numerous flexibilities to address the accessibility and affordability of innovation. However, the pertinent question is, can these flexibilities help make innovation sustainable? Can it be done through voluntary mechanisms or state actions, even if possible? A related concern is whether it can also be promoted and ensured through the institutions in the IP domain.

The answer is contextual and mixed. On the structural level, given the conventional role of IPR, it provides a guarantee to investors that they can recoup their investment costs by securing relevant IPR that provides them exclusivity in the market. Therefore, IP-led incentives can attract investors in the given field. On the same logic, if sustainable technologies, for example, green technologies and green marks/expressions, are enclosed with IPR, it may lead to sustainable innovation. But what should be the motivation for promoting green/sustainable innovation? It goes beyond the IPR framework and needs a push from the government and policymakers. Administrative reforms and governance reforms are the key to promoting sustainable innovation. In the IPR domain, collaborative agreements through IP licensing can help develop sustainable technologies. IP licensing can also facilitate technology transfer for sustainable development.

## 6. Impact of IPR on Sustainable Innovation

The discussion of the impact of IPR on sustainable innovation involves different viewpoints. Many believe that IPR provides a relatively "weak incentive to develop green technologies due to the time lag between green technological invention and their first commercialization."[19] Invention spurs invention and leads to innovation, making the diffusion of the same quintessential. However, given the collaborative nature of green technologies, many companies hold patents on different components that may stake up the

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[18] Pratheeba Vimalnath, Frank Tietze, *et.al.*, "Responsible Intellectual Property Strategy for Sustainability Transition-An Exploratory Study" 73 *World Patent Information* 102195 (2023), *available at:* https://www.sciencedirect.com/science/article/pii/S017221902300025X?via%3Dihub#bib6 (last visited on April 22, 2025).

[19] *Ibid.*

licensing fee and increase transaction costs. As a result, IPR may block the diffusion of green technologies.[20] The monopoly through the robust IP protection on sustainable technologies may block others from accessing IP-protected technologies.

On the other hand, another viewpoint establishes that IPR promotes sustainable innovation. As an organization's structural capital, IPRs such as patents, copyrights, trademarks, and industrial design can enhance "the sustainable innovation process and environment-related activities." However, IPR and sustainability interrelation appears complicated due to the profitability motive of IPR. Nevertheless, it may promote sustainable innovation through openness and sharing of IP through broader mechanisms like "patent commons, pledges, and open source". The Sustainability-IPR interface has been less discussed, though, and the existing literature lacks a structured debate as to how the IPR regime is catching up with the concept of sustainability.[21]

Though companies focus on maximizing profit and securing their innovation through IP protection, given the awareness and dissemination of sustainable innovation, companies adopt sustainability as a strategy to gain a competitive advantage.[22] Companies can adapt ownership claims and licensing strategies that facilitate access and control the responsible use of their innovation. Sustainable innovation imbibes sustainability in "the entire value chain, from suppliers to distributors". The growing interdependence of one organization on another to innovate makes sustainable innovation more appealing. One of the motives of sustainable innovators is to promote it by not filing IPR on innovation.[23] Different IPs need different approaches to absorb and promote sustainability within the IP framework.

### 6.1 Patents and Sustainable Innovation

Patents are government documents issued by the national government to an inventor for an invention, conferring exclusive rights to the inventor regarding the invention for a limited period. This time-bound monopoly is limited to certain exemptions and inherent flexibilities that put a check on the use of these rights. While granting exclusive rights to incentivize the inventor, patent law demands public disclosure. It balances patentees and third parties and leads to a public good. Patents offer manifold scope for sustainable technologies. first, while picking up a green technology for patenting, it secures the inventor/investor to recoup the investment and economic incentive; this guarantee secured

[20] *Ibid.*
[21] *Ibid.*
[22] *Supra* note 3 at 229.
[23] *Id.* at 229-230.

through patents influences other inventors to invest in green technologies, and therefore, patents "can promote the development of green technologies, fostering environmentally friendly innovations". Sustainability is also linked with the affordability and reliability of innovations. However, patents on platform technologies relating to the environment may create barriers to accessibility and affordability of innovation, having a chilling effect on the follow-up innovation. Here, licensing strategies and collaborative mechanisms such as non-exclusive and open licensing (both licensing-in and licensing-out) and patent pledges with numerous commitments can play crucial roles.[24] In recent years, constant progress has been witnessed in this context (for example, Eco patent commons was introduced by "Sony, Microsoft, Nokia, and others with the World Business Council", developing a unique ecosystem).[25]

Licensing indicates the inability of the owner to make her invention commercially workable on her own or her dependence on others to innovate. Innovators can address this inability through licensing to one or more third parties. A patentee may devise licensing strategies to effectuate innovation by assessing her peculiar position and the purpose at hand. She may go for licensing-in or licensing-out options. Licensing-in or in-licensing could be a viable option to derive the value of sustainable technologies when she is placed with "a limited scale of resources to translate the technologies into actual products and services." Moreover, licensing-in is based on collaboration with other companies. Licensing other companies' sustainable technologies enables "opportunities for new ventures with the right business model to use these technologies in the markets."[26] Licensing-out is the strategy through which a company generates revenue by licensing its technology to other companies on mutually agreed royalty. In-licensing out strategy, companies can contribute to sustainable innovation by exercising non-exclusive, fair, reasonable, and non-discriminatory practices relating to green technology. An inventor may opt for a licensing-out strategy for numerous reasons, given that many patents remain unused.[27]

Companies can also donate patents on sustainable technologies for free to public entities, including universities, or they can participate in the patent commons to share technologies for free. Companies come forward with patent pledges of green technologies. For example, Tesla announced "that it would open its patent portfolios to boost technological

[24] *Id.* at 234.

[25] Jo Bowman, "The Eco-Patent Commons: Caring Through Sharing" *WIPO Magazine*, June 3, 2009, *available at:* https://www.wipo.int/en/web/wipo-magazine/articles/the-eco-patent-commons-caring-through-sharing-36818 (last visited on April 22, 2025).

[26] *Supra* note 3 at 234.

[27] *Ibid.*

[28] *Ibid.*

advances in battery technology". The green patent initiative is another significant initiative.[28] International treaties on IPR and national IP laws do not provide for sharing green patents. IP systems do not explicitly make any distinction between environmentally friendly green technologies and other technologies. Innovators can apply patent pledges to all kinds of technologies, including green technologies, but their establishment and organization remain challenging for green technologies as it requires interdisciplinary coordination of scientists, legal professionals, and business professionals and support from industry. In addition to this, the prime challenge is the governance of these technologies in the absence of any standard criteria. The regulation of green technologies and the validity of pledged patents relating to green technologies also remain challenging.[29] The Paris Agreement, 2015 calls for "an effective technology mechanism to facilitate the technology development and transfer in support of climate change mitigation and adoption."[30] In this context, green patent pledges offer an effective mechanism of collaboration and knowledge sharing that may work within the existing IP legal regime in the implementation of the Paris Agreement: "[t]he governance of green patent pledges should be provided by an international organization where credibility and legitimacy can serve to resolve many concerns."[31]

Patent Commons is a platform for sharing technology featuring a collection of free-to-use patents provided by major industry players. Such a model may help with sustainable innovation, unlike the enclosed model fencing technologies through IPR. It's a little fuzzy, though, how and to what extent sustainable innovators strategize IPR in a specific way, 'first to file and protect and then share or make it open for others.'[32] Sustainable innovation may be interpreted in numerous ways, but sustainability, as commonly understood in line with the SDGs, indicates a harmonious innovation considering all three dimensions-"environmental, social and economic sustainability". It includes product, process, and service innovation. Consumers can adopt sustainable product innovation translated into tangible products for sustainable consumption and by innovative companies/innovators to implement sustainable production. On the other hand, sustainable processes entail "making changes to production and organizational processes that are in tune with sustainability (e.g., rethinking value chains like circular economy initiatives such as recycling and upcycling)". It indicates system thinking and organizational transformations in the innovation value chains. Sustainable service innovations include novel business models that have a more intangible nature and provide "novel solutions to meet the specific needs of users".[33]

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[29] Bassem Awad, "Patent Pledges in Green Technology" in Jorge L. Contreras and Meredith Jacob (Eds.), *Patent Pledges-Global Perspectives on Patent Law's Private Ordering Frontier* 95-96 (Edward Elgar Publishing, Inc., Massachusetts, 2017).

[30] *Id.* at 98.

[31] *Ibid.*

[32] *Supra* note 3 at 230.

[33] *Id.* at 230-31.

### 6.2 Trademarks and Sustainable Innovation

Trademarks offer significant space for green innovation or sustainable innovation. The conventional role of trademarks is twofold: first, to enable the trademark holders to establish the identity of their goods and services through distinct marks and sustain their goodwill in the market. From the consumer's perspective, it enables them to go with their choices while selecting the goods and services of a company and not be misled by the deceptive competing products/services. Distinctiveness and indication of source are the two essential elements of trademarks; they are expressions that inform consumers regarding the quality of the products. Take the example of certification marks, which are governed by standardizing organizations. Notably, trademarks are not only indications of source or origin but reflect views of broader significance that go beyond business, informing buyers categorically about products and processes covered by them. Trademarks can indicate "if the product is 'green.' 'sustainable', and 'environmentally friendly." The terms 'green' and 'eco' can reflect whether the product is eco-friendly. It also reflects the environmental responsibility of buyers, and in the information age, buyers are influenced by these phrases.[34]

In the trademark domain, "firms have strong incentives to maintain the informational value of their trademarks." Therefore, they can engage in activities to strengthen the signal. Sustainable products are characterized by "the information asymmetries, where suppliers hold the full information on the whole production chain, but consumers cannot even fully experience the sustainability of products after purchase".[35] However, companies can adapt numerous ways "to deliver a trustworthy claim that consumers can rely upon". Companies can either design their own sustainable brands or private labels and protect them with trademarks or rely on third-party organizations' labels. It could be issued by "multiple commercial parties or by an independent organization (e.g., Marine Stewardship) that monitors if the companies comply with the certification schemes". In this context, greenwashing practices are pervasive, "when a greenwashing company associates a trademark to its practice, this gives a weapon of retaliation to (non-greenwashing) competitors and activist organizations that represent civil society".[36] Many litigations took place where trademark claims around sustainability have been challenged in court. Many of the NGOs use "name-shaming or brand-shaming as a strategy to expose misconduct".[37] One of the contentions relating to trademarks is that they are used as a

[34] See Kathryn Park, "Green Trademark and the Risk of Greenwashing" *WIPO Magazine*, December 13, 2022 *available at:* https://www.wipo.int/en/web/wipo-magazine/articles/green-trademarks-and-the-risk-of-greenwashing-42943 (last visited on April 23, 2025).

[35] *Supra* note 3 at 234.

[36] *Id.* at 235.

[37] *Ibid.*

commercial strategy, and therefore, they conflict 'with the collaborative nature of the collaboration'. Sustainable innovation entails moral sustainability-driven drivers of innovation that apparently seem incompatible value with commercial appropriation. However, if trademark owner companies follow strategic practices aligning with sustainability, they can derive long-term economic benefits.

**6.3 Design and Sustainable Innovation**

Design rights are primarily used to protect the visual appearance of products and commercialize the aesthetic value of a product. It enhances the value of the article over which it is applied. However, designers can use these aesthetic creations to promote sustainable innovation. It can help promote sustainable innovation as “the whole idea of 'eco-design' revolves around the transformational role that design can play in rethinking the processes and practices behind products and services”.[38]

**6.4 Trade Secrets and Sustainable Innovation**

Trade secrets can also be aligned with sustainable innovation; it incentivizes the innovators and business entities to innovate without spending much time and capital in seeking protection through other IPRs, such as patents. However, it depends on the strategic choice, keeping in mind the risks of leaking information. Trade secrets protect any information with a trade value, and its value resides in its secrecy rather than disclosure. In the context of sustainable technologies, innovators can focus on the advancement of technology rather than spending more money on its protection.[39]

**6.5 Copyrights and Sustainable Innovation**

Copyright protection has been conventionally given to different forms of original expressions, including literary, musical, artistic, and dramatic expressions. Gradually, the scope of copyright has been extended to accommodate new entrants containing expressions based on information technology (e.g., software, databases, digital technologies). Scientific literature and research outputs, including data, can be crucial in promoting sustainable innovation. In this context, copyright can promote green technology by disseminating information regarding sustainable innovation through open licensing of scientific literature. It can also be aligned with “programming and data analysis that can help enhance current

[38] *Ibid.*

[39] See “WIPO Guide to Trade Secrets and Innovation-Strategic Roles of Trade Secrets in the Innovation Ecosystem” *available at:* https://www.wipo.int/web-publications/wipo-guide-to-trade-secrets-and-innovation/en/part-ii-strategic-roles-of-trade-secrets-in-the-innovation-ecosystem.html#:~:text=Appropriate %20trade%20secret%20protection%20will,and%20maintain %20a%20competitive%20edge (last visited on April 23, 2025).

technology in an ecologically friendly way and generate new technology in the context of green technology". Therefore, copyright can effectively help promote innovation and education aligned with sustainable development. Taking inspiration from open science, it can share and disseminate scientific knowledge and research findings and data for triggering innovation as "solutions to grand challenges such as climate change and pandemics."[40] It can also make copyrighted material accessible through different licensing arrangements. Open educational resources influence copyright licensing strategies that align with sustainable innovation.[41]

## 7. SDGs, IPR, and Innovation

IPR and innovation are closely linked to almost all the SDGs, poverty, health, and environment, but one of the SDGs, SDG-09, Industry, Innovation, and Infrastructure, is directly related to innovation. Though it does not mention IPR, it imbibes the connection between IPR and innovation. SDG-09 requires the interaction and collaboration of different stakeholders (Academia-Industry-Government complex and public-private partnerships) in promoting sustainable innovation. Despite the specific mention of innovation in SDG 9, the impact of IPR and innovation on other goals is well-reflected by the WIPO:

-it is through human ingenuity that "…it will be possible to promote new solutions that eradicate poverty; boost agricultural sustainability and ensure food security; combat disease; improve education; protect the environment; and accelerate the transition to a low-carbon economy, increase productivity and foster business competitiveness."[42]

As IPR impacts SDG-09, it can also help achieve other SDGs, as the goals are interdependent, and fulfilling one may help fulfill the other.

One of the main features of SDGs is an inclusive and participatory approach; it involves co-creation and allows the participation of diverse groups, making them realize a sense of ownership. Another feature of SDGs is their universal nature, as, in principle, they apply equally to both developed and developing countries. However, it needs to adapt to the relative conditions of developing countries as they are placed on different pedestals, and

[40] International Federation of Library Associations and Advocacy: "Copyright and Sustainable Development-Part1: How a Balanced Copyright Framework Supports Delivery of the 2030 Agenda" *Library Policy* and *Advocacy Blog*, October 12, 2021, *available at:* https://blogs.ifla.org/lpa/2021/10/12/copyright-and-sustainable-development-part-1-how-a-balanced-copyright-framework-supports-delivery-of-the-2030-agenda/ (last visited on April 23, 2025).

[41] *Ibid.*

[42] Claudia Cara, "Intellectual Property is an Undisputed Support for Sustainable Development Goals" *PONS IP* May 13, 2024, *available at:* https://ponsip.com/en/ip-news/news/intellectual-property-is-an-undisputed-support-for-sustainable-development-goals/ (last visited on April 23, 2025).

achieving these goals may need a distinct approach. SDGs are a wider global commitment to grand challenges such as climate change, poverty, water, and peace. The interrelation between IPR and SDGs still remains contentious, and it depends on how IP practices are carried on; however, at the theoretical level, IPR is aligned to provide creative and innovative solutions to the contemporary grand challenges, and they have the potential to translate ideas into a real-world solutions. IPR can be a useful tool to help achieve SDGs if applied diligently with a sustainable approach and meaningful policy interventions.

## 8. WIPO and SDGs: Initiatives and Commitments

Global organizations can play a pivotal role in flagging SDGs and exemplifying the best practices to help countries to align their IPR policies well with SDGs. WIPO took numerous initiatives in this regard. IPC green inventory[43] is a database that enables searches for patent information in environmentally sound technologies. Another initiative is based on a collaborative model that provides a platform for technology transfer and co-creation. It is termed as 'WIPO GREEN',[44] which creates an online platform for technology exchange that extends support to global efforts addressing climate change by connecting providers and seekers of environmentally friendly technologies. It also facilitates “legal aid to organizations in developing countries with respect to green innovations on a pro-bono basis.”[45] A WIPO publication, “WIPO and the Sustainable Development Goals: Innovation Driving Human Progress,” highlights SDGs' interdependence and innovation's role in achieving them.[46] To make the system more inclusive of gender and marginalized classes, WIPO launched 'WIPO in Green', an interview series regarding women's participation in the green tech innovation sector.[47]

WIPO adapted the theme of World IP Day, "IP and SDGs: Building our common future with innovation and creativity" highlighting the crucial role of IP in providing critical incentives for innovation and creativity. It reflects WIPO's commitment to “the UN Sustainable Development Goals.”[48] Given the inclusive and interdependent nature of

[43] WIPO Knowledge Repository: “IPC Green Inventory”, *available at:* https://tind.wipo.int/record/28644?ln=en&v=pdf (last visited on April 23, 2025).

[44] “WIPO Green-The Marketplace for Sustainable Technology”, *available at:* https://www3.wipo.int/wipogreen/en/ (last visited on April 23, 2025).

[45] See “WIPO Green-Pro Bono: Legal Services Through WIPO Green”, February 3, 2021, *available at:* https://www3.wipo.int/wipogreen/en/news/2021/news_0001.html (last visited on April 23, 2025).

[46] See “WIPO and the Sustainable Development Goals-Innovation Driving Human Progress” *available at:* www.wipo.int/edocs/pubdocs/en/wipo_pub_1061_2021.pdf (last visited on April 23, 2025).

[47] See “WIPO in Green” *available at:* https://www3.wipo.int/wipogreen/en/womeningreen/index.html (last visited on April 23, 2025).

[48] See “WIPO: Sustainable Development Goals and Intellectual Property”, *available at:* https://www.wipo.int/en/web/sdgs (last visited on April 23, 2025).

sustainable development, the IP commitment needs to come on all levels, including individual inventors, companies and other organizations, and the government to regulate and govern sustainable technologies. There is a need to apply the IP with a collective capacity to translate sustainable ideas into sustainable solutions.[49] WIPO exemplifies real-world examples and good practices of "implementing the SDGs in national intellectual property systems (e.g., the research study by the WIPO Japan office in collaboration with WIPO's Special Representative on the UN SDGs reflects best IP practices)."[50] WIPO also presents key findings of research analytics exploring the SDGs through patents, and the research establishes that patents represent 13 out of 17 SDGs. Of these, SDG 9- Innovation, Industry, and Infrastructure- leads in terms of the highest number of patents. In addition to this, SDG-13, Climate Action, and SDG-07 - Affordable and Clean Energy, are slowly catching up with patents. The latter trend demonstrates a growing awareness and consumer preference for green technology. The Innovation Maturity Index also indicates that in addition to SDG-13 and SDG-07, SDG-12, Responsible Consumption and Production has also registered a significant presence in contemporary debates and related patents. Given the interdependence of SDGs, SDG01 No Poverty, SDG-04 Quality Education, SDG-06, Clean Water and Sanitation, SDG-14, Life Below Water, and SDG-15, Life on Land garnered the utmost attention from a patent perspective.[51] Patents also help promote the development of medical technologies and pharmaceuticals by securing the investment and rewarding the inventor and by disseminating lifesaving innovation and therefore aligning with SDG -03 Healthcare and Wellbeing.[52]

Despite the high-level discussion and much emphasis on SDGs, IPR, in some situations, poses challenges in achieving the SDGs, for example, ensuring accessibility and equitable distribution of innovations, essential technologies, and medicines. Do the advancements secured through IPR reach those who need it the most? Is it still a complex question in the context of sustainable development? It depends on the IP policies and practices that strike a balance between IP protection and access to innovation on equitable terms. Sustainability has been pitched and accepted as a universal principle guiding the IP and innovation interplay to help achieve SDGs. In this context, SDG-17, 'Partnerships for

[49] *Ibid*.

[50] WIPO: "Intellectual Property Offices and Sustainable Innovation-Implementing the SDGs in National Intellectual Property Systems" *available at:* https://www.wipo.int/edocs/pubdocs/en/wipo-pub-rn2023-10-en-intellectual-property-offices-and-sustainable-innovation.pdf (last visited on April 23, 2025).

[51] WIPO: "Key Findings: Exploring the SDGs Through Patents", *available at:* https://www.wipo.int/web/patent-analytics/key-findings-exploring-the-sdgs-through-patents (last visited on April 23, 2025).

[52] Akos Cserkuti, "The Power of Intellectual Property in Achieving the Sustainable Development Goals" *Patent Renewal*, September 12, 2024, *available at:* https://www.patentrenewal.com/post/the-power-of-intellectual-property-in-achieving-the-sustainable-development-goals (last visited on April 23, 2025).

the goals' and its thrust on forging global partnerships, is the key in the IP domain, where collaborative licensing agreements can bring sustainable IP practices. It also emphasizes the collaborative and cumulative solutions in the partnership of governments, international organizations, companies, and innovators.[53]

### 9. Lessons Learned from the COVID-19 Pandemic

COVID-19 presents many approaches that may help achieve SDGs; it exposes the gaps in the system while setting an example of how the public-private-government partnership can lead to collaborative solutions to a global problem, i.e., the pandemic. Can these approaches be included in the sustainable innovation domain and lead to achieving SDGs? This needs further research. The pandemic highlights the strength of open and collaborative licensing strategies to find solutions to grand challenges. The pandemic exemplifies that IP rights with open and collaborative licensing strategies and the contribution of stakeholders to common knowledge pools can provide viable solutions (patent pledges, C-TAP, etc., though they started well but ended up less effective).[54] It also reflects how to prioritize innovation in each situation, e.g., during the pandemic, the emphasis was on social impact innovation, including innovating vaccines and PPEs. It indicates that, on the same line, we need to prioritize green innovation to address climate change and achieve decarbonization goals. One of the features of a pandemic is that it requires an immediate and emergent response; this urgency needs to be attached to grand environmental challenges. A notable aspect of the pandemic was institutional collaboration and solidarity. During the pandemic, the collaboration of WIPO with WTO and WHO demonstrates an integrated effort to help provide sustainable solutions in an emergent situation.[55] The relevant question is whether these approaches, which worked well in emergent situations, can be continued to non-emergent situations (though sustainability also needs emergent solutions) to solve grand challenges such as climate change.

The pandemic period transcends a sense of realization of the importance of SDGs in crises. The policy responses to green recovery set a great example where "green refers to rebuilding after the COVID-19 crisis in a way that tackles climate change and aligns with the SDGs."[56] It triggers an "interconnected and comprehensive approach to policy

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[53] *Ibid.*

[54] See Kshitij Kumar Singh, "Patent and Pandemic: Exploring Duties Obligations and Responsibilities" in Raman Mittal and Kshitij Kumar Singh (eds.), *Relevance of Duties in the Contemporary World-With Special Emphasis on Gandhian Thought* 380-384 (Springer, Singapore, 2023).

[55] *Ibid.*

[56] Kalterina Shulla, Bernd-Friedrich Voigt, *et.al.*, "Effects of COVID-19 on the Sustainable Development Goals (SDGs). 2:15 *Discover Sustainability* (2021), *available at:* https://link.springer.com/article/10.1007/s43621-021-00026-x#citeas (last visited on April 23, 2025).

implementation and planning",[57] tackling climate change. Countries aspiring for green economies must be inclusive and equitable, focusing on "poverty reduction and growth, creating new jobs and encouraging stakeholders to act environmentally responsibly".[58] The pandemic exemplifies governments' ability to respond effectively to global challenges during crises. This potential could be handy in accelerating progress on climate change if governments take inspiration from the short-term decrease in global greenhouse gas emissions during COVID-19.[59] On numerous levels, e.g., decisions, policies, and actions taken during COVID-19 can help achieve the SDGs if adapted in a contextual setting.

## 10. IPR and Sustainable Innovation: Practical Insights and Current Trends

The foregoing discussion suggests that IPR could empower sustainable innovators through different ends; in addition to profit-making, innovators can align with the social impact and a well-crafted IPR strategy (using different licensing models). However, there is a dearth of literature that could establish systemic evidence on the actual practices of IPR use by sustainable innovators and their desirability from a societal point of view. The previous experience suggests that incremental patents are only filed for strategic use, raising some pertinent questions: "Whether smaller and less experienced firms still have proper access to IPR systems;[60] are sustainable innovators able to leverage the opportunities of IPR systems." In addition to this, it also reflects that IP practices do not often conform to sustainability and act as impediments, for example, 'exclusive contracts forced by original equipment manufacturers frustrate attempts to refurbish and extend lifecycles.' Nevertheless, the right to repair is gaining momentum in the USA, Europe, and India, where 'trademark or patent protected spare parts could still thrive next to unprotected ones in a situation where consumers would be empowered to choose their preferred option'.[61] Sustainable innovation and IP interplay can be better shaped by possible governance solutions.

An inclusive and collaborative approach with significant policy intervention and governmental support can better shape IP practices in tune with sustainability: 'There may be ways to better align private and public incentives through institutional changes at norms and/or legislation levels.' We must explore a 'much broader range of ways of leveraging IPRs than the most common practices biased towards closed models.' There is a need to broaden the geographical reach of current studies to accommodate the concerns of the Global South: "More inclusive studies capturing the experience of the Global South not only as a victim or

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[57] *Ibid.*
[58] *Ibid.*
[59] *Ibid.*
[60] *Supra* note 3 at 236-37.
[61] *Id.* at 237.

laggards but as providing frugal solutions tweaked in environments where actors can rely on strong IPRs."[62] There is a demand for a conceptual framework on responsible IPR that could build upon firm- level theories such as resource dependence or institutional economics to understand motivations and processes." Such a framework acts as an organizational tool to be utilized by companies to make their IP practices responsible and integrate them into their aim to fulfill SDGs.[63]

## 11. Conclusion

IPR leads to innovation by offering the protection that secures investment returns and, therefore, encourages creators, inventors, and investors to invest in innovation. However, in numerous fields, this interrelation has become complicated, which leads to pondering over alternative strategies to conventional IP approaches. Sustainability, understood in line with the current discourse of sustainable innovation and SDGs, lies in the intersection of environmental, social, and economic aspects. Sustainable innovation demands a harmonious approach between economic, social, and environmental considerations. On a superficial level, the profitability-driven IP conflicts with the value-driven sustainability/sustainable innovation. However, the broader understanding of the IPR-sustainability interplay suggests complementarity among them. The ultimate purpose of IPR is to promote scientific and technological progress and creativity in society and promote social good. IP law permits numerous exemptions and licensing strategies that can help promote sustainable innovation, too. Patent pledges, non-exclusive licensing, eco-designs, and eco-friendly marks as trademarks are gaining momentum. Grand challenges necessitate collaborative efforts to innovate by adopting licensing-in and licensing-out strategies by different companies and innovators. Companies can provide open platforms to collaborate, which can build up their image, reflecting their commitment to green innovation. It could also have a long-term economic benefit, given consumers' growing awareness and preferences regarding environmentally friendly products and processes.

Government can also play a pivotal role in promoting sustainable innovation by formulating policies and facilitating mechanisms regarding green innovation. On the international level, the role of WIPO is also crucial in setting the global agenda of environmentally friendly innovation and enabling mechanisms for the same. WIPO's thrust on using IPR as a tool in achieving SDGs may go well given the interdependence of SDGs, as fulfilling one influences the fulfillment of others, too. SDG-09 does not mention IPR but emphasizes innovation, infrastructure, and industry, reflecting an inclusive and collaborative

[62] *Id.* at 238.
[63] *Ibid.*

approach to finding sustainable solutions. The COVID-19 pandemic sets a great example of addressing the grand challenges through cooperative efforts with and without IP. The urgency and immediacy of the pandemic should continue with the grand challenges such as climate change. Policymakers must learn from the best practices witnessed during the pandemic and adapt them to provide sustainable solutions to contemporary problems.

# Balancing Green Innovation and IP Protection

*Parikshet Sirohi**

## ABSTRACT

*The urgent global fight against climate change and environmental degradation has intensified the need for sustainable solutions. Innovations that reduce ecological harm and promote sustainability are essential to address challenges like resource depletion, global warming, water scarcity, and pollution. Green technologies—ranging from renewable energy sources such as solar, wind, and hydroelectric power to waste management strategies like carbon capture, recycling, and composting—play a vital role in this effort.*

*Intellectual Property (IP), particularly patents, has enabled innovation across sectors by incentivizing research and development. While patents reward creators and attract investment, they can also raise technology costs and limit accessibility, especially for startups and smaller enterprises. This duality may hinder the widespread adoption of environmentally beneficial technologies.*

*Patent laws are crucial for encouraging green innovation by offering exclusive rights and financial incentives. However, India's patent regime presents challenges: high filing costs, complex procedures, and slow enforcement deter small players. The compulsory licensing framework, though aimed at improving access, may discourage inventors fearing loss of control. Additionally, the absence of fast-track programs for green patents—unlike in the U.S. and Europe—delays market entry of eco-friendly technologies. This article explores the intersection of environmental innovation and IP, analyzing how patent laws can both foster and impede green technology development, and advocates for a balanced approach to support sustainability goals.*

***Keywords:*** *Green Technology, Innovation, Patents, Commercialize, Sustainable.*

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## 1. Introduction

Today, our planet faces multiple environmental challenges, ranging from climate change to atmospheric pollution. In many countries including ours, environmental issues are now at the centre stage of policymaking, and 'green innovation' is gaining prominence like never before.[1] The climatic changes that we face today, have given rise to a host of issues like global warming and resource degradation.[2] The latter category includes pollution of air, ground water, soil and food sources, as well as destruction/denudation of forests, and destruction of natural habitat of plants and animals. The threat posed is a real one, and necessitates a swift, determined, and synchronized global response. To ensure our very survival, it is absolutely imperative that we move towards a low-carbon, sustainable future, in the wake of rising temperatures, and increased sea levels.[3] In the coming years, such problems will become increasingly acute, on account of the increased occurrence of such adverse weather incidents.[4]

Several international and national instruments, ranging from the United Nations (UN) Framework Convention on Climate Change (UNFCCC), 1992[5] to the Paris Agreement, 2015,[6] have been created to protect our environment. The Sharm El-Sheikh Climate Implementation Summit,[7] better known as COP27, took place in Egypt in November 2022, and focused upon how climate change adversely impacted food production

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[1] Rui Chen, Muhammad Ramzan, *et. al*., "Green Innovation-green Growth Nexus in BRICS: Does Financial Globalization Matter?" 8(1) *Journal of Innovation & Knowledge* 100286 (2023).

[2] The Effects of Climate Change, *available at*: https://science.nasa.gov/climate-change/effects/ (last visited on Feb. 22, 2025).

[3] Sustainable Development Goals, *available at*: https://www.un.org/sustainabledevelopment/climate-change/ (last visited on Mar. 13, 2025).

[4] Shiv Bolan, Lokesh P. Padhye*, et. al*., "Impacts of Climate Change on the Fate of Contaminants Through Extreme Weather Events" 909 *Science of The Total Environment* 168388 (Jan. 20, 2024).

[5] Treaty signed by 154 nations during the UN Conference on Environment and Development (UNCED) which was held at Rio de Janeiro in 1992. This treaty came into effect on March 21, 1994, and its aim was to resist "dangerous human interference with the climate system". See United Nations Climate Change, *available at*: https://unfccc.int/ (last visited on Jan. 31, 2025).

[6] Negotiated by 196 parties during the 2015 UN Climate Change Conference in Paris. This Agreement has 195 parties, as of February 2023. Of the three UNFCCC members which have not signed this Agreement, only Iran is a major emitter. United States of America (USA) which is the second-largest emitter in the world, withdrew from the Agreement in 2020, rejoined it in 2021, and again announced its withdrawal in 2025. See United Nations Climate Change, "The Paris Agreement: What is the Paris Agreement?", *available at*: https://unfccc.int/process-and-meetings/the-paris-agreement (last visited on Jan. 31, 2025).

[7] More than 92 heads of state, an estimated 35,000 representatives, and delegates from 190 countries attended the 27th UN Climate Change Conference, also known as the Conference of the Parties of the UNFCCC or COP27, which took place in Sharm El Sheikh, Egypt, from November 6–20, 2022, under the presidency of Egyptian Minister of Foreign Affairs Sameh Shoukry. See United Nations Climate Change, "About us", *available at*: https://unfccc.int/cop27 (last visited on Feb. 2, 2025).

and food security.[8][9] The summit attempted to develop measures to deal with these situations in the future, and Least Developed Countries (LDCs)[10] were invited to create, and present their adaptation plans.[11]

While industrial and technological development are certainly important for our economic well-being, these have also become critical reasons for environmental pollution and degradation. The march of technology is an essential facet of this dilemma, and both our public and private sectors need to consider green inventions for better sustainability. Scientists across the world have identified technologies, a good deal of which have enormous potential to cut emissions through solutions like efficient use of energy, reduction of carbon footprint, changes in urban mobility with increased use of electric transport, and newer forms of renewable energy.[12] Intellectual Property (IP) policies which encourage financing of Research and Development (R&D) activities are vital if we have to transport these solutions from the workshop to the outside world.

The present generation has a huge and often insatiable appetite for new technology which needs regular/constant updation. While it may be impossible to take steps backward to correct the harm which has already been caused; what can be done is to prevent further harm. That being the case, it is essential to involve a wide gamut of persons from industry, academia, and government to frame policies through which we can ensure that development can take place, without irreparably damaging the environment. 'Green technology' or 'greentech', which comprises technologically-advanced mechanisms, are increasingly being adopted the world over, in an attempt to address environmental concerns, without sacrificing

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[8] Alisher Mirzabaev, Rachel Bezner Kerr, *et.al.*, "Severe Climate Change Risks to Food Security and nutrition" 39 *Climate Risk Management* 100473 (2023).

[9] United States Environmental Protection Agency, "Climate Change Impacts on Agriculture and Food Supply", *available at*: https://www.epa.gov/climateimpacts/climate-change-impacts-agriculture-and-food-supply#:~:text=Climate%20impacts%20like%20sea%20level, taro%2C%20breadfruit%2C%20and%20mango.&text=These%20crops%20are%20often%20key,have%20cultural%20and%20economic%20importance. (last visited on Jan. 17, 2025).

[10] The UN listed the first set of LDCs in its resolution no. 2768 (XXVI) on November 18, 1971, and has, since then, identified developing nations with the lowest socio-economic development metrics. There are currently 44 economies which the UN has designated as LDCs, entitling them to preferential market access, aid, special technical assistance, and capacity-building on technology among other concessions. See UN trade & development, "UN List of Least Developed Countries", *available at*: http://unctad.org/topic/least-developed-countries/list (last visited on Feb. 13, 2025).

[11] LDC Expert Group, *National Adaptation Plans: Technical Guidelines For The National Adaptation Plan Process* 77 (United Nations Framework Convention on Climate Change, 2012).

[12] Xin Wang, Xiuping Dong, *et. al.*, "Transportation Carbon Reduction Technologies: A Review of Fundamentals, Application, and Performance" 11(6) *Journal of Traffic and Transportation Engineering* 1346 (Dec. 2024).

technical advancements. The Happy Seeder technology[13], which was developed by the Reviving the Green Revolution (RGR) cell[14] of Tata Trusts[15] in Punjab, is a good example of this phenomenon. The RGR cell worked with researchers at the Punjab Agricultural University (PAU), Ludhiana[16] to develop this machine, which is a tractor-mounted machine which can directly drill wheat into rice stubble post-harvest. It sows seeds and removes straw at the same time, thus helping the field retain moisture, while encouraging seed germination. The advantages of this technology are manifold: on the one hand, it eliminates the need to burn the paddy stubble, thereby curbing atmospheric pollution; and on the other, it mulches the field with the straw, which improves soil fertility, and improves crop performance.[17]

Green technology aims to combine technology with the environment,[18] and therefore, it is also variously referred to as environmental technology, clean technology, or sustainable technology.[19] India has emerged as one of the leaders in the world in the field of clean and green technology, and aims to use it as a sustainable solution to several pressing problems[20] [21]. 'Green innovation' is a concept which has become increasingly popular in the

[13] Tata Trusts, "Ending Burning of Crop Stubble Through Happy Seeder Technology", *available at*: https://www.tatatrusts.org/our-work/livelihood/agriculture-practices/ending-burning-crop-stubble-through-happy-seeder-technology (last visited on Jan. 7, 2025).

[14] Reviving Green Revolution: An Initiative of Tata Trusts, "Reviving Green Revolution Cell", *available at*: https://www.rgrcell.org/ (last visited on Jan. 7, 2025).

[15] The Tata Trusts represent humanitarianism and the extraordinary force that pushes the boundaries of social and economic development for people all throughout the nation. See Tata Trusts, "About Tata Trusts", *available at*: https://www.tatatrusts.org/about-tatatrusts (last visited on Jan. 8, 2025).

[16] One of the best agricultural universities in the country, it is spread over an area of 494 hectares at Ludhiana with an off-campus area of 1793 hectares. It has several constituent colleges, viz., College of Agriculture, PAU-College of Agriculture located at Ballowal Saunkri, College of Agricultural Engineering & Technology, College of Basic Sciences & Humanities, College of Community Science, College of Horticulture & Forestry, and PAU Pre-Graduation Institutes of Agriculture, located at Gurdaspur and Bathinda. See Punjab Agricultural University, "About PAU: History", *available at*: https://www.pau.edu/index.php?_act= manageLink& DO=firstLink&intSubID=11 (last visited on Jan. 22, 2025).

[17] *Supra* note 13.

[18] Pablo Cisneros Chavira, Ahm Shamsuzzoha, *et.al.*, "Defining Green Innovation, Its Impact, and Cycle – A Literature Analysis" 17 *Cleaner Engineering and Technology* 100693 (Dec. 2023).

[19] Umme Habiba, Cao Xinbang, *et.al.*, "Do Green Technology Innovations, Financial Development, and Renewable Energy use help to Curb Carbon Emissions?" 193 *Renewable Energy* 1087-8 (June 2022).

[20] World Economic Forum: Energy Transition, "How India is Emerging as an Advanced Energy Superpower", May 27, 2024, *available at*: https://chemindigest.com/india-emerges-as-a-global-clean-energy-leader/#:~:text=India%20has%20achieved%20a%20major,a%20global%20clean%20energy%20superpower. (last visited on Jan. 29, 2025).

[21] CID Editorial Team, "India Emerges as a Global Clean Energy Leader" *Chemical Industry Digest*, Jan. 2, 2025, *available at*: https://chemindigest.com/india-emerges-as-a-global-clean-energy-leader/#:~:text=India%20has%20achieved%20a%20major,a%20global%20clean%20energy%20superpower. (last visited on Feb. 10, 2025).

West since 2009, and takes within its ambit, the development of new technology, products, and processes, which aim to reduce the impact of human activity upon the environment.[22] Intellectual Property Rights (IPRs), especially patents, can play a crucial role in encouraging such innovations. Patents are a powerful mechanism to stimulate 'green innovation' because they offer inventors a great deal of benefits, such as monopoly for a period usually extending up to twenty years, sharing of knowledge, and collaboration. However, patent protection also involves high costs of filing and enforcement, which can adversely affect smaller entities from obtaining such protection. Apart from patents, Traditional Knowledge (TK) of communities can also be harnessed to produce green technology. When we look at different ancient civilizations across the world, we can find a common thread of deep respect and interdependence with the natural environment. The cultures, beliefs, and daily practices of these civilizations were shaped by their relationship with nature, and often reflected a deep awareness of the importance of the environment. Thus, if we look at the practices and culture of rural societies, *Adivasis*, and nature worshippers across the country, we can get numerous ideas which can be used to further the cause of green tech.[23]

Green technology has to become widely accessible in order to become an effective tool to address global issues like climate change and resource degradation.[24] The present scenario wherein the developed economies of the West are effectively utilizing environment-friendly technology, while others are being left behind, can be inexpedient to the overall goal of green technology, as a whole.[25] If green technology is not widely accessible, the motivation to use it will be significantly diminished.[26] In the present scheme of things, 'green patents' have come to hold a prominent place, because they deal with the protection of diverse forms of green technology, under one umbrella.[27] However, some aspects, like 'compulsory licensing', still need clarification in order to ensure easy transfer of

[22] *Supra* note 18.

[23] Ayan Mondal and Maya Shanker Pandey, “Indigenous Festivals and Climate Sustainability in India: A Case Study of Cultural Practices and Performances” 16(1) *Rupkatha Journal on Interdisciplinary Studies in Humanities* (2024), *available at*: https://rupkatha.com/V16/n1/v16n103.pdf (last visited on Dec. 23, 2024).

[24] Arshian Sharif, Uzma Bashir, *et.al.*, “Exploring the Impact of Green Technology, Renewable Energy and Globalization Towards Environmental Sustainability in the Top Ecological Impacted Countries” 15(6) *Geoscience Frontiers* 101895 (Nov. 2024).

[25] Patrik Söderholm, “The Green Economy Transition: The Challenges of Technological Change for Sustainability” 3(6) *Sustainable Earth* (2020).

[26] Mohsin Shahzad, Ying Qu, *et.al.*, “Adoption of Green Innovation Technology to Accelerate Sustainable Development Among Manufacturing Industry” 7(4) *Journal of Innovation & Knowledge* 100231 (Oct.-Dec. 2022).

[27] Li Xiangning, “Green Technology and Patents: in the European Context” 19 (Spring 2020) (Master Thesis, Faculty of Law, Lund University).

these technologies. There is a pressing need to either update or modify some of the existing preconditions with regard to green technology. Nations must collaborate and align their efforts in order to best achieve the goals of sustainability.

## 2. International Instruments

In the twenty-first century, building a path to a sustainable future is of profound importance. Adopting green technology is not a matter of choice for the statesmen of today; rather, it is an idea whose time has come, because the very survival of mankind is at stake.[28] Green technology covers within its ambit, various technologies which are sustainable and environment-friendly, and is therefore, also called 'clean technology'. Greenhouse gas emissions, indiscriminate usage of fossil fuels, and large volume of carbon emissions have created environmental lopsidedness, and this is the foremost reason why we have been forced to develop and adopt green technology.[29] Thus, it can be said that climate change and resource degradation are the principal reasons behind the widespread adoption of green technology.

'Sustainable development' was at the heart of the UN Conference on Environment and Development[30] held at Rio de Janeiro in 1992, which was the first attempt at the international level to draw up strategies towards a more sustainable pattern of development. The Rio Summit witnessed participation by more than 100 Heads of State, representatives from 178 nations, and several prominent civil society organizations.[31] The Brundtland Commission[32] in its report titled *Our Common Future* (1987), propounded 'sustainable development' as the solution to the problems of environmental degradation.[33] The Sharm El-

[28] Z. A. Khan and Shireen Singh, "Intellectual Property Rights Regime in Green Technology: Way Forward to Sustainability" 22(4) *Nature Environment and Pollution Technology* 2148 (2023).

[29] *Ibid.*

[30] Gandura Omar Abagandura, Sangeeta Bansal, *et.al.*, "Soil Greenhouse Gas Emissions, Organic Carbon and Crop Yield Following Pinewood Biochar and Biochar–manure Applications at Eroded and depositional Landscape Positions: A Field Trial in South Dakota, USA" 38(1) *Soil Use and Management* 487-502 (2022).

[31] Major UN conference held at Rio de Janeiro from June 3-14, 1992, focusing upon reconciling economic development with environmental protection and promoting sustainable development. See United Nations: Conferences: Environment and Sustainable Development, "United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992: Background", *available at*: https://www.un.org/en/conferences/environment/rio1992 (last visited on Jan. 11, 2025).

[32] *Ibid*.

[33] Formally known as the World Commission on Environment and Development (WCED), this Commission was a UN initiative established in 1983 to address global environmental and development challenges, culminating in the 1987 report titled 'Our Common Future', which defined sustainable development as meeting present needs without compromising the ability of future generations to meet their own needs. The UN Secretary-General appointed Gro Harlem Brundtland, former Prime Minister of Norway, as the chairperson of the Commission on account of her strong background in public health. See United Nations, *Our Common Future* 14 (United Nations, 1987).

Sheikh Climate Implementation Summit (COP27)[34] focused its attention upon how climate change adversely impacted food production and food security.[35] International instruments for sustainable development include a wide range of legal and policy tools, including the Sustainable Development Goals (SDGs)[36] of the UN, global environmental agreements, and international law initiatives, all of which are aimed at promoting sustainable development.

The UN General Assembly (UNGA)[37] set out the SDGs in the year 2015, setting out bolder objectives as compared to the Millennium Development Goals (MDGs),[38] 2000. SDG No. 9 aims to "build resilient infrastructure, promote inclusive and sustainable industrialization, and foster innovation", clearly laying down the relationship between IP and the economy. Green IP can boost the development of new technology, which entails novel discoveries in the areas of production or operation, which create little or no adverse effect upon the environment.[39] It is for this reason that these technologies are also referred to as 'ecologically responsible technologies'.[40]

Similarly, SDG No. 2 aims to ending hunger, achieve food security, and improve nutrition. Green technologies can combine effectively with farm mechanisation to further the cause of sustainable agriculture, while also improving the quality and quantity of foodgrain production. SDG No. 7 entails providing access to affordable, reliable, sustainable, and modern energy for all. Green energy in the form of geothermal energy, hydro-energy, hydrogen energy, solar energy, tidal energy, and wind energy, can certainly be

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34 *Id.* at 6, 10.

35 *Supra* note 7.

35 Amit Hasan Anik, Maisha Binte Sultan, *et.al.*, "The Impact of Climate Change on Water Resources and Associated Health Risks in Bangladesh: A Review" 18 *Water Security* 100133 (2023).

36 17 interconnected goals adopted by the UN in 2015 to address global challenges and achieve a more sustainable future by 2030. SDGs are a universal call to action to end poverty, protect the planet, and ensure that all people enjoy peace and prosperity by 2030. See United Nations Department of Economic and Social Affairs Sustainable Development, "The 17 Goals", *available at*: https://sdgs.un.org/goals (last visited on Jan. 12, 2025).

37 Primary deliberative, policymaking, and representative organ of the UN, where all 193 member-states have equal representation and a vote, serving as a unique forum for multilateral discussion of international issues. See United Nations: General Assembly of the United Nations, "Workings of the General Assembly", *available at*: https://www.un.org/en/ga/ (last visited on Jan. 11, 2025).

38 Eight international development goals, which were agreed upon by UN member states in 2000, aiming to address poverty, hunger, disease, and other issues by the year 2015. However, the goals could not be achieved within the stipulated time period. See United Nations, "Millennium Development Goals and Beyond 2015", *available at*: https://www.un.org/millenniumgoals/ (last visited on Jan. 7, 2025).

39 Nerilie J. Abram, Benjamin J. Henley, *et.al.*, "Connections of Climate Change and Variability to Large and Extreme Forest Fires in Southeast Australia" 2 *Communications Earth & Environment* 8, 10 (2021).

40 Ewa Jadwiga Lipińska, "Sustainable Development, Socially Responsible and Ecologically Managed, Increases the World's Ecological Security: Research on Poland and Polish Regional Cities", in Levente Hufnagel (ed.*), Globalization and Sustainability – Ecological, Social and Cultural Perspectives* 63-83 (IntechOpen, Rijeka, 2024).

the answer to many of the pressing problems which confront the energy sector in India and other parts of the world.[41] The Variable Wind Turbine[42], also known as '039 Patent',[43] serves as a good example of sustainable innovation, and comprises of a variable-speed wind turbine, which drives an Alternating Current (AC) generator. Using this apparatus, wind energy can be harnessed into electricity.

Under different international conventions, India has made certain key commitments towards global environment conservation goals,[44] beginning with the Kyoto Protocol[45] of 2005, which obligates member-states to establish binding emission reduction targets. Under the Paris Agreement of 2015 (COP21),[46] we have updated our first Nationally Determined Contribution (NDC) for lowering greenhouse gas emissions. All these commitments mandate a transition from fossil fuels to renewable energy sources, and thus, we have to completely change the way we look at our energy sector. In 2019, the Climate Change Finance Unit[47] of the Department of Economic Affairs, Ministry of Finance, Government of India brought out its Position Paper titled, 'Climate Summit for Enhanced Action: A Financial Perspective from India,' which unequivocally outlined our perspective on climate finance.[48] This article stressed that use of technology, and timely and appropriate financing, was essential to meet the challenges posed by climate change, and that global climate action needs to be characterised by "scope, scale, and speed".

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[41] Max G. Adam, Phuong T.M. Tran, *et.al.*, "Biomass Burning-derived Airborne Particulate Matter in Southeast Asia: A Critical Review", 407 *Journal of Hazardous Materials* 124760 (Apr. 2021).

[42] Designed to adjust its rotor speed to capture the maximum power available from the wind, particularly in fluctuating wind conditions, by optimizing the blade-tip speed to wind speed ratio. See Igor Iliev, Chirag Trivedi, *et.al.*, "Variable-speed Operation of Francis Turbines: A Review of the Perspectives and Challenges" 103 *Renewable and Sustainable Energy Reviews* 110 (Apr. 2019).

[43] U.S. Patent No. 5,083,039 covers a variable-speed wind turbine, and was a subject of legal disputes, particularly concerning General Electric's claims of patent infringement in the variable-speed wind turbine market. See Google Patents, "Variable Speed Wind Turbine", *available at*: https://patents.google.com/patent/US5083039A/en (last visited on Dec. 29, 2024).

[44] Saswati Chanda and P.K.V.S. Ramarao, "Green Patent" 6(3*) Journal of Emerging Technologies and Innovative Research* 56-69 (2019).

[45] International treaty which aimed to reduce greenhouse gas emissions, particularly from industrialized nations, to combat climate change. It built upon the UNFCCC, and committed signatory nations to achieve specific emission reduction targets. See United Nations Climate Change, "What is the Kyoto Protocol?", *available at*: https://unfccc.int/kyoto_protocol (last visited on Jan. 7, 2025).

[46] *Supra* note 6.

[47] Its duties include preparing the chapter on climate change and sustainable development for the Economic Survey, contributing analytically to the National Climate Policy Framework, and participating in the discussion of climate finance issues in the multilateral climate change regime, and other international fora like the G20. See Press Information Bureau, "Climate Change Finance Unit" *Press Information Bureau*, Aug. 7, 2018, *available at*: https://pib.gov.in/newsite/PrintRelease.aspx?relid=181635 (last visited on Dec. 30, 2024).

[48] Rajasree Ray, Abhishek Acharya, *et.al.*, "Climate Summit for Enhanced Action: A Financial Perspective from India" (Climate Change Finance Unit, Department of Economic Affairs, Ministry of Finance, Government of India, Sep. 2019), *available at*: https://dea.gov.in/sites/default/files/Risk%20Vs%20Uncertainty %20Final.pdf (last visited on Jan. 3, 2025).

### 3. Sustainable Development

In the decades of the 1960s and 1970s, some important works were published which highlighted the negative impact of human activity upon the environment. These include *Silent Spring*,[49] *Tragedy of the Commons*,[50] *Blueprint for Survival*[51] and *Limits to Growth*[52] by the Club of Rome.[53] This concept received its first major international recognition at the UN Conference on the Human Environment,[54] which was held at Stockholm in 1972. Although the term was not out rightly used in this Convention, the international community agreed for the very first time, that both development and the environment, which were hitherto addressed as separate issues, could be managed in a manner which was mutually symbiotic/complementary.[55] The World Commission on Environment and Development, which is also referred to as the Brundtland Commission,[56] in its report titled *Our Common Future*, published in the year 1987, made this term a part of popular discourse.[57] The Report stressed upon the need for 'sustainable development', while discussing that environmental degradation, which was initially seen as a first-world problem and a by-product of industrial wealth, had now become a survival issue for the poorer countries.[58]

However, it was not until the Rio Summit that the global community began to recognize the significance and importance of 'sustainable development'.[59] More recently, the

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[49] Rachel Carson, *Silent Spring* (Houghton Mifflin Company, Boston, 1962).

[50] Garrett Hardin, "Tragedy of the Commons" 162(3859) *Science* 1243-1248 (Dec. 13, 1968), *available at*: https://pages.mtu.edu/~asmayer/rural_sustain/governance/Hardin%201968.pdf (last visited on Dec. 29, 2024).

[51] The Ecologist, *A Blueprint for Survival* (Penguin Books, 1972).

[52] Donella H. Meadows, Dennis L. Meadows, *et.al.*, *Limits to Growth* (Potomac Associates, 1972).

[53] Non-profit, informal organization of intellectuals and business leaders founded in 1968, focused upon identifying and discussing pressing global issues and promoting solutions to complex challenges facing humanity and the planet. See The Club of Rome, "History", *available at:* https://www.clubofrome.org/history/ (last visited on Jan. 14, 2025).

[54] It was the first world conference to make the environment a major issue. The participants adopted a series of principles for sound management of the environment including the 'Stockholm Declaration and Action Plan for the Human Environment', and several resolutions. See United Nations: Conferences: Environment and sustainable development, "United Nations Conference on the Human Environment, 5-16 June 1972, Stockholm: Background", *available at*: https://www.un.org/en/conferences/environment/stockholm1972 (last visited on Jan. 19, 2025).

[55] Biswajit Das, Surya Narayan Mishra, *et.al.*, "Green Technology for Attaining Environmental Safety and Sustainable Development" 9(3) *International Journal of Mechanical Engineering and Technology* 1087-94 (Mar. 2018).

[56] *Supra* note 32.

[57] Aldona Malgorzata Deren and Jan Skonieczny, "Green Intellectual Property is a Strategic Resource in the Sustainable Development of an Organization"14 *Sustainability* 4758 (2022).

[58] World Commission on Environment and Development, "Our Common Future" 6 (1987), *available at*: https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf (last visited on Feb. 10, 2025).

[59] Har Darshan Kumar and Enakshi Kumar, *Cleaner Production: Sustainable Trade & Industrial Ecology* 1-28 (Vitasta Publishing Pvt. Ltd, New Delhi, 2009).

World Summit on Sustainable Development was held in Johannesburg in 2002,[60] which was attended by as many as 191 national governments, UN agencies, multilateral financial institutions and other major civil society groups to assess the progress which had been achieved since Rio. The important commitments which emerged from the Johannesburg Plan of Implementation at the Johannesburg Summit were those on sustainable consumption and production, water and sanitation, and use of sustainable energy.[61] 'Sustainable development' can be interpreted in myriad ways, but essentially, it looks to balance different, and often competing, needs.[62]

In recent times, global momentum against climate change has gained traction, in the wake of reports emanating from the European Union (EU)'s climate service, which indicate that global warming, has for the very first time, crossed the threshold of 1.5 degrees Celsius, across an entire year.[63] India has often been at the forefront of global climate action, and has made multitudinous commitments, while setting ambitious targets to combat climate change.[64] The concerns of the global south must also be borne in mind while formulating strategies in this regard, because any climate action which does not take into account the developmental priorities of the global south, is unlikely to take-off.[65] We have often argued at world fora that mere reduction in carbon emissions would not be an effective solution, but what is needed is a transition to renewable energy.[66] While embarking upon such a transition, it would perhaps be correct to say that authorities are often forced to do a tightrope walk

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[60] This Summit adopted a Political Declaration and Implementation Plan which included provisions covering a set of activities and measures to be taken in order to achieve development which takes into account respect for the environment. See United Nations: Conferences: Environment and sustainable development, "World Summit on Sustainable Development, 26 August-4 September 2002, Johannesburg: Background", *available at*: https://www.un.org/en/conferences/environment/johannesburg2002 (last visited on Jan. 18, 2025).

[61] Danny Grajales, Perezy Soto, *et.al.*, "The Green Patents as a Way of Addressing Environmental Issues" 1(2) *Food Climate Change and Intellectual Property: Defining the Issue* 435 (2012).

[62] Justice Mensah, "Sustainable development: Meaning, History, Principles, Pillars, and Implications for Human Action: Literature Review" 5(1) *Cogent Social Sciences* 1653531 (2019), *available at*: https://www.tandfonline.com/doi/full/10.1080/23311886.2019.1653531 (last visited on Dec. 19, 2024).

[63] United Nations: Climate Action, "1.5°C: What It Means And Why It Matters", *available at*: https://www.un.org/en/climatechange/science/climate-issues/degrees-matter (last visited on Mar. 2, 2025).

[64] World Economic Forum, "India Holds the Key to Hitting Global Climate Change Targets. Here's Why", Jan. 19, 2023, *available at*: https://www.weforum.org/stories/2023/01/india-holds-the-key-to-hitting-global-climate-change-targets-here-s-why/ (last visited on Feb. 16, 2025).

[65] ANI, "Climate Action Must Ensure That Priorities of Global South are Not Compromised: PM Modi" *The Economic Times*, Dec. 1, 2023, *available at*: https://economictimes.indiatimes.com/news/india/climate-action-must-ensure-that-priorities-of-global-south-are-not-compromised-pm-modi/articleshow/105644022.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (last visited on Dec. 28, 2024).

[66] Syed Momina Sultana, "Green Technology-An Emerging Trend" 6(3) *International Research Journal of Engineering and Technology* 3864-68 (Mar. 2019).

when they embark upon the journey to attain their developmental needs, and at the same time, attempt to balance the environmental rights of their citizenry.[67]

## 4. Green Technology and Sustainable Development

Very often, it is seen that development is driven by only one single point agenda, without fully considering the wider impacts of such an action. Sadly, we have already begun to see the damage that this kind of approach can cause. The longer we pursue such a line of action, the more frequent and severe its consequences are likely to be; which is why we need to act now. Green technology, also known as 'greentech' or 'cleantech', is today being used as an umbrella term to include all those technologies and practices which are aimed at minimizing the negative impacts of human activities upon the environment and promoting sustainability.[68] It encompasses a wide range of areas, including renewable energy (geothermal energy, hydro-energy, hydrogen energy, solar energy, tidal energy, and wind energy), energy efficiency, sustainable agriculture, waste management, and pollution control.[69] The primary goals of green technology are to reduce greenhouse gas emissions, conserve natural resources, protect ecosystems, and mitigate climate change.[70] Some of the examples of greentech are solar photo-voltaic cells, energy-efficient appliances, recycling, composting, electric vehicles, etc.

As seen in the previous section of this Paper, in order to achieve 'sustainable development', we may be required, rather forced, to alter our way of life or work. However, this does not necessarily entail that our quality of life will, in any manner, be impacted or reduced. An approach based on 'sustainable development' can certainly bring about a great deal of benefits. Let us take a very simple example: if a person were to make a simple lifestyle change, wherein (s)he chooses to walk or cycle for short distances instead of taking out his/her car, it would not only save money, but would also improve his/her health due to the cardiovascular workout. Such an action over short distances, would be just as quick and convenient, and would have no deleterious impact on the environment. Thus, it is a win-win situation for the person involved, as well as the environment.

The manner in which we approach development affects mankind as a whole, and each one of our decisions impacts society and other peoples' lives.[71] If a community were to

[67] Robert Fair, "Does Climate Change Justify Compulsory Licensing of Green Technology?" 6(1) *Brigham Young University International Law & Management Review* 21-41 (2010).

[68] Caoimhe Ring, "Patent Law and Climate Change: Innovation Policy for a Climate in Crisis" 35(1) *Harvard Journal of Law & Technology* 373-404 (Fall 2021).

[69] Lipika Sharma (ed.), *Green Intellectual Property and Climate Change Mitigation Technologies: Road Ahead* 14, 22 (Bharti Publications, New Delhi, 1st edn., 2021).

[70] *Id.* at 45.

[71] Hsin-Ning Su and Igam M. Moaniba, "Does Innovation Respond to Climate Change? Empirical Evidence From Patents and Greenhouse Gas Emissions" 122 *Technological Forecasting and Social Change*, 49-62 (Sep. 2017).

be poorly planned, it would certainly reduce the quality of life for the residents of that community. If a country were to rely upon food imports while having the capability to grow food locally, it would open itself to food shortages, apart from imposing an additional stress on its foreign exchange reserves. Today, there are various types of green technology which are in use across industries, and each of these technologies are based on innovative methods to make the technology environment-friendly.[72] The International Patent Classification (IPC)[73] has created a 'Green Inventory' with the objective to classify patent data with regard to various technologies in priority domains like agriculture, conservation of energy, forestry, transportation, and waste management.[74] In order to provide a greener alternative to existing sources of energy, green energy focusses upon developing newer sources of energy, such as geothermal energy, hydro-energy, hydrogen energy, solar energy, tidal energy, and wind energy.

There are a host of organizations working in the area of energy conservation technology, who aim to use technology which is less energy-intensive, and focus on improving efficacy in the areas of building insulation, electric appliances, and lighting.[75] The usage of such technologies has greatly helped to reduce the heating costs of building in western Europe, USA, and Canada.[76] Interventions in the area of transportation, especially urban intra-city mobility, aim to reduce the impact of automobile pollution by achieving lower emissions, using alternate fuels, and increased use of electrification.[77] Waste-management technologies attempt to reduce and segregate waste, and manage waste and

[72] Raghu N. and Savitha R., "Green Technology: Innovation Status and Challenges in India" 6(3) *Journal of Emerging Technologies and Innovative Research* 176-184 (Mar. 2019).

[73] Hierarchical system established by the Strasbourg Agreement of 1971, which is used to classify patents and utility models according to the technology which they relate to, thereby facilitating efficient search and retrieval of patent documents. It is used in over 100 countries worldwide, making it a global standard for patent classification. A new version of the IPC enters into force each year on January 1. See WIPO, "International Patent Classification (IPC)", *available at*: https://www.wipo.int/en/web/classification-ipc (last visited on Jan. 7, 2025).

[74] The IPC divides technology into eight main sections: A (Human Necessities), B (Performing Operations; Transporting), C (Chemistry; Metallurgy), D (Textiles; Paper), E (Fixed Constructions), F (Mechanical Engineering; Lighting; Heating; Weapons; Blasting Engines or Pumps), G (Physics), and H (Electricity). See WIPO, "Guide to the International Patent Classification (2024)", *available at*: https://www.wipo.int/publications/en/details.jsp?id=4722&plang=EN (last visited on Dec. 18, 2024).

[75] Mohd. Wira Mohd. Shafiei and Hooman Abadi, "The Importance of Green Technologies and Energy Efficiency for Environmental Protection" 12(5) *International Journal of Applied Environmental Sciences* 937-51 (2017).

[76] Ashfaq Ahmad, Yuhuan Zhao, *et.al.*,"Carbon Emissions, Energy Consumption and Economic Growth: An Aggregate and Disaggregate Analysis of the Indian Economy" 96 *Energy Policy* 131-43 (Sep. 2016).

[77] Rahel Aichele and Gabriel Felbermayr, "Kyoto and the Carbon Footprint of Nations" 63(3) *Journal of Environmental Economics and Management* 336-54 (May 2012).

recyclable items in an environment-friendly manner.[78] Similarly, green technology solutions in farming and forest management encourage practices like usage of organic fertilizers, and proper land management techniques.[79]

The issues of climate change and resource degradation can be effectively managed through systematic adoption of innovative practices and use of environmentally sustainable alternatives.[80] Progress in the arena of green technology enables effective use of resources, reduces carbon footprints, and thereby, helps industries to move towards more environment-friendly models.[81] From the above discussion, it can be said that green technology attempts to implement the agenda of environment preservation, and employs green energy to protect our environment. At present, the thrust of 'cleantech' lies in the following major areas *viz.* energy, materials, transportation, and water. Green technology follows a twin approach – attempts to limit the usage of exhaustible non-renewable energy sources by providing alternatives thereto, and attempts to reduce hazardous emissions.[82] Green technology, is also referred to as 'environmentally sound technology' because it uses inputs which are less harmful for the environment, can adapt to sustainability, recycle materials and inputs after use, and handle waste matter more effectively.[83]

Patent protection can be used to safeguard these environmentally-beneficial technologies, in the interest of sustainable development. Apart from providing financial stimulus to undertake R&D activities, patents grants inventors exclusive monopoly rights over their inventions, which motivates further innovation.[84] This encourages the injection of more funds in the area of green technology, thereby leading to reduction in cost of the technology, and its eventual commercialization, and wider usage.[85] A strong IP framework

[78] Alessandro Antimiani, Valeria Costantini, *et.al.*, "Fossil Fuels Subsidy Removal and the EU Carbon Neutrality Policy" 119 *Energy Economics* 106524 (Mar. 2023).

[79] Ashoka Gamage, Ruchira Gangahagedara, *et.al.*, "Role of Organic Farming for Achieving Sustainability in Agriculture" 1(1) *Farming System* 100005 (Apr. 2023).

[80] *Supra* note 39 at 13.

[81] Muhammad Farhan Bashir, Muhammad Adnan Bashir, *et.al.*, "Linking Gold Prices, Fossil Fuel Costs and Energy Consumption to Assess Progress Towards Sustainable Development Goals in Newly Industrialized Countries" 15(3) *Geoscience Frontiers* 101755 (May 2024).

[82] Khan Baz, Deyi Xu, *et.al.*, "Nexus of Minerals-technology Complexity and Fossil Fuels with Carbon Dioxide Emission: Emerging Asian Economies Based on Product Complexity Index" 373 *Journal of Cleaner Production* 133703 (Nov. 2022).

[83] Abid Haleem, Mohd. Javaid, *et.al.*, "A Pervasive Study on Green Manufacturing Towards Attaining Sustainability" 1(2) *Green Technologies and Sustainability* 100018 (May 2023).

[84] Araken Alves de Lima, Patricia Carvalho dos Reis, *et.al.*, "Scenario-Patent Protection Compared to Climate Change: The Case of Green Patents" 4(3*) International Journal of Social Ecology and Sustainable Development* 61-70 (July 2013).

[85] Bronwyn H. Hall and Christian Helmers, "The Role of Patent Protection in (Clean/Green) Technology Transfer" 26(4) *Santa Clara High Technology Journal* 487-532 (2010).

can certainly accelerate the shift towards environment sustainability.[86] The Trade Related Intellectual Property Rights (TRIPS) Agreement acknowledges the contribution of IPRs towards innovation and growth.[87] Along with expeditious growth of innovation, there is a pressing need to develop a strong innovation ecosystem.[88] Thus, we need to match strategic methods leveraging IP with business practices in the area of green technology in order to ensure their economic effectiveness.

## 5. Green Technology in India

In order to ensure sustainable development, the use of green energy is absolutely crucial. India has developed specialized expertise in this area, giving it pole position in the 'green marathon'.[89] We are one of the leading players in the global green technology market, and have set an ambitious target for our energy sector. In 2022, the Government of India has set the target to achieve zero carbon emissions, by the year 2070[90]. 'Affordable and Clean Energy' is Goal No. 7 of the SDGs, and is required to be accomplished by the year 2030. As per the year-end review conducted by the Ministry of New and Renewable Energy (MNRE), our action plan for promoting green technology was deemed to be quite effective,[91] and the country is currently ranked fourth in the world in terms of installed renewable energy capacity[92]. The present government has committed to development of the sustainable energy sector in a big way, and therefore, we are currently seeing some very large green energy projects, including gigantic solar and wind energy ventures, across the length and breadth of the country.[93]

[86] *Supra* note 57 at 62.

[87] Mondaq, "Green Innovation And IP: Legal Frameworks For Sustainable Technologies In India", *available at*: https://www.mondaq.com/india/patent/1419990/green-innovation-and-ip-legal-frameworks-for-sustainable-technologies-in-india (last visited on Dec. 27, 2024).

[88] Sunny Li Sun and Yanli Zhang, "Enriching Innovation Ecosystems: The Role of Government in a University Science Park" 1 *Global Transitions* 104-19 (2019).

[89] Charles Rajesh Kumar J. and M.A. Majid, "Renewable Energy for Sustainable Development in India: Current Status, Future Prospects, Challenges, Employment, and Investment Opportunities" 10 *Energy Sustainability and Society* (Jan. 2020), *available at*: https://energsustainsoc.biomedcentral.com/articles/10.1186/s13705-019-0232-1 (last visited on Feb. 3, 2025).

[90] Press Information Bureau, "India is Committed to Achieve the Net Zero Emissions Target by 2070 as announced by PM Modi, says Dr. Jitendra Singh" *PIB Delhi*, Sep. 28, 2023, *available at*: https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1961797 (last visited on Jan. 31, 2025).

[91] *Supra* note 57 at 46.

[92] Press Information Bureau, "India's Renewable Energy Capacity Hits New Milestone" *PIB Delhi*, Nov. 13, 2024, *available at:* https://pib.gov.in/PressReleaseIframePage.aspx?PRID=2073038 (last visited on Jan. 30, 2025).

[93] Somesh Kumar, "How India is Paving the Way for a Sustainable Energy Future", Feb. 13, 2025, *available at:* https://www.ey.com/en_in/insights/energy-resources/how-india-is-paving-the-way-for-a-sustainable-energy-future (last visited on Feb. 14, 2025).

The success of the National Solar Mission can be seen in the following paragraph. As of 2022, India was the fifth largest solar Photo-Voltaic (PV) deployment country in the world.[94] In January 2025, our total installed solar capacity is 97.86 GW, which includes ground mounted solar plants: 75.19 GW, grid connected solar rooftops: 15.67 GW, hybrid projects: 2.77 GW, and off-grid solar projects: 4.23 GW.[95] In 2021, our solar capacity was 40,085 Mega Watt Alternating Current (MWAC), which increased to 56,951 MWAC in 2022, and 66,781 MWAC in 2023.[96] In Q1 2024, India installed 10 GW of solar capacity, which was a 400% increase from Q1 2023.[97] As of December 2024, India's total installed renewable energy capacity is reported to be 209.44 GW.[98] This represents a significant increase of 15.84%, as compared to the previous year. Solar and wind power are the primary contributors to this capacity. As per data maintained by the International Renewable Energy Agency (IRENA),[99] India is today 4th in the world in terms of its installed renewable energy capacity.[100]

India has launched a slew of national initiatives to support green technology. The National Science and Technology Entrepreneurship Development Board (NSTEDB) was set up with the objective to aid knowledge-based, technologically advanced businesses engaged in development of environment-friendly solutions.[101] As part of its efforts to mitigate the impact of climate change,[102] the Government of India launched its ambitious National Action Plan on Climate Change (NAPCC) on June 30, 2008 outlining eight

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[94] *Supra* note 92.

[95] Anu Bhambhani, "Utility-Scale Solar Powers India's Record 24.5 GW PV Installations in 2024" *Taiyang News*, Feb. 04, 2025, *available at:* https://taiyangnews.info/markets/india-installed-245-gw-solar-pv-capacity-2024-2 (last visited on Jan. 11, 2025).

[96] *Supra* note 92.

[97] ANI, "India Adds Record 10 GW of Solar Capacity in Q1 2024, Marking Almost 400 pc YoY Increase" *The Economic Times*, May 25, 2024, *available at:* https://economictimes.indiatimes.com/industry/renewables/india-adds-record-10-gw-of-solar-capacity-in-q1-2024-marking-almost-400-pc-yoy-increase/articleshow/110423265.cms?from=mdr (last visited on Feb. 2, 2025).

[98] Press Information Bureau, "India's RE Capacity Registers 15.84% Year-on-Year Growth" *PIB Delhi*, Jan. 13, 2025, *available at:* https://pib.gov.in/PressReleaseIframePage.aspx?PRID=2092429#:~:text=Record%20 Capacity%20Additions,180.80%20GW%20in%20December%202023. (last visited on Jan. 30, 2025).

[99] Leading international intergovernmental organization for energy transformation, which delivers cutting-edge data and analyses on technology, innovation, policy, finance, and investment. See International Renewable Energy Agency, "About IRENA", *available at:* https://www.irena.org/About (last visited on Jan. 26, 2025).

[100] "India Ranks Fourth in the World in Renewable Energy Installed Capacity says PM" *Business Standard*, Feb. 6, 2024.

[101] India Science, Technology and Innovation Portal, "Startups: NSTEDB - National Science & Technology Entrepreneurship Development Board", *available at*: https://www.indiascienceandtechnology.gov.in/startups/nstedb-dst (last visited on Jan. 9, 2025).

[102] Department of Science & Technology, "Climate Change Programme", *available at*: https://dst.gov.in/climate-change-programme (last visited on Jan. 9, 2025).

National Missions on climate change. The Department of Science and Technology (DST)[103] has been entrusted with the responsibility of coordinating two of these missions, *viz.*, the National Mission for Enhanced Energy Efficiency (NMEEE),[104] and the National Mission on Strategic Knowledge for Climate Change (NMSKCC).[105] Each year, under the aegis of the NMSKCC, the DST publishes an annual report, which enables policy analysts and general public to know the extent of climate change in that particular year.[106]

Climate Launchpad,[107] which was co-founded by the EU, is the largest green company ideas competition in the world, and aims to realize the clean technology potential of our planet, so that we are better placed to tackle the climate challenge. Starting 2017, ClimateLaunchpad has been present in our country, and is currently running across four states.[108] Indian inventors have obtained a large number of patents in respect of green technology developed by them.[109] Between 2016 and 2022 alone, the Indian Patent Office (IPO) has issued over 61,000 green patents.[110] In August 2022, Pi Green Innovations,[111] which already enjoyed patents in nations like China, Singapore, and USA for its revolutionary 'carbon cutter technology',[112] which reduces suspended particulate matter in the atmosphere, obtained a patent from the IPO. Similarly, SunHydrogen Inc,[113] which

[103] Central Government department which plays a crucial part in advancing science and technology in the nation, and engages in a variety of activities, such as advancing basic research, high-end research, and the creation of innovative technologies. See Department of Science & Technology, "About Us", *available at*: https://dst.gov.in/climate-change-programme (last visited on Jan. 9, 2025).

[104] *Supra* note 102.

[105] *Ibid*.

[106] Government of India, "Annual Report 2022-23" (Ministry of Science & Technology, Department of Science & Technology, 2023), *available at*: https://dst.gov.in/climate-change-programme (last visited on Jan. 11, 2025).

[107] Climate Launchpad, "About ClimateLaunchpad", *available at*: https://climatelaunchpad.org/climatelaunchpad/ (last visited on Jan. 14, 2025).

[108] Climate Launchpad, "ClimateLaunchpad India is Running in 4 States and Looking to Expand", *available at*: https://climatelaunchpad.org/climatelaunchpad-india/ (last visited on Jan. 17, 2025).

[109] D.P.S. Parmar, "Fast-Tracking Cleantech Patenting in India" *Asialaw*, Apr. 8, 2024.

[110] Rashmita Das, "Green Technology Patenting Trends in India" *The Patent Lawyer*, Feb. 15, 2024.

[111] Technology business which seeks to provide sustainable solutions for a future free of pollution by utilizing design and technological advances to produce items that promise a cleaner environment domestically. See Pi Green Innovations Pvt Ltd, "About Us", *available at*: https://pigreeninnovations.com/ (last visited on Dec. 13, 2024).

[112] Up to 90% of the particulate matter (PM2.5 to PM10) that is released by automobiles, factories, and generator sets is captured by this filter-less, retrofit, fully automatic, and portable system, which stores the material in a container for later use. See Pi Green Innovations Pvt Ltd, "Carbon Cutter", *available at*: https://pigreeninnovations.com/ (last visited on Dec. 13, 2024).

[113] This business develops solar-powered nanoparticle devices which simulate photosynthesis. Its SunHydrogen Panels technology generates renewable hydrogen for fuel cells, renewable power, and other uses. See SunHydrogen, "Clean Hydrogen: From Water & Sunlight", *available at*: https://pigreeninnovations.com/ (last visited on Jan. 6, 2025).

engages in development of various green technology, received a patent from the IPO for its 'multi-junction artificial photosynthetic cell with enhanced photo-voltages', at a time when it already enjoyed similar patents in certain western countries. The very fact that such important inventions are now being patented in India apart from the developed world, indicates the growing importance of the country on the global innovation and patent landscape, which will certainly provide a fillip for the adoption of these technologies across the country.[114]

India is now placed third in Asia in the category of sales of Low Carbon Environmental Goods and Services (LCEGS),[115] demonstrating the great degree of demand in the country for such goods and services. Approximately 13% of the world's high-value green inventions are now taking place in India, which is quite notable, bearing in mind that we are still classified as a 'low-income country', and demonstrates a commitment towards 'green innovation'.[116] Another facet of the problem is that India, which has a large population, also stands to benefit from the labour-intensive nature of green technology.[117] Focus on such technology can not only help to achieve the goal of sustainability, but also promote long-term economic growth by generating jobs. Green technology can also help us to address certain other issues like urbanization, increased human activity, and globalization.[118] It is imperative for us to grow, diversify, and make our IP framework accessible on the global stage. Our priority should be to promote green inventions, and spread such innovations emanating from our shores, globally. This would not only incentivize domestic consumers to choose sustainable products over others, but will also accelerate the export of green technology to other countries.[119]

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[114] Anasuya Haldar and Narayan Sethi, "Environmental Effects of Information and Communication Technology - Exploring the Roles of Renewable Energy, Innovation, Trade and Financial Development" 153 *Renewable and Sustainable Energy Reviews* 111754 (Jan., 2022).

[115] Includes activities which reduce greenhouse gas emissions, improve energy efficiency, and provide renewable energy or environmental benefits, thereby forming a key part of the overall green economy. See KMatrix: LCEGS 2023 – LCEGS Extended, "Low Carbon Environmental Goods and Services 2023 Definition", *available at*: https://kmatrix.co/lcegs2023/ (last visited on Jan. 19, 2025).

[116] DePenning & DePenning, "Green Innovation and IP: Legal Frameworks for Sustainable Technologies in India", Jan. 24, 2024, *available at*: https://depenning.com/blog/copyright-green-inventions/ (last visited on Jan. 17, 2025).

[117] Manisha Singh and Pradeep Kumar Kamal, "Incentivisation of Green Technologies in India" *Asia Law Business Journal*, Aug. 31, 2022, *available at*: https://law.asia/incentivisation-green-technologies-india/ (last visited on Jan 22, 2025).

[118] *Supra* note 24.

[119] Arunava Bandyopadhyay and Soumen Rej, "Can Nuclear Energy Fuel An Environmentally Sustainable Economic Growth? Revisiting The EKC Hypothesis For India" 28(44) *Environmental Science and Pollution Research International* 63065-86 (2021).

## 6. Case Study: *M.K. Ranjitsinh & Ors.* v. *Union of India & Ors.*

Recently, a very interesting case came up before the Hon'ble Supreme Court of India, wherein on the one hand, the Court was confronted with the interests of the solar power producers (solar energy being a form of greentech), and on the other, was the issue of protection of the natural habitat of the Great Indian Bustard (GIB),[120] which was an endangered bird species. On account of its taller and heavier built, and larger wingspan, this bird has poor eyesight as compared to other bird species. In the aforementioned matter, the Court has, while expanding the ambit of Articles 14[121] and 21[122], acknowledged the right to remain free from the ill effects of climate change, as a distinct standalone fundamental right. The Court made a reference to its earlier order dated April 19, 2021, wherein it was held that all low-voltage electricity lines in potential habitats of GIB should be laid underground, in all prospective cases.[123] However, the Court, in order to balance the interests of the solar power producers, ruled that a general prohibition could not be enforced, and such implementation must therefore, be on a case-to-case basis.[124]

The Apex Court recognised that the act of commissioning transmission lines was a tedious one, which took about three to five years, and each power producer was required to conform to the technical specifications prescribed by the Central Electricity Authority (CEA) for the maintenance and functioning of transmission lines.[125] Routing of a transmission line should be avoided through protected forests, national parks, and wildlife sanctuaries, with minimal tree cutting.[126] Further, section 89(2)(c) mandates that all clearances from trees and forest areas during the building of transmission lines must be as per the Forest Conservation Act, 1980, and any Rules made by the Central Government in this regard.[127]

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[120] This endangered species of bird, which weighs 15-18 kg, is easily identified by its black forehead crown, offering a contrast with its pale head and neck. It has a brownish body with black, brown, and grey markings on its wings, and its existence is seriously threatened by collisions with high tension electric wires, swift moving automobiles, and roving canines. See WWF, "Great Indian Bustard", *available at*: https://www.wwfindia.org/about_wwf/priority_species/threatened _species/great_indian_bustard/ (last visited on Jan 20, 2025).

[121] The Constitution of India, art. 14: "Equality before law-The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

[122] *Id.*, art. 21: "Protection of life and personal liberty-No person shall be deprived of his life or personal liberty except according to procedure established by law."

[123] AIR 2021 SC 209; 2021 SCC OnLine SC 326.

[124] 2024 SCC OnLine SC 570.

[125] The Electricity Act, 2003 (Act 36 of 2003), s. 70.

[126] Central Electricity Authority (Technical Standards for Construction of Electrical Plants and Electric Lines) Regulations, 2010, s. 88.

[127] *Id.*, s. 89(2)(c).

On account of the intricacies occasioned by elements like the GIB's natural habitats, which today only exist in certain parts of Rajasthan and Gujarat, and the existence of overhead solar transmission lines in these areas, it was necessary to gain a better understanding of how exactly the standards outlined in the CEA Regulations, 2010 would respect citizens' rights to the environment.[128] It is in this backdrop that the Court constituted an Expert Committee to assess various aspects of the matter, namely grounds of feasibility, scope of overhead and underground transmission lines in potential GIB habitat areas, and identify further reasonable measures which could be undertaken to address the prevailing state of affairs.[129]

In our legal framework, there is no single effective statutory enactment which safeguards environment and climate change-related concerns, even though a large number of governmental policies, Rules and Regulations are operational. It is in this backdrop that the stand taken by the Court that absence of a law does not automatically translate to the non-existence of a right and its legal remedy, needs to be appreciated, and applauded.[130] The Court laid down that governmental authorities while allocating funds for infrastructural projects are, to a large extent, obligated to safeguard the environment, and natural habitats of birds and animals, especially species which are endangered under the Wild Life (Protection) Act, 1972.[131] Article 48A[132] of our Constitution entails that the State should endeavour to protect and improve the environment, and imposes a consequent duty upon the State to safeguard forests and wildlife. The Court emphasised upon the importance of Articles 14 and 21, which paved the way to recognise the "right to be free from the adverse effects of climate change" as a standalone fundamental right.[133] The Court ruled that the vulnerability of Article 14 can easily emerge in such cases. At some future date, the indigenous communities in the Andamans may fall into a precarious position as compared to their compatriots living in the Indo-Gangetic plains due to rising sea levels, leading to a serious risk to their constitutionally guaranteed right to equality.[134] The Court made a rather intriguing reference

[128] *Supra* note 124.

[129] *Ibid*.

[130] Fizza Zaidi, "Analysis: What does the New Supreme Court Judgment Mean for Climate Action in India?" *DownToEarth*, Apr. 8, 2024, *available at*: https://www.downtoearth.org.in/ governance/analysis-what-does-the-new-supreme-court-judgment-mean-for-climate-action-in-india--95462 (last visited on Jan. 19, 2025).

[131] Act 53 of 1972.

[132] *Supra* note 121, art. 48A: "Protection and improvement of environment and safeguarding of forests and wild life-The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country."

[133] Shreshtha Mathur, "M.K. Ranjitsinh v. Union of India: The Supreme Court's Very Own Sophie's Choice Moment" *Bar and Bench*, Apr. 27, 2024, *available at*: https://www.barandbench.com/topic/supreme-court-judgment (last visited on Jan. 20, 2025).

[134] *Supra* note 124.

to the climate asylum claim filed by a Kiribati citizen, which was rejected by the Supreme Court of New Zealand.[135]

## 7. Interface Between Green Technology and IPR

In the modern world, IPRs, especially patents, can assist in the shift towards a low-carbon regime, thereby helping to achieve the overall goal of sustainable development. Various entities like government organizations, investors, inventors and partners from different countries, have a role to play when it comes to developing and marketing green technology.[136] The concept of 'Green IP' emerged out of the need to create solutions to address the problems posed by climate change and resource degradation. 'Green IP' refers to the use of various IPRs tools to protect developments in green technology. Patents grant inventors and creators limited-time 'exclusive' rights, and are therefore, significant to ensure technological progress. When combined with proper collaboration between the government and private sectors, an effective Green IP framework can provide the most suitable environment for global dissemination of sustainable products and technologies.[137]

IPRs promote technological innovation, foster creativity, and provide legally-enforceable rights which cannot be infringed.[138] The importance of IP in the contemporary economy has grown by leaps and bounds, as is evident from the increased number of IP applications being filed worldwide, especially in the field of patents.[139] On similar lines, green technology has also grown many times over, especially when it comes to providing solutions to complex environmental problems. Patent laws are thus key to fostering 'green innovation' by incentivizing further R&D in the sustainable technologies sector. The financial reward, recognition and increased funding opportunities which patents offer innovators, motivates them to pursue breakthroughs in new technology.[140]

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[135] *Ioane Teitiota* v. *The Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107.

[136] Jennifer Brant, "Green Technology Diffusion: Insights from Industry" *WIPO Magazine*, Feb. 19, 2024, *available at*: https://www.wipo.int/web/wipo-magazine/articles/green-technology-diffusion-insights-from-industry-38710 (last visited on Jan. 13, 2025).

[137] Antra Kalnbalkite, Vita Brakovska, *et.al.*, "The Tango Between the Academic and Business Sectors: Use of Co-management Approach for the Development of Green Innovation" 2(4) *Innovation and Green Development* 100073 (Dec. 2023).

[138] Paula Kivimaa and Florian Kern, "Creative Destruction or Mere Niche Support? Innovation Policy Mixes for Sustainability Transitions" 45(1) *Research Policy* 205-17 (Feb. 2016).

[139] Seyi Saint Akadiri and Tomiwa Sunday Adebayo, "Asymmetric Nexus Among Financial Globalization, Non-renewable Energy, Renewable Energy Use, Economic Growth, and Carbon Emissions: Impact on Environmental Sustainability Targets in India" 29(11) *Environmental Science and Pollution Research* 16311-23 (Mar. 2022).

[140] Aline Bento Ambrosio Avelar, Keilla Dayane da Silva-Oliveira, *et.al.*, "Education for Advancing the Implementation of the Sustainable Development Goals: A Systematic Approach" 17(3) *International Journal of Management in Education* 100322 (Nov. 2019).

Article 7 of TRIPS highlights the role of IPRs in promoting technological innovation, for the benefit of the entire community as a whole.[141] It aims to facilitate 'transfer and dissemination of technology', besides stressing upon the significance of a proper balance between rights and obligations.[142] Such a balance helps to promote and preserve social and economic welfare. Despite TRIPS not having outrightly dealt with the aspect of 'green innovation', efforts are being made to promote the development and adoption of green technology, globally.[143] By ensuring protection of IP assets, IPRs can help to garner additional investments in green technology, thereby enabling inventors to commercialize their innovations.[144] Some countries like USA have introduced special provisions for green technology to further bolster environmental innovation. Initiatives such as the Green Patent Program in USA,[145] and similar measures across Europe, have attempted to fast-track the examination of patent applications in the case of environment-friendly inventions, thereby leading to an accelerated market entry for such products and technologies. Collaborative models, centred around patent pooling and open licensing, can also help in the widespread usage and adoption of green technology.[146] Such initiatives avoid duplication of R&D efforts, which would, in turn, make eco-friendly innovations more accessible globally. Greater worldwide collaboration in the area of green technology can be fostered through transfer of technology transfer in important areas like renewable energy. [147]

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[141] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), 1994, art. 7: "Objectives- The Protection and Enforcement of intellectual Property Rights Should Contribute to the Promotion of Technological Innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a Manner Conducive to Social and Economic Welfare, and to a Balance of Rights and Obligations."

[142] Marinella Favot, Leyla Vesnic, *et.al.*, "Green Patents and Green Codes: How Different Methodologies Lead to Different Results" 18 *Resources, Conservating & Recycling Advances* 200132 (Oct. 2023).

[143] Nicolò Barbieri, Alberto Marzucchi, *et.al.*, "Knowledge Sources and Impacts on Subsequent Inventions: Do Green Technologies Differ from Non-green Ones?" 49(2) *Research Policy* 103901 (Mar. 2020).

[144] Andrea Bellucci, Serena Fatica, *et.al.*, "Venture Capital Financing and Green Patenting" (Ispra: European Commission, 2021), JRC127059, *available at:* https://www.econstor.eu/bitstream/10419/250160/1/jrc127059.pdf (last visited on Feb. 12, 2025).

[145] Antoine Dechezleprêtre and Eric Lane, "Fast-tracking Green Patent Applications" *WIPO Magazine*, June 3, 2013, *available at:* https://www.wipo.int/web/wipo-magazine/articles/fast-tracking-green-patent-applications-38465 (last visited on Feb. 4, 2025).

[146] Rashmita Das, "Green Innovation and IP: How Patent Laws Encourage or Hinder Environmental Technologies", Oct. 24, 2024, *available at:* https://www.unitedandunited.com/green-innovation-and-ip-how-patent-laws-encourage-or-hinder-environmental-technologies/#:~:text=Collaborative%20IP%20models%2C%20such%20as,friendly%20innovations%20more%20accessible%20globally (last visited on Feb. 1, 2025).

[147] *Supra* note 28 at 53.

As part of the 2030 Agenda for Sustainable Development,[148] the World Intellectual Property Organization (WIPO)[149] has, once again, noted that IP-linked innovation is pivotal to develop a nation's capability towards innovation, and its ability to attract Foreign Direct Investment (FDI).[150] In order for green technology to reach its full potential, countries must necessarily have a reasonably strong IP protection infrastructure in place. High-value technological innovations should be developed on top priority, in order to ensure that green development includes top-notch innovations as well.[151]

The Patents Act, 2005 presents a catena of challenges in terms of promotion of green technology. The high cost and increased degree of complexity in the patent filing procedure continue to remain a significant factor, and can often be prohibitive for start-ups and small businesses, who may be involved in the development of green technology.[152] The high filing fees, large number of objections at various stages, and large amount of time involved in obtaining a patent, can pose an insurmountable hurdle for smaller entities who seek protection their green inventions.[153] Enforcement of patent rights remains another concern, on account of the lengthy litigation processes in the country, which may end up delaying the commercialization of green technology.[154] All these factors have the effect of reducing the incentive for companies to invest in R&D activities. A solution to this problem has been attempted by creating a separate Intellectual Property Division (IPD) in various High Courts across the country, starting with the Delhi High Court.[155] The objectives behind establishing these special courts is to resolve disputes related to IPR in an efficacious manner, uphold and protect IP rights of the inventor/creator, promote a vibrant IP adjudication ecosystem across

[148] Outlines the 17 Sustainable Development Goals (SDGs), which are intended to reduce poverty, hunger, and inequality while tackling climate change and safeguarding the environment in order to create a more sustainable and equitable future for all by 2030. See United Nations: Department of Economic and Social Affairs, "Transforming Our World: the 2030 Agenda for Sustainable Development", *available at:* https://sdgs.un.org/2030agenda (last visited on Jan. 22, 2025).

[149] One of the 15 specialized agencies of the UN, it supports the world's innovators and creators by ensuring that their ideas reach the market safely and enhance lives of people across the globe. See WIPO, "About WIPO", *available at:* https://www.wipo.int/about-wipo/en/ (last visited on Jan. 17, 2025).

[150] Kaiwen Chang, Lanlan Liu, *et.al.*, "The Impact of Green Technology Innovation on Carbon Dioxide Emissions: The Role of Local Environmental Regulations" 340 *Journal of Environmental Management* 117990 (Aug. 15, 2023).

[151] *Supra* note 18.

[152] *Supra* note 68 at 391.

[153] *Supra* note 68 at 391.

[154] Zoltan J. Acs, Luc Anselin, *et.al.*, "Patents and Innovation Counts as Measures of Regional Production of New Knowledge" 31(7) *Research Policy* 1069-85 (Sep. 2002).

[155] Reto M. Hilty and Pedro Henrique D. Batista, "Potential and Limits of Patent Law to Address Climate Change" 72(9) *GRUR International* 821-39 (Sep. 2023).

the country, and shape the legal landscape for IP in India. As of now, three High Courts in India, *viz*., the High Courts of Delhi, Madras, and Calcutta, currently have dedicated IPDs, with the Delhi High Court being the first to establish such a division,[156] whereas the High Courts of Bombay, Calcutta, and Gujarat have designated specialized IP Benches.[157] The Karnataka High Court is on its way to becoming the next High Court to have its own IPD. On June 20, 2024, the Chief Justice of the Karnataka High Court issued a notification announcing the formation of a sub-committee which had been tasked to draft the Rules for establishing the IPD.[158]

### 8. Compulsory Licensing of Green Technology

'Compulsory licensing' is a license/permission which permits a third-party to use a patented invention by paying a royalty to the inventor. The permission of the patent-holder is not required for this purpose, and compulsory licenses can be granted by the Central Government when certain conditions are satisfied. It is an essential concept in IPR, and creates a set of circumstances wherein a license created by statute enables a third-party to have access to the invention of a patent-holder. Under TRIPS, patents in respect of which a compulsory license has been issued, can be made available to certain third-parties for further use, whereas the Patents Act, 1970, provides for a detailed discussion of 'compulsory licensing' under Chapter XVI[159] of the Act. However, the phrase 'compulsory licensing' has not been used in TRIPS; rather, the Agreement refers to the use of the invention without the authorization of the rights-holder.[160] However, a third-party can only benefit under this clause if (s)he has previously attempted to obtain the consent of the rights-holder upon acceptable commercial conditions, and such attempts have not been successful. Situations of 'national emergency', 'extraordinary urgency', and 'public non-commercial purpose', are exceptions to this rule, and the period of such use shall be limited to the authorized purpose only.[161] The

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[156] Surendra Sharma and Udayvir Rana, "Game-changer: The Intellectual Property Division of the High Court of Delhi" *ManagingIP*, Sep. 30, 2022, *available at*: https://www.managingip.com/article/2aoxdrzghl7fpb3f1ce80/sponsored-content/game-changer-the-intellectual-property-division-of-the-high-court-of-delhi (last visited on Dec. 19, 2024).

[157] Shiv Sahay Singh, "Calcutta HC Sets Up Separate Divisions for Intellectual Property Rights disputes" *The Hindu*, Nov. 16, 2024.

[158] RNA Technology and IP Attorneys, "Delhi High Court IP Division Sets the Bar High" *Lexology*, June 21, 2023, *available at*: https://www.lexology.com/library/detail.aspx?g=fdc68a78-094a-4f75-b103-51087787c487 (last visited on Dec. 18, 2024).

[159] High Court of Karnataka, Notification No. HCLC 59/2022, *available at*: https://karnatakajudiciary.kar.nic.in /old_website/noticeBoard/notfn-HCLC-59-2022-20062024.pdf (last visited on Dec. 21, 2024).

[160] The Patents Act, 1970 (Act 39 of 1970), chap. XVI: Working of Patents, Compulsory Licenses and Revocation.

[161] TRIPS Agreement, art. 31.

compulsory licensee shall be bound to pay to the patent holder, proper remuneration for the use of his/her invention. It is to be noted that 'compulsory licensing' under TRIPs can only be allowed in the event of any of the three conditions enumerated above. When seen under the prism of climate change, a great number of scholars argue that 'compulsory licensing' of green technology would not be forbidden under TRIPS, on account of the fact that the Agreement does not elaborate upon either 'public interest' or 'national emergency'.[162] Given this background, member-states would be required to show that there was such a situation, in order to resort to this provision.

In order to mandate use of green technology under the 'compulsory licensing' clause, member-states should first make out a watertight case of 'national emergency', 'extraordinary urgency', or 'public non-commercial purpose'. The onus is entirely upon member-states to prove that the given situation falls within any of the aforesaid categories. In its initial phase, the price of green technology is often very high, especially in low-income countries like ours, and therefore, 'compulsory licensing' may be resorted to, in order to address this issue, especially in the short term. It is to be noted that not all policy-framers favour 'compulsory licensing', and some opine that grant of such licenses may have the effect of abridging the rights of the patent-holder in cases involving unauthorized usage of the patent. In the long term, it may also prove to be harmful to nations where such licenses are granted, because it may obstruct development of a proper research-based environment.

India's 'compulsory licensing' regime, which aims to make essential technologies more accessible, may, in some cases, pose hurdles for innovators in the green technology sector. The fear of losing exclusive control over their patented technologies through issuance of compulsory licenses, could dissuade inventors from introducing their cutting-edge inventions.[163] Lastly, unlike other areas of the world like the USA and Europe, India lacks specific programmes which can put green patent applications on the fast-track.[164] This delay in grant of patent approvals can sometimes prove critical, and can impede the country's march towards sustainability.

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[162] Jingkun Zhou, Yunkai Zhou, *et.al.*, “Can Green-Technology Innovation Reduce Atmospheric Environmental Pollution?” 11(5) *Toxics*, 403 (Apr. 24, 2023).

[163] Jamie Feldman, “Compulsory Licenses: The Dangers Behind the Current Practice” 8(1) *Journal of International Business and Law* 137-67 (2009).

[164] Antoine Dechezleprêtre, “Fast-tracking 'Green' Patent Applications: An Empirical Analysis” (Centre for Climate Change Economics and Policy, Feb. 2013), *available at*: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2014/02/WP107-fast-tracking-green-patent-applications.pdf (last visited on Jan. 5, 2025).

## 9. International Efforts to Promote Green Patents

Across the world, private and public sectors have worked together to strengthen and preserve Green IP. In this category, it would be useful to discuss the efforts of the World Business Council for Sustainable Development (WBCSD),[165] and multinational corporations like Sony and Nokia, which jointly established the Eco-Patent Commons[166] in the year 2008. This community seeks to share patents and knowledge about environmental issues, energy efficiency, control and prevention of pollution, recycling, and water conservation. In 2009, the Clean Energy Research Centre (CERC), which enables engineers, researchers and scientists to study and develop green technology, was developed a result of US-China cooperation.[167] A US-China Renewable Energy Forum was also created to promote collaboration on IP issues associated with new and renewable energy.[168] Along similar lines, the Joint Clean Energy Research and Development Centre (JCERDC) was established in 2009 as a US-India partnership, and seeks to resolve global issues concerning environmental sustainability and energy advancement.[169]

In December 2009, the United States Patent and Trademark Office (USPTO) launched the Green Technology Pilot Program to expedite the review of patent applications in the area of green technology, energy conservation, environmental protection, and carbon emission reduction.[170] The programme's objective was to expedite the process of 'green

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[165] Assembles transformative organizations to create a worldwide community which improves the institutions in which they operate in order to create a better future. Its members work to reduce the climate disaster, restore nature, and address inequality by pushing the limits of what businesses can accomplish. See World Business Council for Sustainable Development, "The Building Blocks of Transformation", *available at*: https://www.wbcsd.org/ (last visited on Jan. 8, 2025).

[166] Several major multinational corporations came together to launched this non-profit project in 2008 to give people royalty-free access to patents for eco-friendly technologies. However, it ran into organizational and structural problems, and was shut down in 2016. See Jo Bowman, "The Eco-Patent Commons: Caring Through Sharing" *WIPO Magazine*, June 3, 2009, *available at*: https://www.wipo.int/web/wipo-magazine/articles/the-eco-patent-commons-caring-through-sharing-36818 (last visited on Jan. 6, 2025).

[167] Multidisciplinary research centre devoted to doing top-notch clean energy research, development, training, and demonstrations. Its objective is to become a global leader in the research, development, and demonstration of cutting-edge clean energy solutions to tackle the problems of sustainability and climate change. See The University of British Columbia: Clean Energy Research Centre, "CERC Intro", *available at*: https://cerc.ubc.ca/ (last visited on Jan. 18, 2025).

[168] Forum for policymakers, business executives, and scholars from both these nations to work together to advance renewable energy policies and technologies, with an emphasis on quickening the clean energy transition and decarbonization initiatives. See U.S. Department of Energy, "US-China Renewable Energy Forum", *available at*: https://www.energy.gov/ia/us-china-renewable-energy-forum (last visited on Jan. 17, 2025).

[169] Important project under the U.S.-India Partnership to Advance Clean Energy (PACE), which seeks to promote revolutionary research and development in the clean energy sector. See Press Information Bureau, "Setting Up of JCERDC with US" *PIB*, Dec. 30, 2010, *available at*: https://pib.gov.in/newsite/PrintRelease.aspx ?relid=68772 (last visited on Jan. 19, 2025).

[170] *Supra* note 164.

innovation' by examining the green patent applications before other applications. On similar lines, the United Kingdom Intellectual Property Office (UKIPO) launched the Green Channel[171] programme in 2009 to provide for accelerated processing of patent applications for inventions which offered any environmental benefits. Recently, Japan too has joined the queue, by joining the WIPO GREEN programme. The Japanese Patent Office (JPO) has made it clear that it shall endeavour to work with WIPO to help spread green technology to distant corners of the world. After partnering with WIPO, Japan has published the Green Transformation Technologies Inventory (GXTI), which will help enterprises explain their green transformation efforts.

The IPC 'Green Inventory' is a web-based database, which provides links to the IPC system.[172] It was introduced by WIPO in 2010, and makes it faster to search for patent data about Environmentally Sound Technologies (ESTs).[173] Launched in 2013, 'WIPO GREEN' is a green technology online marketplace, which aims to bring green technology suppliers and buyers together on one platform.[174] Through its database, which currently has within its purview, over 3,000 innovations and demands, it makes it easier to create, adopt, and implement solutions in the area of greentech.[175] It supports global efforts to address climate change by connecting providers and seekers of environmentally friendly technologies. Through its database, network and acceleration projects, it brings together key players to catalyse green technology innovation and diffusion. All these initiatives demonstrate a commitment towards promoting creativity, cooperation, and information exchange in the area of greentech, which will ultimately enable us to develop an increased amount of Green IP globally.

## 10. Conclusion

The worldwide climate catastrophe has disrupted supply chains, availability of labour, and adversely affected demand. Hence, corporations, authorities and policy framers

[171] Launched on May 12, 2009, with the goal of expediting the processing of patent applications pertaining to technologies that help the environment. This enabled applicants to request quicker processing of patent search, examination, and publishing processes. See Government of UK, Intellectual Property Office, “Green Channel”, *available at*: https://www.gov.uk/guidance/patents-accelerated-processing (last visited on Jan. 6, 2025).

[172] WIPO, “International Patent Classification (IPC)”, *available at*: https://www.wipo.int/en/web/classification-ipc (last visited on Dec. 27, 2024).

[173] Includes technologies which protect the environment, reduce pollution, and promote use of sustainable resources, recycling, and waste handling. See UN Environment Programme, “Environmentally Sound Technologies”, *available at*: https://www.unep.org/regions/asia-and-pacific/regional-initiatives/supporting-resource-efficiency/environmentally-sound (last visited on Jan. 20, 2025).

[174] WIPO GREEN, “WIPO GREEN – The Marketplace for Sustainable Technology”, *available at*: https://www3.wipo.int/wipogreen/en/ (last visited on Jan. 18, 2025).

[175] *Supra* note 150.

across the world, have banded together in an attempt to create viable solutions to tackle this rather formidable opponent. This cooperation has culminated in new ideas, and consequently, the concept of Green IP has emerged. Technical progress is absolutely essential in today's world. However, the march of science and sustainable development, have acquired an even greater significance, because the very survival of mankind is at stake, on account of the challenges posed by climate change and resource degradation. Countries must focus upon technical advancement in the area of green technology, thus contributing towards the ultimate goal of environmental sustainability. On account of their ability to safeguard both inventor's rights and ecological development, patents can be used as an effective instrument to accomplish a practical synthesis between environmental sustainability and commercial growth. Through patenting of green technology, we can achieve the twin goals of preservation of our ecosystem, as well as technological advancement.

One of the major criticisms of our existing IP system is that there is a plethora of patents, and relatively insufficient knowledge with regard to these.[176] Therefore, it may sometimes become difficult to eliminate patents which restrict innovators unfairly, and therefore, the current IP regime does not foster long-term innovation. Regulatory adjustments should emphasize upon the need to eliminate administrative and practical obstacles to patenting. In order to do so, we may need to look at abolition of the criteria of 'non-obviousness' in order to achieve sustainable advances.[177] The patent process must also be changed to make it easier for innovators to obtain patents at a lower cost, and in a lesser amount of time.[178] The judicial and administrative machinery should be strengthened in order to ensure effective enforcement of patents. Through stricter patentability criteria, lower patenting expenses, faster patent prosecution, and effective enforcement of patents, we can certainly have faster development and adoption of green technology, thereby leading to reduced emissions.

In order to provide incentives for Indian inventors to pursue green technology, and achieve the country's goal of becoming a significant player in this area, the government must provide inventors benefits, which are at par with developed countries. The cost associated with certification and processing of green technology in India has been identified as very

[176] Arho Suominen, Matthias Deschryvere, *et.al.*, “Uncovering Value Through Exploration of Barriers - A Perspective on Intellectual Property Rights in a National Innovation System” 123 *Technovation* 102719 (May, 2023).

[177] Claude Henry and Joseph E. Stiglitz, “Intellectual Property, Dissemination of Innovation and Sustainable Development” 1(3) *Global Policy* 237-51 (2010).

[178] Andre O. Laplume, S. Pathak, *et.al.*, “The Politics of Intellectual Property Rights Regimes: An Empirical Study of New Technology Use in Entrepreneurship” 34(12) *Technovation* 807-16 (2014).

high, and we must attempt to address this issue on a war footing.[179] The processing fees involved in the use of green technology in India is very high, and the case of batteries meant for use in electric cars is a case in point. It is on account of these reasons that many technological exchanges fail in our country. There is thus a fair case for the government to offer tax breaks and straightforward financing options. By building an infrastructure where patent-holders can form direct linkages with businesses, barriers to technology exchange can be diminished.

The future of balancing IP protection and 'green innovation' hinges upon the creation of an ecosystem which supports both technical advances and environmental sustainability. Even as we continue to grapple with the need to augment the usage of clean energy, ensure waste management, and effective pollution control, fostering 'green innovation' through a well-structured IP framework must always remain a priority. One key area for improvement is the introduction of a fast-track patent regime for green inventions, on the lines of similar programmes in USA and Europe. By accelerating the patenting process, innovators can bring their environment-friendly technologies to the market sooner, which would, in turn, lead to faster adoption and upscaling of sustainable solutions.

Finally, it needs to be said that our IP policy also needs to be tweaked suitably, in order to balance patent protection with green technology. While a strong IP framework would certainly encourage investment in R&D, it needs to be borne in mind that excessive monopolization could limit the widespread availability of critical environmental solutions. Collaborative models like patent pooling and open licensing can help the authorities to ensure that essential green technology remains accessible to all our people, and at the same time, rights of inventors and investors would be protected.[180] Government incentives, tax breaks, and subsidies for use of green technology, coupled with effective IP reforms outlined in the preceding paragraphs, can certainly provide a noteworthy boost to our country's progress towards sustainability. By striking the right balance between IP protection and accessibility, we can promote a thriving green technology sector, while, at the same time, also meeting our environmental obligations on a global scale.

[179] Rajat Gupta, Shirish Sankhe, *et.al.*, “Decarbonising India: Charting a Pathway for Sustainable Growth” 47 (McKinsey Sustainability, Oct. 2022).

[180] Jaakko Siltaloppi and Rosa Maria Ballardini, “Promoting Systemic Collaboration for Sustainable Innovation Through Intellectual Property Rights” 11(1) *Journal of Co-operative Organization and Management* 100200 (June, 2023).

# Comparative Analysis of Opt-Out Organ Donation Laws in Developed Countries: Lessons for India

*Manoj Kumar* & Gaurav Singh Sachan***

## ABSTRACT

*The persistent gap between organ demand and availability has prompted many countries to reform their organ donation frameworks. It's important to mention that EU nations like Spain, Austria and France have opted for the opt-out system where all citizens start out as potential donors unless they say otherwise. The paper examines the laws of these countries, their working structures and public attitudes to assess how much presumed consent laws actually help. We examine how these systems have helped to increase the number of organ donations and adjust their viability to suit the Indian system and laws. Identifying how these systems function in terms of regulations, hospitals and clinics, info for the public and right practices is a main goal. These matters involve the hesitation welcomed by society for deceased organ donation, the lack of a national law that treats consent as presumed, concerns raised by religions and families and the possible use of organs without clear objection in a great democracy. By reviewing experiences from other nations, the document strives to offer meaningful suggestions for India to move from an opt-in to an opt-out model, stressing the importance of public faith, transparent policies and laws that fit India's diverse groups.*

***Keywords:*** *Opt-out Organ Donation, Organ Transplantation, Ethical Considerations, Deceased Organ Donation.*

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## 1. Introduction

In the matter of organ donation, some developed countries are adopting a policy where people do not have to actively agree for donation. At death, the concept treats people as consenting organ donors unless they have chosen not to become donors during their lifetime.[1] This idea is opposite the opt-in method, where donation takes place only after people officially registers themselves as organ donors. In Spain, Austria and France and other developed nations, using the opt-out system has increased the deceased organ donation rates. The models created in different countries show that India's low level of donated organs needs attention, even as the number of patients requiring transplants is growing.

Though India's population is largest in the world yet very few organs become available through donation. Only 0.65 persons give the gift of organ donation for every million Indians, while Spain registers more than 40 such donors per million. This proves that a big change in India's organ donation rules is essential. Because the opt-out system has grown donor pools in other places, it is now a key topic under discussion in Indian policy circles. A comparison of its use in different countries and its fitness to the India's culture, laws and society should be carried out before adopting the model.[2]

The way things are handled legally, culturally and in healthcare are not the same in developed countries. Spain and France follow a soft opt-out policy whereas Austria follows a hard opt-out approach. In a soft opt-out approach even though the citizens are deemed to be organ donors unless they have opted out from it in their life time, the consent of the aggrieved family of the deceased is also sought and respected, whereas in hard opt-out approach no such consent of the family is sought and even if the family refuses for such donation their emotions are not respected. Spain has one of the highest organ donation rates in the world, largely due to a well-organized transplant coordination system and public awareness efforts, not just the legal framework.[3] A detailed comparison of these frameworks, how they were created and what they accomplished may suggest a way for India to modify its donation rules without harming their usefulness.

## 2. Types of Organ Donation and Transplant Policies

Organ donation requires receiving organs from a generous donor to transplant them into people who urgently need a healthy organ. States use many different, often complicated

[1] Rajesh Panwar, *et. al.*, "Why Are We Poor Organ Donors: A Survey Focusing on Attitudes of the Lay Public From Northern India" 6 *Journal of Clinical and Experimental Hepatology* 81 (2016).

[2] *Ibid.*

[3] R. Matesanz, *et. al.*, "How Spain Reached 40 Deceased Organ Donors per Million Population" 17 *American Journal of Transplantation* 1447–54 (2017).

guidelines to regulate donation and transplantation. Unless mentioned otherwise, the term organ donation here will refer to deceased organ donations.[4] Deceased donation refers to the donation of organs after a death is declared, and the organs will be usable if the death is either determined by brainstem or circulatory death. A great many organ transplants around the world involve these types of transplants. Living donation, on the other hand, involves a living person voluntarily donating a very limited number of organs such as one of their kidney, a portion of their liver, lung, pancreas or intestines, and the donor's condition often determines whether he can donate the organ or not. Organ transplantation refers to the process in which organs given by donors are inserted into people who need them, and there is a difference between donating and transplanting, as not all donated organs are successfully transplanted due to factors such as organ condition or chance of compatibility. Getting an organ involves finding a suitable donor, asking the family's permission and obtaining the organ, and in most cases, permission is granted for organ donations after a transplant coordinator talks with a potential donor's relatives.[5]

Organ donation rules use three main options: people must opt in, opt out, or consent through a required option. In opt-in systems, individuals must agree to become donors in order to register, and a person becomes a donor after he fills out a registration form. It is also called an "express consent" policy.[6] In an opt-out system, all citizens are presumed to be organ donors unless and until they have voluntarily made it clear during their lifetime that they do not want to be an organ donor. In these systems, people are presumed to give consent after death unless they have excluded themselves in advance.[7] Under the required option system, people must make a decision about whether they want to become an organ donor or not when applying for a new or renewed driver's license or when signing up for a donor registry, and most states have donor registries where prospective donors can register their desire to donate their organs. With this strategy, personal responsibility of individuals also comes into the picture, and everyone knows what they are working towards.

According to hard consent models, what people choose in their life time matters a lot. Only with their permission the organs be donated in hard opt-in systems, and if they did not

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[4] Kenneth W. Kizer, Rebecca A. English, *et. al.*, *Realizing the Promise of Equity in the Organ Transplantation System Realizing the Promise of Equity in the Organ Transplantation System* (National Academies Press, 2022).

[5] Katja Doerry, *et. al.*, "Religious and Cultural Aspects of Organ Donation: Narrowing The Gap Through Understanding Different Religious Beliefs" 26 *Pediatric Transplantation* (2022).

[6] Jordan Miller, *et. al.*, "'It's Like Being Conscripted, One Volunteer Is Better Than 10 Pressed Men': A Qualitative Study into the Views of People Who Plan to Opt-out of Organ Donation," 25 *British Journal of Health Psychology* 257–74 (2020).

[7] David B. Olawade, *et.al.*, "Transforming Organ Donation and Transplantation: Strategies for Increasing Donor Participation and System Efficiency" 133 *European Journal of Internal Medicine* 14–24 (2025).

have actively said no to organ donation in hard opt-out systems their organs will be donated. People who are grieving for their loved ones are more concerned about the cremation rather than on deciding about organ donation. When a person's wishes are not known for certain, families may be asked for consent to donation by the donation agency. Since the deceased's wishes are considered to be respected, the responsible families accompany these practices.[8]

The central worry about posthumous organ donation is the status of individuals in both legal and ethical terms after dying. Although there are no major rights of the deceased which are recognized by law but the customs and traditions says to treat them with lasting respect. So, normally, organs are taken only when the deceased and their family both agree to this.[9] Often, it is up to the family to make decisions about remains as well as organ donations. Legal frameworks set out how to get permission, who is allowed to approve payments and how closely donor requests need to be followed. Because there is no single rule for the rights of human remains, it is clear that laws regarding organ donation must be adjusted depending on the situation.[10]

An opt-out system means that in most countries, people become donors at death, unless they have stated somewhere that they did not wish to donate after their death. The goal of this policy is to overcome the shortage of organs for transplantation by making the process of receiving people's consent faster and easier for those dealing with their loved one's death. Whether or not it is the right choice such agreements continue to raise ethical questions, since individuals active consent is not sought by him voluntarily. A lot of countries that use this approach let families know about the process ahead of time, making sure efficiency is maintained while still thinking about personal and family wishes.[11]

### 3. Working of Opt-Out System at International Level

Countries around the world have implemented or tested variants of the opt-out approach, with differing levels of success. In Europe, nations like Spain, Austria, Belgium, and France have historically advocated for implied consent. In recent years, some countries, notably England (UK), the Netherlands, and Wales, have adopted opt-out frameworks, moving away from opt-in systems. Beyond Europe, nations like Singapore and Colombia

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[8] Raymond Vanholder, *et. al.*, "Organ Donation and Transplantation: A Multi-Stakeholder Call to Action" 17 *Nature Reviews Nephrology* 554–68 (2021).

[9] R. Matesanz, et al., "About the Opt-Out System, Live Transplantation, and Information to the Public on Organ Donation in Spain … Y olé!" 17 *American Journal of Transplantation* 1695–6 (2017).

[10] Sunil Shroff, "Legal and Ethical Aspects of Organ Donation and Transplantation" 25 *Indian Journal of Urology : IJU : Journal of the Urological Society of India* 348 (2009).

[11] Sunil Shroff, "Working Towards Ethical Organ Transplants" 4 *Indian Journal Of Medical Ethics* 68–9 (2007).

have adopted opt-out regimes, indicating an increasing worldwide trend towards implied consent as a strategy to mitigate organ shortages.

The justification for the opt-out mechanism is both legal and practical. From a legal perspective, assumed consent laws seek to streamline and standardise organ retrieval processes, therefore eliminating procedural obstacles that might hinder or obstruct donation. Advocates contend that these systems signify a change in society norms, positioning organ donation as a standard social benefit rather than an extraordinary act of generosity. From a public health standpoint, implied consent methods are thought to decrease family refusal rates and expand the pool of possible donors, hence enhancing transplantation results and decreasing reliance on live donors.[12]

Nonetheless, the shift to an opt-out mechanism is fraught with controversy. Critics express apprehensions over the ethical ramifications of assuming consent without specific individual approval. Enquiries about physical autonomy, informed consent, and governmental overreach persist in questioning the validity of these legislative improvements. The efficacy of opt-out legislation is heavily influenced by contextual circumstances, including public faith in healthcare institutions, the strength of administrative processes for registering disagreement, and the availability of infrastructure for organ retrieval and transplantation. Legislation alone is insufficient; the efficacy of opt-out systems requires meticulous implementation, ongoing public education, and clear legal protections.

The top three countries where the adoption of opt-out system have proved to be a great success are Spain, Austria and France. The entire working of the system in these countries becomes important to be discussed in detail, to find some viable solution to be adopted for India.

### 3.1 Spain

Although Spain operates under a formal assumed consent system, transplant coordinators actively seek to ascertain a patient's willingness to donate before to death, as well as the comfort level of their families or loved ones with this decision. Estébanez a transplant coordinator for 4 years stated in a paper published by World Economic Forum that around 10-15 percent of relatives decline to provide permission, a figure she aspires to reduce to zero. The impact of death is sometimes difficult to comprehend. Estébanez

[12] Alejandra Zúñiga-Fajuri, "Increasing Organ Donation by Presumed Consent and Allocation Priority: Chile" 93(3) *Bulletin of the World Health Organisation* 199–202 (2015).

recalled a patient who expressed a desire to become a donor. Following his death, his sister consented, although his wife did not. The medical personnel had respected the family's wishes, she said.[13] Transplant coordinators arrange matters and National Transplant Organisation (Organización Nacional de Trasplantes) (ONT) takes charge of organ allocation, cooperating with 189 facilities where organs are harvested and 44 hospitals for transfer and transplant. To coordinate, Estébanez and others rely on one database and many phone calls, often using older cell phones that keep working.[14] As soon as a donor dies, an external group acts quickly to gather the organs for distribution among the recipients. Organs take just minutes to become unusable after oxygen is cut off and hospitals are compensated by the government when a retrieval is performed.[15]

Spain introduced its presumed consent (opt-out) system for organ donation with the *Transplantation Law (Law 30/1979 of October 27)*. Article 5 of this statute presumes all citizens are organ donors unless they have expressly objected. Although the legislation for organ donation in Spain switched from consent required to opt out in 1979, the rate didn't increase immediately. It was in 1989, a decade after the law passed, that a national coordinating network *Organización Nacional de Trasplantes (ONT)* for transplants was set up. As a consequence, a major change began in the country's organ donation processes. Part of what made this change happen was that every hospital hired transplant coordinators. The specialists often chosen from critical care units know how to recognize potential donors, carry out medical aspects of the procedure and talk compassionately to families about the possibility of donation.[16] The active approach used by doctors contributed to many more organ donations, making Spain the leading country in the world. In fact, there is much misunderstanding about Spain's legal situation. Even with the opting-out law, there is no central, national system for people to indicate their choice.[17]

With this method, rates of organ donations in Spain soared rapidly. It pointed out that a rigorous system and knowledgeable employees matter, apart from making sure the laws are strong. As a result, the European Union backed a policy to help member states set up systems similar to Spain's. One of its main points is to develop national coordination and to assign professionals familiar with donation to each hospital following the Spanish

[13] Chris Baraniuk, "Spain Has a Lesson for The Rest of The World About Organ Donation" *World Economic Forum,* June 27, 2018.

[14] *Ibid.*

[15] Rekha Lalwani, Sheetal Kotgirwar, *et.al.*, "Changing Medical Education Scenario: A Wakeup Call for Reforms in Anatomy Act," 21 *BMC Medical Ethics* (2020).

[16] Chris J. Rudge, "Organ Donation: Opting In or Opting Out?" 68 *The British Journal of General Practice* 62 (2018).

[17] A. Rithalia, *et.al.*, "A Systematic Review Of Presumed Consent Systems for Deceased Organ Donation" 13 *Health Technology Assessment* (2009).

model.[18]

Because of Spain's strong organ donation program, Croatia looked to the Spanish *National Transplant Organization (ONT)* for advice in the past. After that, Croatia apparently copied Spain's governance system almost completely.[19] Research done in 2013 showed Croatia's progress with to an increase in donors over 30 per million population. Yet, the close resemblance to parts of Spain's system suggests the basis was drawn from the Spanish approach, without any formal recognition.[20]

Although opting out is allowed, Spanish officials say that the legislation alone is not behind their high proportion of donors.[21] The implied consent statute was not very effective until major changes were made in medical practices and hospitals were better coordinated. In Spain, city planners, hospitals and families are involved to show that infrastructure, training and family help lead to more organ donations. It acts as a strong model for other nations wanting to progress in donation rules by putting into practice real advances, not only passing new laws.[22]

### 3.2 Austria

Austria follows a "hard" opt-out system for organ donation, since 1992, after the enactment of the *Federal Act on Transplantation (Transplantationsgesetz)* in the year 1991. As per Section 62 (Para 1) all adults are considered as organ donors unless they have explicitly refused it during their life. Section 62 (Para 2) gives the requirement for the refusal; it says that a written declaration of refusal must be recorded in the Austrian Federal Ministry of Health's registry. In cases where the deceased did not opt out, organs may be removed without consulting the family, making enforcement strict compared to the softer approaches in Spain or France. Even so, only about 0.25% of the population has chosen to do this so far. Austrians tend to be somewhat passive in signing out of donation, which has helped Austria have high donation statistics for several years.[23]

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[18] John Fabre, Paul Murphy, *et.al.*, "Presumed Consent: A Distraction In The Quest For Increasing Rates Of Organ Donation" 341 *BMJ (Online)* 922–925 (2010).

[19] M. J. Pérez-Sáez, *et.al.*, "Survival Benefit From Kidney Transplantation Using Kidneys From Deceased Donors Aged ≥75 Years: A Time-Dependent Analysis" 16 *American Journal of Transplantation* 2724–2733 (2016).

[20] *Supra* Note 3.

[21] Marie Thuong, *et.al.*, "New Classification of Donation After Circulatory Death Donors Definitions and Terminology" 29 *Transplant International* 749–759 (2016).

[22] S. D. Shemie, *et.al.*, "Lifetime Probabilities of Needing an Organ Transplant Versus Donating An Organ After Death" 11 *American Journal of Transplantation* 2085–2092 (2011).

[23] Rajvir Singh, *et.al.*, "Opt-Out Consent at Different Levels of Attitude to Organ Donation: A Household Survey in Qatar" 14 *Journal of Multidisciplinary Healthcare* 401 (2021).

Austria is part of the European Eurotransplant consortium, made up of eight countries, that makes organ sharing across borders possible. The member countries are Austria, Slovenia, Belgium, Croatia, Luxembourg, Germany, Hungary and the Netherlands. From Leiden University, the Eurotransplant Foundation supervises the lists of people waiting for organs and makes sure each member country follows its organ allocation rules. The Transplantation Advisory Board has created Austria's unique allocation rules which were then signed by the Ministry of Health. Transplant clinics generally allot organs according to medical urgency and recipient need, exercising considerable discretion. The Standing Committee Organ Transplantation of the German Medical Council enforces allocation regulations in Germany, serving as a member of the European Transplant Committee (ET).[24]

All four regional centers for organ donation in Austria are set up inside transplant centers. National transplantation would not be effective without these coordination centers. It is their job to find possible donors, give donor information to Eurotransplant and arrange the procedure for collecting organs with surgeons from the entity involved. Also, specific coordination centers in hospitals become responsible for telling the regional centers about possible donors. Affiliated with transplant centers, transplant coordinators direct and support smaller hospitals in learning how to identify donors and submit their reports. Since 2017, Austrian law requires that a second opinion from a different transplant centre is obtained before the organ of a suitable donor can be rejected. It aims to build better openness, accountability and begin strengthening medical integrity in organ procurement. The extra check is added to ensure no deserving organs are overlooked due to anyone's or an organization's healthy prejudices.[25]

Some parts of the job of the transplant coordinator are different in Austria than in Spain. In Spain, many transplant coordinators are critical care experts who help determine who should donate and how to speak with relatives. In Austria, it falls to the ICU staff to talk about organ donation with a family member. As most transplant coordinators in Austria are medical students, they tend to hold back from family matters, afraid their training may cause tension. Austrian experts believe surgeons ought to stay out of conversations about donation with families. The issue comes from worries about surgeons' personal profit from success in retrieval and transplantation. Family ethics require that no one is pressured, but all families receive complete support instead. When possible, the family should hear this news from an

[24] A. Vincent and L. Logan, "Consent for Organ Donation," 108 *British Journal of Anaesthesia* (2012).
[25] Danyang Li, Zackary Hawley, *et.al.*, "Increasing Organ Donation via Changes in the Default Choice or Allocation Rule" 32 *Journal of Health Economics* 1117–1129 (2013).

ICU staff member they are used to and trust which is typically the patient's physician or nurse.[26]

Using this approach which values culture and ethics, reassures families and asserts that the organ donation procedure is done with great respect to the dead. It enables families to discuss these hard choices with medical staff they recognize, instead of relying on transplant coordinators or surgeons, because it might ease their stress at that time. Austria has succeeded in increasing organ donation but its credit goes to opt-out method, only partly, as it is not the only reason behind its success. Carrying out the system requires a wide range of coordination centers, detailed ways of allocation, constant medical oversight and a family-based method for starting donation talks. The close relationship among sections of the health system is behind Austria's high rates of organ donation and makes its approach unique.[27]

Nations considering or applying this type of regulation can learn a lot from Austria's experience. It explains how essential infrastructure, qualified people and morally sound rules are, as well as the requirements the law sets out. Although using implied consent encourages donations, a sound system should address the emotional, ethical and medical part of the donation process. Austria achieves an effective and caring opt-out system using strong organizational support, clear sharing practices and caring family involvement.[28]

The nation's successful opt-out system depends on much more than just its laws. Such an outcome is achieved with an organized, ethically solid and scientifically correct process applied from national planning to the hospital bedside. Europe has one of its most effective organ donation systems, which is largely possible due to Austria's joining in Euro transplant and its diligent management of responsibilities. Here, legislation defines the system, but it is only when policy, practice and empathy join together that the process leads to great results.[29]

### 3.3 France

France's presumed consent system is enshrined in the *Bioethics Laws*, specifically in the *French Public Health Code (Code de la Santé Publique)* as amended in 2017. Article

[26] M. Wilkinson, "Individual and Family Decisions About Organ Donation" 24 *Journal of Applied Philosophy* 26–40 (2007).

[27] Jeremy Chapman. *et.al.*, "Follow-up After Renal Transplantation With Organs From Donors After Cardiac Death" 19 *Transplant International* 715–719 (2006).

[28] Rajvir Singh, *et.al.*, "Prevalence of Socio-demographic and Behavioral Factors About Organ Donation in Qatar: A Household Survey" 2020 *Qatar Medical Journal* (2020).

[29] "The Potential Impact of An Opt-out System for Organ Donation in the UK on JSTOR", *available at*: https://www.jstor.org/stable/20789510 (last visited on May 28, 2025).

L.1232-1 of the law states that all deceased persons are considered as potential donors unless they've registered an objection during their life in the National Register of Refusals or communicated their refusal to relatives, who can relay it to medical staff. The system is "soft" opt-out, as relatives are consulted, especially if no official refusal exists. Additional principles required by law include the anonymity of donation, prohibition of payment, and procedures to ensure informed decisions and safety of transplants. The 2021 Bioethics Law extended the obligation for broad public information about organ donation.

The reason for France's switch to an opt-out system is the ongoing gap between those who require transplants and organs that can be transplanted. The policy intends to assist transplantation by including those who may need an organ on the waiting list, unless they express other wishes. Establishing consent as a default means for most of the organs that are transplantable, so more people tend to treat donation as the expected thing.[30] On the one hand, French law supposes that agreement is not needed, but it gives people tools to ensure that their values are recognized. The people signing up on the refusal registry gets an opportunity to state clearly without any external pressure their wish to not become an organ donor. In addition, if family members keep expressing objections in conversations, it protects against anyone's silent and unspoken wishes.[31]

It is clear from France's opt-out contribution that trust from the public and good communication are crucial. Those working in medicine should speak compassionately and clearly with the family if the deceased didn't object to the procedure. As a result, although families are not able to correct the lack of registration, their interests are recognized and proper standards direct the removal of organs.[32] France and its healthcare services have chosen to educate the public to promote lasting success. Measure are in place to teach the local community about rights under the revised system and to decrease the shame often attached to organ donation. The goal is to reach youngsters as well as groups that have doubts about medical institutions. France is encouraging people to see organ donation as a responsible thing to do through open discussions about it.[33]

The introduction of the soft opt-out provision has improved donation rates in France, as the data shows. Although the legal shift alone didn't cause the rise, it has

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[30] Amanda M. Rosenblum, *et.al.*, "The Authority Of Next-of-kin In Explicit And Presumed Consent Systems For Deceased Organ Donation: An Analysis of 54 Nations" 27 *Nephrology Dialysis Transplantation* 2533–2546 (2012).

[31] Janet Delgado, *et.al.*, "The Role of the Family in Deceased Organ Procurement: A Guide for Clinicians and Policymakers" 103 *Transplantation* 112–118 (2019).

[32] Katharina Beier, *et.al.*, "Understanding Collective Agency in Bioethics" 19 *Medicine, Health Care and Philosophy* 411–422 (2016).

[33] David Shaw, *et.al.*, "Family Over Rules? an Ethical Analysis of Allowing Families to Overrule Donation Intentions" 101 *Transplantation* 482–487 (2017).

definitely changed how donation discussions take place. Health professionals say there are fewer cases now of donation being blocked due to family members unsure of the deceased's wishes.[34] But, the process of moving to the present system has not been entirely smooth. Concerns about implied consent continue, since many underprivileged groups still continue to protest against inadequate care. In reaction, France has promised to work on improving communication, making sure everyone in rural or undeveloped areas, as well as other groups, learn about their rights and new system options.[35]

World leaders should realize that good healthcare reform depends on tactics that fit a country's culture and values. The basic block is legislation and the rest such as community participation and continuous monitoring of the result, should be built on top of it. The focus of the strategy is that organ donation should be ethically, socially and medically and legally sound.[36] France's decision to make people organ donors unless they opt out is a clear and early move against the lack of organs. Although there are still problems around ethics, autonomy and reputation, the policy helped create an improved and fairer way for donations. The nation is working to improve its methods, explaining how better laws, community work and institutional support can make a big difference in public health.[37]

## 4. Disadvantages of Opt-Out System

Presumed consent may be seen as a violation of the individual's autonomy and bodily integrity, especially if individuals are unaware of their right to opt out.[38] Some people may not understand the law or may not know they are considered donors unless they take specific action.[39] Greece is one of the glaring example which has faced this issue it had implemented an opt-out system in 2013, but faced public backlash and mistrust due to poor public awareness, leading to suspension of the law's enforcement.[40]

The other major downside is persistent high rates of family refusal. In many of the opt-out countries, the families are often consulted, and in case if the deceased persons had

[34] *Supra* note 6 at 3.

[35] Alberto Molina-Pérez, *et.al*., "Should the Family Have a Role in Deceased Organ Donation Decision-making? A Systematic Review of Public knowledge and Attitudes Towards Organ Procurement Policies in Europe" 36 *Transplantation Reviews* 100673 (2022).

[36] *Ibid.*

[37] *Supra* note 21 at 7.

[38] Cameron, J. & Forsythe, J. L. R., "How Can We Improve Organ Donation Rates? Research Into the Identification of Barriers and effective Policy Strategies" 322(7292) *British Medical Journal* 1114–1116 (2001).

[39] Delgado J., & Llobet G., "Presumed Consent in Organ Donation: Is It Really the Answer?" 45(3) *Journal of Medical Ethics* 191–195 (2019).

[40] Georgiadis, A., & Papalois, A., "Donation and Transplantation in Greece: Problems and Solutions" 5(2) *International Journal of Organ Transplantation Medicine* 79–84 (2014).

not made their wishes clear to their relatives, they most often block donation out of uncertainty or mistrust. The UK had reported family refusal as the biggest obstacle to donation, with rates around 39% for ethnic minorities, largely due to families not knowing their loved one's preferences.[41]

The evidence repeatedly shows that simply shifting to an opt-out default doesn't inherently raise donation rates. Longitudinal studies across countries like Argentina, Chile, Sweden, Uruguay, and Wales found no significant difference in deceased donor rates after switching from opt-in to opt-out, unless accompanied by substantial investment in healthcare infrastructure and public education.[42] Chile experienced a 29% drop in donations after implementing opt-out, due in part to widespread misunderstanding and mistrust among the population. Only later, with legislative adjustment and improved transparency, did donor rates recover.[43]

Imposing presumed consent without adequate public preparation can damage confidence in the health system. Brazil's experience is instructive: After a "hard" opt-out model was introduced in 1997, there was such public outrage that people rushed to register as non-donors, and the law was repealed just one year later.[44] In England, 15% of respondents in a government survey indicated they would opt out if presumed consent became law, thus, significantly limiting potential gains.[45]

The notion of "presumed" willingness contradicts many people's understanding of donation as a deliberate gift. Critics argue it risks commodifying the body and can be perceived as state overreach ("organ conscription").[46] In multicultural societies, this can intensify suspicions, especially where religious or cultural attitudes to the body after death are sensitive topics. For instance, the Latin American context shows that abrupt or poorly communicated policy changes can lower trust and increase opt-outs, as initially seen in Chile.[47]

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[41] Harriet Marsden, "The Pros and Cons of 'Opt Out' Organ Donation" *The Week*, Mar. 17, 2025.

[42] Organ donation: Opt-out Defaults Do Not Increase Donation Rates, *available at:* https://www.mpg.de/23726833/1113-bild-organ-donation-opt-out-defaults-do-not-increase donation-rates-149835-x (last visited on Aug. 2, 2025).

[43] Harriet Rosanne Etheredge, "Assessing Global Organ Donation Policies: Opt-In vs Opt-Out" 14 *Risk Management and Healthcare Policy* 1985–1998 (2021).

[44] Nicola J Williams , Laura O'Donovan, *et.al.*, "Presumed Dissent? Opt-out Organ Donation and the Exclusion of Organs and Tissues" 30(2) *Medical Law Review* Spring 268–298 (2022).

[45] *Ibid.*

[46] *Ibid.*

[47] *Supra* note 43.

The opt-out donation regime is not a panacea for organ shortages. Without heavy investment in public education, family engagement, cultural sensitivity, and healthcare logistics, it can even backfire. Countries considering opt-out models must proceed cautiously, learning from the missteps and lessons of others. Countries like Chile, Greece, Brazil, and even England in some respects, highlight the pitfalls when presumed consent is implemented without adequate safeguards.

## 5. Laws About Organ Transplantation in India

An organ transplant gives individuals who have organ failure at its worst stage the possibility to live again. The chief legal rules for human organ transplantation in India are found in the Transplantation of Human Organs Act (THOA), 1994 which sorts out details of the organ removal, storage and transplantation process to avoid unauthorized trading of organs. It represents a key step forward in making transplantation consistent in India by complying with both ethical and legal standards.[48]

The management of health affairs in India is a state subject. That means while the THOA is central law, it does not become automatically applicable to states rather they have to adopt it by resolution passed in that behalf under Art. 252(1) of the Constitution of India. Maharashtra, Himachal Pradesh and Goa had asked for the Act, so there it was applicable from the beginning. Nearly all the states have now adopted it except Andhra Pradesh and Jammu & Kashmir. Despite the strong efforts to curb illegal trade and regulate organ donation still, there were reports of illegal organ trafficking, with the first version of the Act.[49]

In 2009, Goa, Himachal Pradesh and West Bengal had proposed amendments in the 1994 Act to the shortcomings. The upgrades were designed to focus the framework more on current needs, improve the system for governing transplantation and boost how clearly policies for organ donation and transplantation are communicated. The changes brought about the Transplantation of Human Organs (Amendment) Act, 2011, drafted by Parliament and followed by adoption of the THOA Rules, 2014. Additional steps and documentation rules were added to the regulations to make sure administration remains overseen and ethical.[50]

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[48] S. Shroff, *et. al.*, "Cadaver Organ Donation And Transplantation - An Indian Perspective," 35 *Transplantation Proceedings* 15–17 (2003).

[49] Francis L. Delmonico, *et. al.*, "Ethical Incentives — Not Payment — For Organ Donation," 346 *New England Journal of Medicine* 2002–2005 (2002).

[50] *Supra* note 10 at 348-355.

As per the THOA a donor may allow the removal of his organs or tissues, at any point prior to his death.[51] Such approval shall be executed in writing by the use of Form 7 as stipulated under the Rules, and shall be made while two or more witnesses are present, and one of such witnesses shall be a close family of the donor. If this sanction has not been withdrawn before the intended donor's death, the person in possession of the deceased's corpse is obligated to enable the donation.[52] Nonetheless, the approval of a close family or anyone who is having legal possession of the corpse is necessary for organ retrieval, regardless of the fact that the deceased had already registered himself as an organ donor.[53]

The National Organ and Tissue Transplant Organisation ("NOTTO") offers the opportunity to create a 'donor card', which allows the donation of certain organs upon an individual's death. Nonetheless, the THOA contains no provision for the establishment of such cards. The procedure followed in making of a donor card does not adhere to the guidelines given in section 3 clause 2 of the Act. The legal validity and enforcement of such cards is therefore ambiguous.

Upon the admission of a prospective donor to the ICU of any hospital, the Registered Medical Practitioner (RMP) there is obligated to verify whether the individual has prior to his death consented to the donation of their organs and to get the relevant documents of such consent.[54] If the prospective donor has not consented to donation, the RMP must inform him of his choice to give his organs posthumously.[55] Upon the individual's death, 'brain-stem death' is verified by a panel of medical experts if the person has consented to donation.[56] The hospital thereafter notifies the Human Organ Retrieval Centre in writing on the authorised donation for requisite action.[57]

In situations where the prospective donor did not provide permission for donation prior to his demise, then there could be three situations which would arise:

### 5.1 Permission from Family

The RMP is obligated to inform the close relatives of the possible donor on the choice to consent to or refuse the donation of organs or tissues.[58] Anyone legally in possession of the deceased's corpse has the power allow or disallow the retrieval of any

[51] *Ibid.*
[52] The Transplantation of Human Organs and Tissues Act 1994, s. 3(2).
[53] The Transplantation of Human Organs and Tissues Rules, 2014, rules 5(4)(a) and (b).
[54] *Supra* note 25, s. 3(1A)(i).
[55] *Id.*, s. 3(1A)(ii).
[56] *Id.,* s. 3(5).
[57] *Id.*, s. 3(1A)(iii).
[58] *Id.*, s. 3(1A).

organ if a) the prospective donor had not voiced any unwillingness to organ donation before his death.[59] and b) no proximate related entities object to the contribution.[60] In case the deceased person is a minor, then his parents or guardians may consent to the extraction of his organs for medicinal reasons.[61] Prior to the excision of any organs, the 'brain-stem death' shall have to be validated by a panel of medical professionals.[62] Upon authorisation of the donation, the hospital notifies the Human Organ Retrieval Centre in writing for requisite action.[63]

### 5.2 Unidentified Corpses

If a deceased individual (with certified brain death) remains unclaimed in a hospital or prison, and no near relative claims the body within 48 hours post-mortem, the individual responsible for the management or oversight of the facility may authorise the extraction of any organ or tissue from the body.[64] Nevertheless, physicians should refrain from permitting the extraction of organs if they have grounds to suspect that a close family of the deceased may assert a claim to the corpse, even if such a claim has not been made within 48 hours.

### 5.3 Post-mortem Examination for Medico-legal Reasons

The individual authorised to permit the retrieval of organs of the deceased under the Act may give such permission even when the deceased has to undergo a post-mortem examination for medico-legal purposes (in case of death caused by an accident or unnatural causes) or even for pathological reasons. Nonetheless, the individual sanctioning the removal of organs must verify that the dead did not articulate any objections to organ or tissue donation prior to their death. Consequently, when a post-mortem is necessitated following an individual's demise, the RMP will obtain consent from the donor or their family, subsequently requesting the SHO, SP, or DIG of the region to ensure the prompt extraction of the organs from the deceased.[65]

The Delhi Anatomy Act and other state guidelines are in addition to the national THOA rules on body donation. This legislation directs the supply of bodies to medical schools and it lets THOA help in making that happen. In 2013, a study paper was commissioned by the Parashar Foundation and the MOHAN Foundation to look at how

[59] *Id.,* s. 3(3).
[60] *Supra* note 25, s. 3(3).
[61] *Id.*, s. 3(7).
[62] *Id.*, s. 3(5).
[63] *Id.,* s. 3(1A)(iii).
[64] *Id.,* s. 5.
[65] The Transplantation of Human Organs and Tissues Rules, 2014, rule 6.

organ donation from dead donors operates in Delhi. As part of the study, "A study of the deceased donation environment in Delhi/NCR" examined trends, noted issues, researched international success stories and offered recommendations on how India and the National Capital Region (NCR) might enhance their organ donation services.[66] The research suggested that more public awareness to be provided. It called for all donor registry data to be united and for transplant coordinators to take on more important responsibilities between healthcare staff and family members of donors.[67]

## 6. Challenges of Organ Donation in India

"The Transplantation of Human Organs and Tissues Act of 1994" with the 2014 Rules, was enacted to stop organ trafficking and control transplants across India. No matter its original goal, there are still several problems- like a shortage of organs, murky criteria for new donors, confusing application procedures and complications over what brain-stem death exactly means under the law. If someone suffers brainstem death, usually from a stroke, or injury, they cannot be brought back to normal consciousness by mechanical life support. The Act names certain individuals as deceased for organ transplantation purposes, meaning organs may be taken if consent has been given.[68]

Even so, in India, brain-stem death becomes official for organ transplantation purposes only. Additional laws, for example, the "Registration of Births and Deaths Act, 1969" and BNS, still use irregularities in the body's circulatory or respiratory system to define death. Because of these gaps, physicians are less certain about the law. Even when a brain-stem dead patient is not having organs donated by their family, life support must be kept running by the hospital. This leaves hospitals needing to balance their duties, their responsibilities by law and their use of available resources. Also, there are very few places outside cities where brain death can be detected, through ICU beds and ventilators. For this reason, patients living in smaller facilities or rural areas often miss the opportunity to become donors, even though brain-stem death is now accurately determinable.[69]

Because of the Act's opt-in model, registering to donate organs is still very difficult. Given this principle, individuals are not expected to participate unless they have approved

[66] Reginald Magee, "Art Macabre: Resurrectionists and Anatomists" 71 *ANZ Journal of Surgery* 377–380 (2001).

[67] Kaissar Yammine, "The Current Status of Anatomy Knowledge: Where Are We Now? Where Do We Need to Go and How Do We Get There?" 26 *Teaching and Learning in Medicine* 184–188 (2014).

[68] Surraj Susai, Mrudula Chandrupatla, *et.al.*, "Anatomy Acts Concerning Body and Organ Donations Across The Globe: Past, Present and Future With A Special Emphasis on the Indian Scenario" 56 *Anatomy & Cell Biology* 1 (2023).

[69] Sanjib Kumar Ghosh, "Human Cadaveric Dissection: A Historical Account From Ancient Greece To The Modern Era" 48 *Anatomy and Cell Biology* 153–169 (2015).

themselves. Because people are not sufficiently aware, a great many prospective donors are passed by. If there is no written permission, the Act lets authorized relatives direct organ removal; yet, problems among family members and the fear of legal fallout often keep transplants from happening. The Authorisation Committee which approves gifts that do not come from relatives or exchange gifts, is accused of causing delays in its procedures. According to the Rules, governments should judge as quickly as possible, although this speed is not clearly stated in the document. Patna High Court has recommended judges render rulings in one month, but this is not always followed.[70] These challenges require several changes to be made. It is necessary that brain-stem death be recognized in each medical statute rather than being limited only to organ transplants. Neurological changes need to be added to the agreement on death in the RBD Act and BNS.

**7. Lessons For India**

Instead of getting a person's permission which is what opt-in means, opt-out means adults are considered potential organ donors unless they actively choose not to. In Spain, Austria and France, the opt-out models have produced good and improved results. Such a model may assist India also which faces both organ scarcity and problems related to cultural beliefs about organ donation.[71]

Spain's system for organ donation is seen by many as the world standard. Although the law allowed for mild opt-out in 1979, the big change came when the National Transplant Organisation (ONT) began in 1989. This association is responsible for all of Spain's organ donation and transplant programs and means to professionalize the whole process. In Spain, hospitals have transplant coordinators available, who make sure likely donors are identified and referred quickly and that dialog with the families be easily ensured. Although Spain legalizes donation from those who have not opposed, families are always contacted to ensure their views are included. The approach Spain takes which is both caring and efficient, makes it the world's leader with 40 or more donors per million citizens.[72]

Implied permission in Austria takes the form of a very rigid opt-out system. If the dead hasn't objected to the procedure, the legislation doesn't require family members to be consulted. Because the state wants to safeguard lives, it is believed that a donation should

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[70] Omar Habbal, "The Science of Anatomy: A Historical Timeline" 17 *Sultan Qaboos University Medical Journal* 18–22 (2017).

[71] N. Wig, *et.al.*, "Awareness of Brain Death and Organ Transplantation Among High School Children," 66 *Indian Journal of Pediatrics* 189–192 (1999).

[72] Alberto Abadie and Sebastien Gay, "The Impact of Presumed Consent Legislation on Cadaveric Organ Donation: A Cross-country Study" 25 *Journal of Health Economics* 599–620 (2006).

receive priority consideration. People in Austria give organs more often than in many other countries, mainly because of strong support from lawmakers and an advanced health system for quick organ procurement. Some critics believe that the method used by Austria could deny people's freedom if they are unaware of the laws or unable to show disagreement for any reason.[73]

The change to a hard opt-out system in France in 2017 represents a good example of a hybrid model. Consent to use personal data is given unless a person has their own record in the national refusal registry. Yet, families no longer enjoy the absolute right to reject the organ retrieval, but anything mentioned to relatives by a child may still get considered if it's recorded properly. Public awareness among young people was improved through supported education campaigns from the French government. The purpose was to make donating part of our sense of community responsibility. Though early numbers suggest a small rise in donations, ethical talks are still ongoing about how implications of consent work and how transparency between health organizations and the public can be upheld.[74]

To judge how relevant these models are in India, we must take account of the country's laws, culture and infrastructure. Since 1994, the Transplantation of Human Organs and Tissues Act has governed India's choice of an opt-in framework for organ donation. Even with excellent work by NOTTO and other amendments, the number of organ donors each year is low at just 0.65 donors for every million people. In addition, most European countries that do well also see between 15 and 20 donors per million. Because the gap is very wide, opt-out choices may play a part in bringing about needed reforms.[75]

At the same time, putting opt-out laws into Indian law will face many big challenges. Personal consent is given top importance by Indian law in medical ethics matters. According to Article 21 of the Constitution, the implied consent approach could go against our personal rights to life, liberties and bodily autonomy. When there are no detailed rules to protect them, public health workers might treat those of low means in ways that make implied consent unjust or exploitative.[76]

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[73] Lucy D. Horvat, *et.al.*, "Informing the Debate: Rates of Kidney Transplantation in Nations With Presumed Consent" 153 *Annals of Internal Medicine* 641–649 (2010).

[74] M. Usman Ahmad, *et.al.*, "A Systematic Review of Opt-out Versus Opt-in Consent on Deceased Organ Donation and Transplantation (2006–2016)" 43 *World Journal of Surgery* 3161–3171 (2019).

[75] Firat Bilgel, "The Impact of presumed Consent Laws and Institutions on Deceased Organ Donation" 13 *European Journal of Health Economics* 29–38 (2012).

[76] Alberto Molina-Pérez, David Rodríguez-Arias, *et.al.*, "Differential Impact of Opt-in, Opt-out Policies on Deceased Organ Donation Rates: A Mixed Conceptual and Empirical Study" 12 *BMJ Open* e057107 (2022).

Indian culture reflects many beliefs and religious practices that determine people's opinions about organ donation. The number of religious groups believe in the idea of bodily integrity after death. A number of scholars argue that performing funeral rites may stand between the dead and their spiritual fate. Skipping over these concerns might cause the public to disapprove and put more trust in the healthcare system at risk. Because dissent from the public caused Britain to reverse its similar law, Brazil's own experience underlines the risks of not involving society enough when making such decisions.[77]

In addition, India does not currently have the resources necessary to carry out a straightforward opt-out mechanism. Many hospitals do not have enough workers certified in transplantation, do not use consistent standards to declare brain death and lack adequate means of preserving and conveying the organs to recipients. Nations such as Spain, had achieved the success more from coordination and training than simply passing new laws. If we lack these basic requirements then implied consent legislations would become merely an article of aesthetics rather than actual authority.[78]

Still, India could learn much from the way the United States has dealt with the disease. Starting out, India could put some states or groups such as officially listed drivers or insured members, under the assumed permission rule, while permitting entire families to disagree by not following the requirement. It would allow the system to be tested and improved before being rolled out for the whole country. A second option which could be tried is to create a list of people who have made their wishes known and make it digitally accessible for the public awareness. India must make sure to invest in training coordinators, standardize the legal system and ensure that families receive proper and clear treatment from start to finish.[79]

Informational sessions shall be made necessary for all state governments to be imparted to public at large. A large part of Spain's success comes from the regular, varied programs that discuss organ donation and deal with related problems. To change the way organ donation is discussed, India should include people of different faiths, leaders in the community and teachers.[80] A truly effective opt-out movement requires people to be open

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[77] Aric Bendorf, *et.al.*, "Socioeconomic, Demographic and Policy Comparisons of Living and Deceased Kidney Transplantation Rates Across 53 Countries" 18 *Nephrology* 633–640 (2013).

[78] Brian J. Boyarsky, *et.al.*, "Potential Limitations of Presumed Consent Legislation" 93 *Transplantation* 136–140 (2012).

[79] Institute of Medicine (US) Committee on Assessing Genetic Risks, *et.al.*, *Social, Legal, and Ethical Implications of Genetic Testing* (National Academies Press (US), 1994).

[80] Jane Parry, "Breaches of Safety Regulations are Probable Cause of Recent SARS Outbreak, WHO Says" 328 *BMJ* 1222 (2004).

and carefully watched.[81] Be certain about how people's right to object are laid out, how objections are handled and how problems can be solved. Such a view may not properly develop in the community if this balance is missing, with those who are below the economic threshold refusing to see the policy as suitable.[82]

Even though Spain, Austria and France's opt-out measures are useful examples, they must be carefully changed to suit India's legal, social and healthcare settings.[83] A smooth shift to the new system calls for legislative changes, support from the public, better infrastructure and strong morals and ethics.[84] If foreign methods are adjusted to fit the situation in India, the nation stands a better chance of finally closing the huge gap between those needing organs and those whose lives can be saved.[85]

## 8. Conclusion

The success of Spain's opt-out law depends both on its law and on how the system is put together. Spain's worldwide leadership in organ donation has improved greatly due to ONT's creation, the education imparted to transplant coordinators in hospitals and new efforts made to locate more donors. Trust from the public which grows when transparency in system is improved and real time information is shared is crucial. France makes it simple for people to opt-out, and also notifies the family before retrieval of organs from deceased's body to obtain their consent and hence keeps a balance between privacy and what's good for society as a whole. In Austria, it is thought that consent has been given, so objections from the family have no effect on the law. Although this has caused more donations, opposed voices argue it weakens principles about making informed decisions and having personal freedom.[86] The opt-out model has potential advantages such as increasing the donor pool and normalizing donation but its effectiveness depends heavily on complementary factors such as public trust, transparency, healthcare infrastructure, and education. Countries like Spain, France and Austria show that opt-out works best with strong administrative and ethical

[81] Jeanne Guillemin, "Scientists and the History of Biological Weapons: A Brief Historical Overview of the Development of Biological Weapons in the Twentieth Century" 7 *EMBO Reports* (2006).

[82] Stefan Riedel, "Biological Warfare and Bioterrorism: A Historical Review," 17 *Baylor University Medical Center Proceedings* 400–406 (2004).

[83] Thachamvally Riyesh *et. al.*, "Laboratory Acquired Buffalo Pox Virus Infection, India" 20 *Emerging Infectious Diseases* 325–326 (2014).

[84] Eva Pilot, *et. al.*, "Towards Sustainable Public Health Surveillance in India: Using Routinely Collected Electronic Emergency medical Service Data for Early Warning of Infectious Diseases" 9 *Sustainability (Switzerland)* (2017).

[85] John J. Ewel, *et. al.*, "Deliberate Introductions of Species: Research Needs" 49 *BioScience* 619–630 (1999).

[86] J. Rosel, *et.al.*, "Discriminant Variables Between Organ Donors and Nondonors, A Post Hoc Investigation" 9 *Journal of Transplant Coordination* 50–53 (1999).

frameworks. In contrast, countries like Chile, Greece, Brazil, and even England in some respects, highlight the pitfalls when presumed consent is implemented without adequate safeguards.

Meanwhile, the approach India follows now comes across a number of hurdles. There is no enough public awareness, religious and cultural hurdles, underdeveloped procedures to handle donated organs and not enough qualified doctors and proper facilities, mainly in rural locations. Common myths discouraging donation are, that someone will benefit from the donation at another person's expense or that a deceased person becomes less respected after organ donation, and some religious beliefs also disallow donation such as the concept of rebirth in hindu mythology, these are some of the reasons which often cause families to deny organ donation. It's possible that even registered donors will have their wishes abandoned by family if the family does not understand the situation or is highly emotional. Since the health system is already strained and not be able to deliver proper care to patients, it limits the effectiveness of any new legislation covering organ donation.

For adoption of an opt-out model, India needs to move forward by gradually and clearly planning its steps. Public involvement is important and it should be followed with experiments in specific locations. Consultations with healthcare workers, lawyers, religious authorities and civil society members can help produce a framework that matches the needs of India's population. When public awareness and infrastructure strengthening were carried out gradually, the nation will become ready for the transformation in all aspects. Building better transplant infrastructure is very important. There should be trained transplant coordinators in Indian hospitals to handle each stage, from searching for donors to advising and obtaining consent from the families of the deceased. Real-time systems that display organs availability at national and state level needs to be strengthened where already present and needs to be introduced where missing.

The existing framework established by the Transplantation of Human Organs and Tissues Act (THOTA), 1994, functions based on express agreement. Although THOTA establishes regulations for organ retrieval and transplantation, including punitive measures against commercial transactions, it inadequately addresses the structural obstacles that impede donations. Transitioning to an opt-out model requires not just legislative modification but also fundamental alterations in the relationship between individual rights, governmental obligations, and healthcare ethics.

Any initiative towards implied consent must comply with Article 21 of the Indian Constitution, which ensures the right to life and personal liberty. The idea of physical

autonomy is fundamental to this right, and any rule assuming consent must include channels for persons to express protest readily and effectively. This entails establishing a legal duty for the state to provide extensive knowledge, accessible opt-out registers, and open protections against pressure or exploitation. Moreover, India's diversified culture, characterised by varied religious and cultural views, need a culturally attuned legal system. The legislation should be designed to provide religious exemptions and preserve the autonomy of the family unit where appropriate.

From a legal scholar's viewpoint, the implementation of an opt-out system in India is not only a legislative action but a multifaceted reconfiguration of legal standards, ethical implications, and institutional practices. While legally viable, its success hinges on meticulous legislative drafting, constitutional conformity, public trust cultivation, and administrative readiness. By using worldwide best practices and tailoring them to India's own legal and social environment, the legislation may effectively bridge the gap between demand and supply in organ transplantation, thereby reshaping India's organ donation landscape in a fair and equitable way.

# Misinformation and Disinformation: Threats to Information Ecosystem in the Modern Era

*Sumiti Ahuja**

**ABSTRACT**

*In an age where information is instantly accessible, the spread of false and misleading content—whether intentional (disinformation) or unintentional (misinformation)—poses a significant threat to the global information ecosystem. During the COVID-19 pandemic, WHO Director-General Tedros Adhanom Ghebreyesus warned that the world was confronting not only an epidemic but an "infodemic," as misleading content circulated with the same speed and danger as the virus itself. The internet and social media have amplified this challenge, enabling false information to reach vast audiences at minimal cost and unprecedented scale. Such distortions of truth undermine human security, obstruct justice, and create barriers to accessing reliable information. The rapid expansion of Artificial Intelligence has further intensified vulnerabilities within digital information spaces worldwide.Sustainable Development Goal 16, promoting "Peace, Justice and Strong Institutions," particularly Target 16.10, emphasizes public access to accurate information and the protection of fundamental freedoms. In India, Article 19(1)(a) guarantees free speech while simultaneously placing a responsibility on institutions and individuals to ensure the dissemination of truthful information. Several legal and policy initiatives—such as the IT Rules 2021, the Disaster Management Act 2005, and the Digital Personal Data Protection Act 2023—seek to address these challenges. Globally, the UN's "Global Principles for Information Integrity" aim to build healthier information environments grounded in human rights and sustainable development. Ensuring information integrity and advancing the SDGs ultimately require the coordinated efforts of governments, tech companies, media, and the public.*

***Keywords:*** *Fake News, Misinformation, Disinformation, Co-regulation, Algorithmic Accountability.*

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## 1. Introduction

Disingenuous information can now be produced easily and realistically, thanks to the rapid advancements in information and communication technologies (ICT) and their growing pervasiveness.[1] It can also be disseminated to a targeted audience at a never-before-seen speed and scale, including through artificial intelligence (AI) techniques. Misinformation and disinformation pose immense risks to the information ecosystem in the contemporary era. There are severe repercussions with wide-ranging effects. Effective action is essential to strengthen the integrity of information spaces to maintain freedom of expression and democratic participation.

Misinformation is defined as incorrect or misleading information that may or may not have a specific harmful intent. It encompasses inaccurate, incomplete, misleading, or deceptive information, as well as selective or half-truths.[2] Disinformation, on the other hand, is misinformation coupled with the intent to deceive. Both misinformation and disinformation may be false. The essential distinction is the intent behind them. Misinformation is shared without malevolent purpose, whereas disinformation is false information shared intentionally to deceive.[3] The key causes of the rise in disinformation and misinformation are diminishing faith in the mass media, the impact of blogging, the social media, and the proliferation of "clickbait media".[4]

The key challenges in dealing with misinformation are identifying and separating it from genuine content.[5] This complexity derives from the rapid expansion and dissemination of information *via* digital platforms. Furthermore, balancing the fundamental right to free speech and expression with content regulation by state actors presents a significant

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[1] Jon Bateman and Dean Jackson, *Countering Disinformation Effectively: An Evidence-Based Policy Guide* 1-4 (Carnegie Endowment for International Peace, 2024), *available at*: https://carnegie-production-assets.s3.amazonaws.com/static/files/Carnegie_Countering_Disinformation_Effectively.pdf (last visited on Dec. 20, 2024).

[2] Yanmengqian Zhou and Lijiang Shen, "Processing of Misinformation as Motivational and Cognitive Biases" 15 *Frontiers in Psychology* 1 (2024).

[3] Insights, "Misinformation vs. Disinformation", *available at*: https://insights.taylorandfrancis.com/social-justice/misinformation-vs-disinformation/ (last visited on Dec. 20, 2024).

[4] Clickbait media is content that uses dramatic headlines or visuals to entice readers to click a link. The idea is to drive traffic to a website or blog to earn money through advertisements. [See Michael Paulyn, "What Is the Meaning of Clickbait and Is It Dangerous?" Apr. 20, 2024, *available at*: https://www.avg.com/en/signal/what-is-clickbait-is-it-dangerous (last visited on Dec. 23, 2024)].

[5] Esma Aïmeur, Sabrine Amri, *et.al.*, "Fake news, Disinformation and Misinformation in Social Media: A Review" 13 *Social Network Analysis and Mining* 8 (2023).

challenge. It involves considerable planning to avoid censorship while effectively addressing harmful misinformation.[6]

Misinformation and disinformation can negatively impact the Sustainable Development Goals (SDGs) by undermining the efforts to promote sustainable development, peace, and security.[7] Misinformation and disinformation can threaten: (i) 'democracy' by undermining trust in institutions and elections, and fueling societal divisions; (ii) 'public health' by jeopardizing efforts to address pandemics and other public health issues; (iii) 'environment' by weakening the efforts to conserve oceans, seas, and marine resources, and to address climate change; (iv) 'peace and security' by subverting the efforts to promote peace and security, and to resolve conflicts; and (v) 'vulnerable communities' by the targeting of marginalized and vulnerable communities, and further their social, economic, and political exclusion.[8]

The author has tried to elaborate upon the importance of information and access to information for citizens as part of SDGs, risks posed by mis- and disinformation due to continuous growth and advancement in information technology, measures taken at both national and global level to counter this ever-growing menace.

## 2. Importance of Information

Information is a fact, thought, or data given or described *via* many modes of communication, such as written, oral, visual, and auditory communications.[9] It is knowledge acquired or communicated by study, instruction, investigation, or news, and is shared through the act of communicating, whether audibly, non-verbally, visually, or in writing.[10]

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[6] Prof. Rasmus Kleis Nielsen, "How to Respond to Disinformation While Protecting Free Speech", *Reuters Institute for the Study of Journalism*, Feb. 19, 2021, *available at*: https://reutersinstitute.politics.ox.ac.uk/news/how-respond-disinformation-while-protecting-free-speech (last visited on Dec. 29, 2024).

[7] United Nations, "Information Integrity and the Sustainable Development Goals", *available at*: https://www.un.org/sites/un2.un.org/files/information-integrity-and-sdgs-en.pdf (last visited on Dec. 29, 2024).

[8] OECD, "Mis- and disinformation", *available at*: https://www.oecd.org/en/topics/disinformation-and-misinformation.html (last visited on Dec. 29, 2024).

[9] Colin James, "The 4 Types of Communication – Definitions and Examples", *available at*: https://colinjamesmethod.com/the-4-types-of-communication/ (last visited on Dec. 26, 2024).

[10] Indeed Editorial Team, "6 Types of Information (With Examples)", *available at*: https://www.indeed.com/career-advice/career-development/types-of-information (last visited on Dec. 26, 2024).

Information is of vital importance for the public at large and is equated to a public good.[11] It is so because, information is both, non-rivalrous and non-excludable. In other words, there is no dearth of information, it is something which if used by one, does not affect the ability of others to make use of it (non-rivalrous); it is also of such a nature that no individual should be prevented from accessing information (non-excludable).[12]

The importance of information for the public at large is mainly five-fold.[13] First, it promotes democracy, as accessibility to information is an essential component of democracy and is inextricably tied to freedom of speech. It enables citizens to make informed decisions about problems that are pertinent to them and to determine if the governments are keeping their commitments. Second, it enhances the accountability of the government, since information helps to guarantee that the government is transparent and accountable to its citizens. Third, access to information contributes to trust building by strengthening the bond of trust between any government and its citizens. Fourth, it promotes the rule of law, as access to information is both a right as well as a multiplier of other rights[14], forming an integral part of the freedom of speech and expression and working towards the promotion of the rule of law. Finally, it furthers the empowerment of citizens, as the basic object of the right to information is empowerment of citizens and the promotion of vigilance amongst them, so that the government is transparent and accountable.

India, in the year 2005, passed the Right to Information Act (RTI Act)[15] , which grants citizens the right to access information. Long Title of the RTI Act, *inter alia*, states that

"……….to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority……".[16]

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[11] For a good to qualify as 'public good', the former must be non-rivalrous and non-excludable. It means, something which if consumed by one, does not affect the ability of the other to consume it (non-rivalrous); it should not be of such a nature that any individual can be prevented from its consumption (non-excludable). [See Stanford Encyclopedia of Philosophy, "Public Goods", Jul. 21, 2021, *available at*: https://plato.stanford.edu/entries/public-goods/ (last visited on Dec. 27, 2024)].

[12] John M. Abowd, "Private and Public Data Provision in the U.S." (Jan. 2007), *available at*: https://ecommons.cornell.edu/server/api/core/bitstreams/082711d7-ecfa-42c1-bbb3-99719afeeab8/content (last visited on Dec. 27, 2024).

[13] Laura Neuman (ed.), *Access to Information: A Key to Democracy* (The Carter Center, United States, 2002), *available at*: https://www.cartercenter.org/documents/1272.pdf (last visited on Dec. 28, 2024).

[14] UNESCO, "Right to Information", *available at*: https://www.unesco.org/en/right-information (last visited on Dec. 30, 2024).

[15] The Right to Information Act, 2005 (Act 22 of 2005).

[16] See The Right to Information Act, 2005 (Act 22 of 2005), *available at*: https://www.indiacode.nic.in/bitstream/123456789/2065/5/a2005-22.pdf (last visited on Dec. 29, 2024).

Apart from this, information also plays crucial role in personal growth of an individual, as it helps the latter in making informed decisions towards achievement of his/her goals. The flow of information facilitates social integration and development, as well as the coordination and control of people's actions.[17]

### 3. Misinformation and Disinformation: Meaning

False or erroneous information, a misrepresentation of the facts, is known as misinformation. False information purposefully meant to mislead or, intentionally misrepresent the facts is known as disinformation.[18] In other words, disinformation is false, inaccurate, or misleading information that is shared with the intent to deceive the recipient, as opposed to misinformation which refers to false, inaccurate, or misleading information that is shared without any intent to deceive.[19]

Misinformation and disinformation are phenomena that are being examined more and more; in other words, they are now identified as a significant social issue that is being researched a lot around the world and seems to be becoming a bigger worry. Given the abundance of erroneous number of hoax claims on COVID-19 that were made and disseminated during the pandemic, such a measure does not come as a surprise. The Director General of the World Health Organization (WHO), Tedros Adhanom Ghebreyesus,[20] while addressing the issue of misinformation said, "We're not just fighting an epidemic; we're fighting an infodemic[21]", and pointed out that misleading information that was doing rounds during such sensitive times was spreading as fast as the virus, and was as dangerous[22] as the

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[17] LIS Education Network, "The Needs and Importance of Information", Jan. 06, 2014, *available at*: https://www.lisedunetwork.com/the-needs-and-importance-of-information/ (last visited on Dec. 29, 2024).

[18] American Psychological Association, "Misinformation and Disinformation", *available at*: https://www.apa.org/topics/journalism-facts/misinformation-disinformation (last visited on Dec. 29, 2024).

[19] Canadian Centre for Cyber Security, "How to Identify Misinformation, Disinformation, and Malinformation (ITSAP.00.300)" (May 2024), *available at*: https://www.cyber.gc.ca/en/guidance/how-identify-misinformation-disinformation-and-malinformation-itsap00300 (last visited on Dec. 30, 2024).

[20] Ethiopian diplomat, scholar, biologist, public health officer, who assumed the office of Director-General of WHO in 2017, becoming the First African to hold that position. [See Kara Rogers, "Tedros Adhanom" *Encyclopedia Britannica*, *available at*: https://www.britannica.com/biography/Tedros-Adhanom (last visited on Dec. 30, 2024)].

[21] The novel coronavirus (nCov) has brought back this phrase, which was first used during the SARS pandemic. It is defined as "an abundance of information about a problem that is considered detrimental to its solution" [See Dictionary.com, "Infodemic", *available at*:https://www.dictionary.com/browse/infodemic (last visited on Dec. 31, 2024)].

[22] United Nations Department of Global Communications, "UN Tackles 'Infodemic' of Misinformation and Cybercrime in COVID-19 Crisis", Mar. 31, 2020, *available at:* https://www.un.org/en/un-coronavirus-communications-team/un-tackling-%E2%80%98infodemic%E2%80%99-misinformation-and-cybercrime-covid-19 (last visited on Dec. 31, 2024).

latter. Several fake videos and articles were being circulated on social media: how to cure COVID-19 by drinking alcohol, or, how vegetable vendors were licking vegetables to spread the virus, on how cow urine kills the virus, on complete lockdown lasting for more than three months, xenophobia[23], etc.

The virtue of knowledge is threatened by mis/disinformation. In the digital age, where consumers of media platforms are exposed to a variety of convincing assertions with dubious provenance and a lack of authenticity, this scenario is especially pertinent.[24] At its core, disinformation is an assault on the veracity of knowledge. The information ecosystem becomes contaminated when people believe incorrect information to be true and it spreads throughout society.[25] This is especially the case in the field of politics, which is where the concept of post-truth[26] originated. According to a study,[27] the purpose of disinformation could be scientific purpose, political propaganda, cultural purpose, financial purpose, advertising or clickbait, humorous purpose, religious propaganda, and at times, there may not be any specific purpose at all.

## 4. Misinformation and Disinformation: Threats to the Information Ecosystem & Measures To Combat

### 4.1 Threats to the Information Ecosystem

An information ecosystem is a complex system that describes the flow and transformation of information through a network of people, tools, and institutions.[28] The intricate web of information sources, audiences, and technology that influence the production, dissemination, and consumption of information is referred to as an

[23] Attitudes, biases, and actions that despise, exclude, and even demonize individuals because they are considered to be outsiders or foreigners to the community, culture, or sense of national identity. [See EMN Asylum and Migration Glossary, "Xenophobia", *available at*: https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/xenophobia_en (last visited on Jan. 01, 2025)].

[24] Marta Pérez-Escolar and Darren Lilleker, "A Systematic Literature Review of the Phenomenon of Disinformation and Misinformation" 11(2) *Media and Communication* 76 (2023).

[25] Gleb Tsipursky, "Towards a Post-lies Future: Fighting "Alternative Facts" and "Post-truth" Politics" 77(2) *The Humanist*, 12 (2017).

[26] According to Cambridge Dictionary, post-truth is defined as "…a situation in which people are more likely to accept an argument based on their emotions and beliefs, rather than one based on facts" [See Cambridge Advanced Learner's Dictionary & Thesaurus, "Post-truth", *available at*: https://dictionary.cambridge.org/dictionary/english/post-truth (last visited on Jan. 01, 2025)].

[27] *Supra* note 24.

[28] Internews: Center for Innovation & Learning, "Mapping Information Ecosystems to Support Resilience" (2015), *available at*: https://internews.org/wp-content/uploads/legacy/resources/Internews_Mapping_Information_Ecosystems_2015.pdf (last visited on Jan. 01, 2025).

information ecosystem.[29] The public, citizen journalism,[30] social media, and traditional media all engage dynamically to shape the information flow in this ecosystem.[31]

From a technological perspective, it can be inferred that the major factors to have contributed to the increased generation and circulation of mis/disinformation can be said to be as follows. These include the democratization of content generation, which has enabled widespread production and sharing of information; economic incentives and fast-paced news cycles, which encourage rapid dissemination without adequate verification; widescale and prompt reach facilitated by digital platforms; deliberately created filter-bubbles that limit users' exposure to diverse viewpoints; algorithmic content curation and the absence of transparency in how such systems operate; and the scalability and anonymity in online accounts, both of which allow mis/disinformation to spread quickly and often without accountability.

*Democratization of content generation*: The democratization of content generation refers to making it easier for people to generate and distribute digital content.[32] It allows ordinary users to produce, edit, personalize, and distribute digital content, something which earlier could only have been possible by traditional content suppliers in established media businesses. This has been made feasible by the introduction of new technology such as AI and cloud computing,[33] as well as the increased availability and lower cost of new media tools.[34] Some benefits of democratization of content creation are that it is more inclusive, more diverse, it has leveled the playing field for businesses of all sizes, and has blurred the lines of distinction, to some extent, between amateur and professional content creators.

*Economic incentives and fast-paced news cycles*: The more hits a story receives, the more money is generated through ad revenue. To increase the number of hits/clicks, content

[29] See Fiveable: Honors Journalism, "Information Ecosystem", *available at*: https://library.fiveable.me/key-terms/hs-journalism/information-ecosystem (last visited on Jan. 03, 2025).

[30] Type of journalism in which citizens or non-professionals collect and disseminate news and information. Citizen journalists disseminate their work *via* websites, blogs, and social media. [See Sonny Albarado, "Citizen Journalism" *Encyclopedia Britannica*, Jan. 25, 2024, *available at*: https://www.britannica.com/topic/citizen-journalism (last visited on Jan. 05, 2025)].

[31] Kehinde Segun, "Exploring the Impact of Citizen Journalism on Traditional Media" 1(3) *International Journal of Human Research and Social Science Studies* 63-73 (Sep., 2024).

[32] Joshua, "The Democratization of Content Creation: How AIGC Makes it Accessible and Affordable", *available at*: https://quickcreator.io/articles2/aigc-democratization-content-creation/ (last visited on Jan. 03, 2025).

[33] Delivery of computing services *via* the internet, or "the cloud". It enables customers to access computing resources such as storage, servers, and databases on demand. [See Microsoft Azure, "What is Cloud Computing?: A Beginner's Guide", *available at*: https://azure.microsoft.com/en-us/resources/cloud-computing-dictionary/what-is-cloud-computing (last visited on Dec. 30, 2024)].

[34] Oxford Reference, "Democratization of Content", *available at*: https://www.oxfordreference.com/display/10.1093/acref/9780191800986.001.0001/acref-9780191800986-e-3140 (last visited on Dec. 30, 2024).

creators compete to provide attention-grabbing material that appeals to consumers' emotions or cognitive biases,[35] given the fast-paced news cycle and multiple information sources.

*Widescale and prompt reach*: Content created in any part of the world, can be viewed in any other part of the world, nearly instantaneously.[36] Furthermore, content creators receive rapid feedback on the performance of their content *via* likes, share, comments, reactions, etc. The latter emphasizes upon the interactivity part of the digital content creation and dissemination.[37]

*Deliberately created filter-bubbles*: When algorithms provide us with information that aligns with our beliefs based on our past behaviour and search history, it can lead to a state of intellectual or ideological isolation known as a "filter bubble".[38] Organisations that want to disseminate mis/disinformation might purposefully produce filter bubbles by precisely and directly targeting potentially vulnerable people, for example, through sponsored posts or advertisements.[39]

*Algorithmic content curation and absence of transparency*: The practice of selecting, organizing, and presenting content to consumers based on their preferences and behaviours is known as algorithmic curation.[40] Online platforms, like social media and search engines, employ it. However, these algorithms are not transparent to end users. Due to this intricacy, viewers may find it difficult to comprehend why they are experiencing particular online watching experiences, where the information was actually coming from, or even that their experiences differ from those of other users.[41]

*Scalability and anonymity in online accounts*: The weak identity and account management systems of many online platforms can be used by individuals who want to

[35] Buster Benson, "Cognitive Bias Cheat Sheet" *Medium*, Sep. 01, 2016, *available at*: https://buster.medium.com/cognitive-bias-cheat-sheet-55a472476b18 (last visited on Dec. 30, 2024).

[36] Centre for Media Transition, *The Impact of Digital Platforms on News and Journalistic Content* 42 (University of Technology Sydney, NSW, 2018).

[37] Hamidreza Shahbaznezhad, Rebecca Dolan, *et.al.*, "The Role of Social Media Content Format and Platform in Users' Engagement Behavior" 53(1) *Journal of Interactive Marketing* 47 (2021).

[38] Richard Fletcher, "The Truth Behind Filter Bubbles: Bursting Some Myths" *Reuters Institute*, Jan. 24, 2020, *available at*: https://reutersinstitute.politics.ox.ac.uk/news/truth-behind-filter-bubbles-bursting-some-myths (last visited on Jan. 02, 2025).

[39] Janna Anderson and Lee Rainie, "The Future of Truth and Misinformation Online", Oct. 19, 2017, *available at*: https://www.pewresearch.org/internet/2017/10/19/the-future-of-truth-and-misinformation-online/ (last visited on Jan. 01, 2025).

[40] Ambika Sharma, "Algorithmic Content Curation: Crafting the Ultimate User-First Experience" *Pulp Strategy*, Aug. 22, 2023, *available at*: https://www.pulpstrategy.com/algorithmic-content-curation-crafting-the-ultimate-user-first-experience (last visited on Jan. 02, 2025).

[41] Arunesh Mathur, Arvind Narayanan, *et.al.*, "Endorsements on Social Media: An Empirical Study of Affiliate Marketing Disclosures on YouTube and Pinterest" 2(CSCW) *Proceedings of the ACM on Human-Computer Interaction* 119:11 (Nov., 2018).

disseminate misinformation to create many accounts (also referred to as 'Sybils' or 'bots')[42] in order to, for instance, pretend to be authentic followers of a political or socio-welfare movement and/or fabricate the appearance that a certain piece of content is well-liked.[43]

It is believed that psychological factors make people susceptible to think and act on misinformation. Misinformation that presents opponents in an unfavorable light is more likely to be believed by people than misinformation about their group. Lastly, even when information contradicts prior knowledge, people are more inclined to trust it if repeated.[44] Exposure to incorrect information, according to behavioural models, increases the likelihood that people would believe it, and thus the likelihood that they will spread it. Spreading false information, on the other hand, does not require individuals to accept it; they can do so to express their political allegiance, disparage opponents they regard as rivals, or obtain social benefits.[45] While older people are more likely to follow and disseminate false information on social media, they may also be more adept at identifying disinformation than younger people.[46]

### 4.2 Measures to Combat

Two main types of interventions have been suggested to avert the growth and dissemination of false information, *viz.*, system-level interventions, such as laws and technological standards which concentrate on significant systemic changes; and individual-level interventions, which aim to modify specific behaviours. Individual-level initiatives often have fewer implications for freedom of expression and rely less on collaboration from tech businesses, but system-level interventions may be more effective in limiting the spread of erroneous information.[47]

[42] Sybils are illegal entities that pose as legitimate individuals, whereas bots are automated programs that can participate in misleading or dangerous behaviour. Their existence can result in erroneous estimates of wallet repute and power, potentially jeopardizing the dependability of decentralized ecosystems. [See Emmmanuella Dan, "Solving the Sybil and Bot Problem: How 0xScore Enhances Decentralized Systems" *Medium*, Jan. 23, 2024, *available at*: https://medium.com/@danemmanuella1999/solving-the-sybil-and-bot-problem-how-0xscore-enhances-decentralized-systems-0328e4bdeed6 (last visited on Jan. 03, 2025)].

[43] Zoe Adams, Magda Osman, *et.al.*, "(Why) Is Misinformation a Problem?" 18(6) *Perspectives on Psychological Science* 1445 (2023).

[44] American Psychological Association, "What Psychological Factors Make People Susceptible to Believe and Act on Misinformation?", Nov. 29, 2023, *available at*: https://www.apa.org/topics/journalism-facts/misinformation-belief-action (last visited on Dec. 26, 2024).

[45] American Psychological Association, "How and Why Does Misinformation Spread?", Nov. 29, 2023, *available at*: https://www.apa.org/topics/journalism-facts/how-why-misinformation-spreads (last visited on Dec. 27, 2024).

[46] *Supra* note 44.

[47] American Psychological Association, "What Interventions Can be Used to Counter Misinformation Effectively?", Nov. 29, 2023, *available at*: https://www.apa.org/topics/journalism-facts/misinformation-interventions (last visited on Dec. 28, 2024).

Debunking, pre-bunking, literacy training, and nudging approaches focus on changing individual behaviours.[48] Correcting false information is known as debunking or fact-checking.[49] It is applied after people have been exposed to false information, and it works best when it has a thorough justification that disproves false information and substitutes it with accurate information. Fact-checking takes a lot of time, deteriorates over time, and may need to be corrected repeatedly.[50] The goal of pre-bunking, also known as pre-emptive debunking, is to stop individuals from initially believing false information.[51] Psychological inoculation, the most popular pre-bunking technique, involves exposing people to a mild form of a lie to increase their resistance to future persuasion.[52] Literacy training assists people in improving their ability to judge the quality and accuracy of information and complete tasks. Nudges are tiny environmental modifications designed to influence behaviour in predictable and desirable ways.[53] Researchers have employed a variety of nudges to try to discourage people from distributing misinformation: i) Accuracy nudges, to encourage people to think about the truthfulness of information before sharing it,[54] whereas ii) social norms nudges highlight community standards of behaviour when reporting information,[55] and iii) motivational nudges reward people for being as accurate as possible.[56]

## 5. Role of Artificial Intelligence in the Expansion of Threats

The technological miracle of electronic intelligence has catapulted us into an era in which we are building a global society whose reliance on computers is growing

[48] *Ibid.*

[49] Clara Juarez Miro and Jonathan Anderson, "Correcting False Information: Journalistic Coverage During the 2016 and 2020 US Elections" 25(2) *Journalism Studies* 220 (2024).

[50] Ethan Porter and Thomas J. Wood, "The Global Effectiveness of Fact-checking: Evidence From Simultaneous Experiments in Argentina, Nigeria, South Africa, and the United Kingdom", Sep. 10, 2021, *available at*: https://www.pnas.org/doi/10.1073/pnas.2104235118 (last visited on Jan. 02, 2025).

[51] Mauro Bertolotti and Patrizia Catellani, "Counterfactual Thinking As A Prebunking Strategy To Contrast Misinformation on COVID-19" 104 *Journal of Experimental Social Psychology* 2 (2023).

[52] Toby D. Pilditch, Jon Roozenbeek, *et.al.*, "Psychological Inoculation Can Reduce Susceptibility to Misinformation in Large Rational Agent Networks" 9 *Royal Society Open Science* 2 (2022), *available at*: https://pmc.ncbi.nlm.nih.gov/articles/PMC9363981/pdf/rsos.211953.pdf (last visited on Jan. 03, 2025).

[53] The Decision Lab, "Nudge Theory", *available at*: https://thedecisionlab.com/reference-guide/psychology/nudge-theory (last visited on Jan. 04, 2025).

[54] Ethan Porter, Thomas J. Wood, *et.al.*, "Shoves, Nudges and Combating Misinformation: Evidence On A New Approach" *Behavioural Public Policy* 3 (2024), *available at*: https://www.cambridge.org/core/services/aop-cambridge-core/content/view/C2C2837C576F69A0F37F02FD5F9B1CF8/S2398063X24000423a.pdf (last visited on Jan. 04, 2025).

[55] Yifat Nahmias, "Privacy Preserving Social Norm Nudges" 26 *Michigan Technology Law Review* 46 (2019).

[56] Altaf Mazhar Soomro, Gnana Bharathy, *et.al.*, "A Review On Motivational Nudges For Enhancing Building energy Conservation Behavior" 1 *Journal of Smart Environments and Green Computing* 3-20 (2021).

exponentially.[57] AI technologies play a significant role in the current global disinformation epidemic. Such systems compound the problem not just by increasing the likelihood of developing realistic AI-generated fake content, but also, more crucially, by enabling hostile stakeholders to spread disinformation to a targeted audience on a massive scale. In response, more AI systems are being developed to detect and control internet misinformation. Such technologies also do not avoid ethical and human rights considerations, particularly those related to freedom of expression and information.[58]

When there is too much information available, people experience cognitive overload and only engage in matter that confirms their preconceived notions. This effect is exacerbated by AI technology, which makes it possible to create false information and synthetic content. Increased societal division and difficulties in public discourse have resulted from this.

### 5.1 AI as a Facilitator in the Creation & Dissemination of Fake Content

AI has transformed many aspects of human existence and impacted countless businesses. This usage of technology has also generated new obstacles and risks, the most noteworthy of which is deepfakes. "Deepfakes"[59] or "synthetic media"[60] refer to the use of modified digital content, such as hyper-realistic synthetic video, audio, photos, or texts created with powerful AI capabilities, to undermine specific decision-making processes.[61] The primary epistemic hazard is that deepfakes can readily induce individuals to adopt erroneous beliefs. This technique has the ability to create information that is substantially identical to the original material, and impacts target public opinion, social groups, political discourse, and both personal and national security.[62] The use of AI to produce Deepfakes has

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[57] Tom Stonier, *Information and Meaning: An Evolutionary Perspective* 2 (Springer, New York, 2012).

[58] Noémi Bontridder and Yves Poullet, "The Role of Artificial Intelligence in Disinformation" 3 *Data & Policy* e32 (2021).

[59] Realistic images, videos, or sounds made with AI to make individuals or events appear real that did not occur. They are a form of synthetic media that can be used to disseminate misleading information and propaganda. [See Ian Sample, "What are Deepfakes – And How Can You Spot Them?" *The Guardian*, Jan. 13, 2020, *available at*: https://www.theguardian.com/technology/2020/jan/13/what-are-deepfakes-and-how-can-you-spot-them (last visited on Jan. 06, 2025)].

[60] Media that is created or modified using AI, and may include images, videos, text, voice, etc. Deepfake is a popular type of synthetic media. Synthetic media can be used to spread misinformation and can erode public trust. [See Giulio Corsi, Bill Marino, *et.al.*, "The Spread of Synthetic Media on X" 5(3) *Harvard Kennedy School Misinformation Review* 2 (June, 2024).

[61] Mekhail Mustak, Joni Salminen, *et.al.*, "Deepfakes: Deceptions, Mitigations, and Opportunities" 154 *Journal of Business Research* 1 (2023).

[62] Rakash L. Kharvi, "Understanding the Impact of AI-Generated Deepfakes on Public Opinion, Political Discourse, and Personal Security in Social Media" 22(4) *IEEE Security & Privacy* 115 (July-Aug. 2024).

become concerning for varied reasons, including the fact that results are becoming more realistic, that they can be produced quickly, and that they can be produced at a low cost using publicly available software and the ability to rent processing power through cloud computing.[63] Even non-professional users can obtain the necessary software tools and, by using publicly available information, can produce convincing fake content.

The Global Risks Report 2024[64] by the World Economic Forum[65] has identified misinformation and disinformation as serious dangers in the coming times, noting the possibility of domestic propaganda and censorship.[66] Political exploitation of AI offers serious hazards, with the rapid spread of deepfakes and AI-generated content making it increasingly impossible for voters to distinguish between truth and lie, thereby influencing voter behaviour and compromising the democratic process. Elections can be manipulated, public trust in institutions eroded, social discontent sparked, and violence erupted.[67]

It is believed that 'false media has existed for as long as there has been media to falsify': forgers have forged documents or works of art, youngsters have falsified driving licenses, and so on.[68] Although propaganda and similar issues are not new, it is becoming increasingly obvious that the development of technology has acted as a catalyst for the mass production, distribution, and consumption of mis/disinformation.[69]

### 5.2 AI as a Tool to Detect & Regulate False Information Online

The rise of AI in the digital age has brought both opportunities and concerns, particularly in terms of information integrity. AI technology capable of producing 'deepfakes'

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[63] Drew Robb, "Deepfake Awareness Riding on Top Gun's Coattails" *CIOInsight*, June 02, 2022, *available at*: https://www.cioinsight.com/news-trends/deepfake-awareness-top-gun/ (last visited on Jan. 04, 2025).

[64] Presents an in-depth study of the most serious risks confronted by the world today. It is intended to help in the identification of the major risks for 2024 and thereafter. It serves as a standard for global risk management and has an impact on policies and plans at both the organisation and the government levels. [See MarshMcLennan, "Global Risks Report 2024", *available at*: https://www.marshmclennan.com/insights/publications/2024/january/global-risks-report-2024.html (last visited on Jan. 06, 2025)].

[65] Non-profit organization that convenes leaders from business, politics, academia, and civil society to address global concerns. [See World Economic Forum, "Stakeholders", *available at*: https://www.weforum.org/stakeholders/ (last visited on Jan. 04, 2025)].

[66] World Economic Forum, "The Global Risks Report 2024: 19th Edition" 8 (Jan. 2024), *available at*: https://www3.weforum.org/docs/WEF_The_Global_Risks_Report_2024.pdf (last visited on Jan. 04, 2025).

[67] Gabriel R. Sanchez and Keesha Middlemass, "Misinformation is Eroding The Public's Confidence in Democracy" July 26, 2022, *available at*: https://www.brookings.edu/articles/misinformation-is-eroding-the-publics-confidence-in-democracy/ (last visited on Jan. 08, 2025).

[68] John Akers, Gagan Bansal, *et.al.*, "Technology-Enabled Disinformation: Summary, Lessons, and Recommendations" 4 (Dec., 2018), *available at*: https://dada.cs.washington.edu/research/tr/2018/12/UW-CSE-18-12-02.pdf (last visited on Dec. 28, 2024).

[69] *Id.* at 2.

can be used to spread both misinformation and disinformation. However, at the same time, AI can help battle erroneous information by studying patterns, language, and context to aid in content moderation, fact-checking, and detection of false information.[70] The same AI and data-driven approaches that are used to spread mis/disinformation can also be used to detect and regulate it.[71]

Machine learning (ML)[72] algorithms enable automated and scalable identification of false information online, which is critical given the massive amount of information exchanged on social media sites. Overall, ML is an effective method for detecting and mitigating the spread of bogus content on social media.[73]

## 6. Public Access to Information and SDGs

Since the Rio Declaration of 1992[74], access to information has been acknowledged as essential to sustainable development.[75] It was underlined in the 2020 Resolution of the Human Rights Council[76] as a duty of public institutions, and found place under the SDGs of 2015, to encourage participatory governance.

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[70] Cathy Li and Agustina Callegari, "Stopping AI Disinformation: Protecting Truth in the Digital World" *World Economic Forum*, June 14, 2024, *available at*: https://www.weforum.org/stories/2024/06/ai-combat-online-misinformation-disinformation/ (last visited on Jan. 02, 2025).

[71] The University of Queensland, "How AI is Being Used to Fight Fake News", *available at*: https://sponsored.chronicle.com/how-ai-is-being-used-to-fight-fake-news/index.html (last visited on Dec. 30, 2024).

[72] AI is a broad field that includes ML as a subset. ML allows machines to learn from data and improve on their own. ML uses algorithms and statistical models to process large amounts of data and identify patterns. [See AWS, "What's the Difference Between AI and Machine Learning?", *available at*: https://aws.amazon.com/compare/the-difference-between-artificial-intelligence-and-machine-learning/ (last visited on Jan. 03, 2025)].

[73] Maialen Berrondo-Otermin and Antonio Sarasa-Cabezuelo, "Application of Artificial Intelligence Techniques to Detect Fake News: A Review" 12(24) *Electronics* 5041 (2023).

[74] The 1992 United Nations Conference on Environment and Development (UNCED), also referred to as the 'Earth Summit', adopted the Rio Declaration on Environment and Development. The Declaration identified 27 guiding principles to give countries a starting point for decisions and policies that take impact of socio-economic development on the environment into account. [See Convention on Biological Diversity, "Rio Declaration on Environment and Development", *available at*: https://www.cbd.int/doc/ref/rio-declaration.shtml (last visited on Jan. 04, 2025).

[75] Principle 10 of the Rio Declaration states, "….at the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities" [See UN General Assembly, *Report of the United Nations Conference on Environment and Development*, GAOR, UN DocA/CONF.151/26 (Vol. I) (Aug. 12, 1992) p.no. 2].

[75] UN General Assembly, *The Role of Good Governance in the Promotion and Protection of Human Rights*, GA Res 45/9, GAOR, UN Doc A/HRC/Res/45/9 (Oct. 09, 2020).

The United Nations (UN) adopted the SDGs, sometimes referred to as the 'Global Goals'[77], in 2015 as a global call to take action towards the eradication of poverty, to safeguard the environment, and to guarantee that everyone lives in peace and prosperity by 2030. The SDGs, or Agenda 2030, are an ambitious attempt to improve the lives of the world's poorest people within 15 years, and all 193 UN Member States[78] agreed to implement them in 2015. However, the Agenda goes beyond poverty; among its 17 agreed-upon objectives are ambitious targets to address issues like gender inequality, environmental degradation, corrupt governance, and healthcare hurdles.[79] The 17 SDGs are integrated in nature, i.e., they acknowledge that development must strike a balance between social, economic, and environmental sustainability and that actions taken in one area will impact results in other areas as well.[80]

The primary requirement for sustainable development is the union of three elements: economic development, environmental protection, and social equity. Thus, it is imperative that the public is allowed to access relevant information freely to ensure the successful integration of these elements and the achievement of the set goals.

Public access to information is a key part of the SDGs of the UN and is a driver for achieving the 2030 Agenda for Sustainable Development.[81] Open and inclusive access to information empowers people and sets the groundwork for the creation of inclusive knowledge societies.[82] Access to information is essential for evaluating public officials in implementing and monitoring the SDGs, as well as for empowering the public to make

[77] Set of universally accepted goals, adopted by all UN member states, that aim to address global issues such as poverty, inequality, climate change, and environmental degradation. To accomplish these goals by 2030, all nations must strive to work together, effectively making them a "global" call to action to ensure that no one is left behind. [See United Nations: Sustainable Development Goals, "The Sustainable Development Agenda", *available at*: https://www.un.org/sustainabledevelopment/development-agenda-retired/ (last visited on Jan. 08, 2025)].

[78] List of Member States, *available at:* https://www.un.org/en/about-us/member-states (last visited on Jan. 08, 2025).

[79] United Nations, "Sustainable Development Goals: 17 Goals to Transform our World", *available at*: https://www.un.org/en/exhibits/page/sdgs-17-goals-transform-world (last visited on Jan. 09, 2025).

[80] United Nations Development Programme, "The SDGs in Action", *available at*: https://www.undp.org/sustainable-development-goals (last visited on Jan. 01, 2025).

[81] Tawfik Jelassi, "Advancing Universal Access to Information Within the 2030 Agenda for Sustainable Development" *UN Chronicle*, Sep. 27, 2021, *available at*: https://www.un.org/en/un-chronicle/advancing-universal-access-information-within-2030-agenda-sustainable-development (last visited on Jan. 08, 2025).

[82] UNESCO, "Inclusive Knowledge Societies for Sustainable Development", Mar. 2012, *available at*: https://www.un.org/en/development/desa/policy/untaskteam_undf/groupb_unesco_knowledge_societies.pdf (last visited on Jan. 09, 2025).

decisions, hold governments accountable, and promote "just, peaceful, and inclusive societies",[83] which is SDG Goal 16 of the UN 2030 Agenda for Sustainable Development.[84]

According to the Instruction Manual of the United Nations Educational, Scientific and Cultural Organization (UNESCO)[85] Survey on 'Public Access to Information',[86] the latter is founded on the fundamental freedom of expression and association, which is an established human right and States are responsible for upholding this right.[87] In order to uphold this right, States are obliged to create a legal framework which gives the public the right to request access to information, and the State must promptly respond to such requests. The relevant authorities must proactively publish information of public interest, in public domain.[88]

The right to information (RTI) is not merely an objective; it is a necessary condition for attaining sustainable development in its entirety.[89] RTI aims to increase access to water and healthcare by giving people the knowledge they need to demand services, enabling communities to hold businesses and governments responsible for contaminating their water supplies, and holding governments responsible for unethical behaviour.[90] Thus, RTI encourages accountability in development-related concerns just as it does in more political ones, and encompasses more than just government pledges. It gives people the ability to take part, advocate for, and track significant advancements towards development objectives.[91]

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[85] UNESCO has been identified as that UN custodian agency, for SDG Indicator 16.10.2, which is responsible to track the overall progress in the number of those countries that have adopted and effectively implemented legal guarantees with respect to 'Access to Information' [See Andrey Richter, *The need to accelerate worldwide progress: UNESCO 2023 report on public access to information (SDG 16.10.2)* (UNESCO, Paris, 2024)].

[86] Right to obtain information held by public authorities. It is a fundamental right which is part of freedom of expression. (See The Universal Declaration of Human Rights, 1948, art. 19).

[87] UNESCO, "Instruction Manual: UNESCO Survey on Public Access to Information (SDG Indicator 16.10.2)" 9-10 (2021), *available at*: https://eyeonglobaltransparency.net/wp-content/uploads/2021/04/Instruction-Manual-UNESCO-Survey-on-Public-Access-to-Information-English-1.pdf (last visited on Jan. 02, 2024).

[88] United Nations, "SDG Indicator Metadata", *available at*: https://unstats.un.org/sdgs/metadata/files/Metadata-16-10-02.pdf (last visited on Jan. 09, 2025).

[89] Shamsul Bari and Ruhi Naz, "Revisiting The Role of RTI For Sustainable Development" *The Daily Star*, Apr. 16, 2021, *available at*: https://www.thedailystar.net/opinion/news/revisiting-the-role-rti-sustainable-development-2078061 (last visited on Jan. 10, 2025).

[90] Sahina Mumtaz Laskar, "Importance of Right to Information for Good Governance in India" *Bharati Law Review* 216-229 (Oct.-Dec., 2016).

[91] Harsh Mander and Abha Joshi, "The Movement for Right to Information in India", *available at*: https://www.humanrightsinitiative.org/programs/ai/rti/india/articles/The%20Movement%20for%20RTI%20in%20India.pdf (last visited on Jan. 10, 2025).

SDG Goal 16, 'Target 16.10' refers to ensuring public access to information and protection of fundamental freedoms, in accordance with national legislation. The proposed indicator for the same is "…existence and implementation of a national law and/or constitutional guarantee on the right to information".[92] For instance, article 19(1) (a) of our Constitution grants freedom of speech and expression. At the same time, various institutions must release reliable information to avoid both, misinformation, and disinformation. If citizens have a right to access information, then the relevant institutions must have a corresponding duty to provide them with reliable information.

The 2015 SDG agreement places a strong emphasis on transparency, and countries everywhere have pledged to include the right to information in their legal frameworks. Although more 'right to information' laws have been passed (90 percent of the world's population currently resides in a country with an RTI law), implementation has not always kept up with the trend, and progress is undoubtedly not universal.[93] To secure development by the year 2030, the SDGs must foster partnership among the commercial sector, governments, civil society, and educational institutions.[94]

## 7. United Nations Global Principles for Information Integrity

The idea behind the 'UN Global Principles for Information Integrity' was first presented in the UN Secretary-General's 'Our Common Agenda' Report,[95] and it was expanded upon in the 'Information Integrity on Digital Platforms' policy brief [96]. 'Our Common Agenda' presents the vision of the UN Secretary-General on the future of global cooperation through an "inclusive, networked, and effective multilateralism"[97]. A new social contract based on human rights, improved management of vital global commons, global public goods that provide equitable and sustainable benefits to all, and a revived sense of

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[92] Sustainable Development Solutions Network, "Indicators and a Monitoring Framework", *available at*: https://indicators.report/targets/16-10/ (last visited on Jan. 01, 2025).

[93] Article 19, "Access to information is critical to achieving the SDGs", Sep. 28, 2018, *available at*: https://www.article19.org/resources/access-to-information-is-critical-to-achieving-sdgs/ (last visited on Jan. 02, 2025).

[94] Maltez Alberto Mabuie, "Access to Information: A Key Driver To Achieve Sustainable Development Goals" 4(12) *American Research Journal of Humanities & Social Science* 26 (2021).

[95] The UN Secretary-General's landmark report presented at the 75th session of the General Assembly, *available at*: https://www.un.org/en/content/common-agenda-report/assets/pdf/Common_Agenda_Report_English.pdf (last visited on Jan. 04, 2025).

[96] United Nations, "SG's Policy Brief on Information Integrity on Digital Platforms", *available at*: https://www.un.org/en/civil-society/information-integrity-digital-platforms (last visited on Jan. 09, 2025).

[97] United Nations, "Secretary-General's Report "Our Common Agenda"" (2021), *available at*: https://www.un.org/en/content/common-agenda-report/assets/pdf/Common_Agenda_Key_Proposals_English.pdf (last visited on Jan. 05, 2025).

solidarity between peoples and future generations are the four main themes covered by the recommendations in 'Our Common Agenda'.[98]

The Secretary-General in the policy brief on 'Information Integrity on Digital Platforms', has called for guardrails for addressing the global threat of online hate speech, misinformation, and disinformation. A need for coordinated international action has been emphasized in order to ensure safety and inclusiveness of digital space, at the same time focusing upon effective protection of human rights.[99] The policy brief delves deep into the adverse effect of threats to information integrity on advancements in local, national, and international issues, and has been promoted to provide a gold standard to guide action for strengthening information integrity.[100]

In June 2024, the UN Global Principles for Information Integrity, came in force. This document's main purpose was to serve as a resource for the UN Member States, before the 'Summit of the Future'[101], which was to be held in September 2024. These principles aimed to combat the spread of online misinformation, disinformation, and hate speech, and alleviate the broad harm caused by incorrect information on digital platforms. Its five guiding principles are: "societal trust and resilience; healthy incentives; public empowerment; independent, free, and pluralistic media; and transparency and research".[102]

Thereafter, in September 2024, 'Summit of the Future' was held with the goal to improve and bolster global governance. The outcome of this summit was "Pact for the Future", alongwith two annexes, namely "Global Digital Compact" and "Declaration on Future Generations".[103] The goal of the Pact is to accelerate SDGs, among other things, and

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[98] *Ibid.*

[99] United Nations, "Guardrails Urgently Needed to Contain "Clear and Present Global Threat" of Online Mis- and Disinformation and Hate Speech, says UN Secretary-General" June 12, 2023, *available at*: https://www.un.org/sustainabledevelopment/blog/2023/06/press-release-guardrails-urgently-needed-to-contain-clear-and-present-global-threat-of-online-mis-and-disinformation-and-hate-speech-says-un-secretary-general/ (last visited on Jan. 09, 2025).

[100] *Supra* note 96.

[101] United Nations: Regional Information Centre for Western Europe, "The Summit of the Future (22-23 September 2024)" Apr. 15, 2024, *available at*: https://unric.org/en/the-summit-of-the-future-in-2024/ (last visited on Jan. 10, 2025).

[102] IISD, "UN Launches Global Principles for Information Integrity" July 12, 2024, *available at*: https://sdg.iisd.org/news/un-launches-global-principles-for-information-integrity/ (last visited on Jan., 10, 2025).

[103] United Nations, "Pact for the Future, Global Digital Compact and Declaration on Future Generations" (Sep. 2024), *available at*: https://www.un.org/sites/un2.un.org/files/sotf-pact_for_the_future_adopted.pdf (last visited on Jan. 05, 2025).

the Global Digital Compact encourages fair access to technology and ensures that everyone benefits from technology.

## 8. Indian Initiatives to Curb Mis- and Dis-information

### 8.1 Legislative Provisions

India lacks specific legislation to regulate the dissemination of mis/disinformation. However, several initiatives have been taken by the government to tackle this menace – from time to time, relevant provisions of the Epidemic Diseases Act, 1897, the Disaster Management Act, 2005, and the Bharatiya Nyaya Sanhita, 2023, have been invoked to prosecute wrongdoers accused of spreading rumors and/or creating panic amongst the populace. Provisions of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, the Information Technology Amendment Rules, 2023, the Digital Personal Data Protection Act, 2023, and the Telecommunications Act, 2023 also restrict access to the alleged misinformation.

i) *The Epidemic Diseases Act, 1897*: This law was originally designed to control the spread of contagious diseases, and can also be used to address misinformation during public health crises.[104] It grants the government the authority to implement measures that prevent disease transmission, including regulating the dissemination of false information which could worsen the situation, and provides for penalties against individuals spreading harmful misinformation. Additionally, it facilitates legal action against those deliberately spreading falsehoods that threaten public health, thus helping to mitigate the impact of misinformation during epidemics. The cobwebs surrounding this law were dusted off during the Covid19 pandemic. Originally designed to address the spread of infectious diseases during the British colonial period, this law has been criticized for granting broad and often unchecked powers to authorities, which can lead to potential abuse. The absence of safeguards for transparency and accountability further exacerbates its shortcomings, rendering it an inadequate and potentially dangerous instrument for addressing contemporary public health challenges.[105]

ii) *The Disaster Management Act, 2005*: It contains provisions to punish persons who raise a false alarm or circulate a false warning related to a disaster or the severity/extent of such

[104] Rakesh P.S., "Implementing the Epidemic Diseases Act to Combat Covid-19 in India: An Ethical Analysis" *Indian Journal of Medical Ethics*, *available at*: https://ijme.in/articles/implementing-the-epidemic-diseases-act-to-combat-covid-19-in-india-an-ethical-analysis/?galley=print (last visited on Feb. 25, 2025).

[105] Parikshit Goyal, "The Epidemic Diseases Act, 1897 Needs an Urgent Overhaul" 55(45) *Economic and Political Weekly: Engage* (Nov. 07, 2020).

disaster, causing panic among the public. Punishment extends to imprisonment for one year or fine.[106] Fifteen years after its enactment, this Act was invoked for the very first time during the Covid19 pandemic, since lots of false or unverified information was being circulated through dubious and unverified channels.[107] Some such information pertained to the cure and precautions against Covid19 virus, whereas, other mis/disinformation had the potential to create fear and panic in the minds of the already scared people. Thus, the law which was enacted as a response to the 2004 Tsunami that struck eastern coast of India, and saw thousands of casualties, was put to use in the country.[108]

iii) *Bharatiya Nyaya Sanhita, 2023* (BNS): Recognizing the serious implications of misinformation and the crucial necessity to combat it, the BNS has adopted significant new measures to punish the deliberate manufacture, distribution, or publication of incorrect information. It makes it illegal to make, publish, or disseminate statements, rumours, false information, or reports (including through electronic means) with the intention or potential of causing harmful consequences.[109] Misinformation has traditionally been utilized to incite public fear that could result in crimes against the state or public tranquillity, or to incite one class or community to commit crimes against another, this section consequently includes misinformation within its purview. The Sanhita stipulates imprisonment for up to three years, a fine, or both for commission of such offence. Promoting animosity, hostility, or malice amongst various racial, religious, linguistic, or regional groups is also punishable under this provision.[110] Longer period of imprisonment of up to five years and a fine has been imposed to deter such offences in places of worship or during religious ceremonies.

The BNS also aims to regulate misinformation by punishing anyone who makes or publishes false or misleading information, whether it be in the form of spoken or written words, signs, visible representations, or through electronic medium, which results in 'jeopardizing the sovereignty, unity, integrity, or security of India'.[111] The accused in such a case is liable to face imprisonment for up to three years, a fine, or both. But if it occurs in a

[106] The Disaster Management Act, 2005 (Act 53 of 2005), s. 54.

[107] Chetan Chauhan, "Covid-19: Disaster Act Invoked for the 1st Time in India" *Hindustan Times*, Mar. 25, 2020, *available at*: https://www.hindustantimes.com/india-news/covid-19-disaster-act-invoked-for-the-1st-time-in-india/story-EN3YGrEuxhnl6EzqrlreWM.html (last visited on Mar. 10, 2025).

[108] Neeraj Chauhan, "Disaster Act Provisions Lifted After 2 yrs of Covid" *Hindustan Times*, Mar. 24, 2022, *available at*:https://www.hindustantimes.com/india-news/disaster-act-provisions-lifted-after-2-yrs-of-covid-101648060066847.html (last visited on Mar. 10, 2025).

[109] The Bharatiya Nyaya Sanhita, 2023 (Act 45 of 2023), s. 353. The provision is titled 'Statements conducing to public mischief'.

[110] *Id.*, s. 353(2).

[111] *Id.*, s. 197(1)(d). The provision is titled 'Imputations, assertions prejudicial to national integration'.

place of worship or during religious ceremonies, the maximum imprisonment of up to five years can be levied which may include a fine.[112]

When a person, who is under legal obligation to disclose information to a public servant, knows or reasonably believes that the information is false and yet provides it, can face six months in prison, a fine of up to five thousand rupees, or both.[113] However, if such false information is with respect to: an offence committed, prevention of an offence, or is crucial to apprehend an offender, the punishment is increased to up to two years in prison, a fine, or both.[114]

Whoever, with the intent to influence the outcome of an election, makes or publishes any statement purporting to be a statement of fact that is false and which, he either knows or believes to be false or does not believe in the truth of it, concerning the personal character or conduct of any candidate, shall be fined[115] under the Sanhita.

iv) *The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021* (IT Rules, 2021):[116] The IT Rules, 2021 impose obligations on intermediary platforms to prohibit the hosting, sharing, uploading, transmitting, and so on of any prohibited information, including misinformation and evidently false information on the Internet, as well as impersonating another person.[117]

Non-compliance by intermediary platforms may result in loss of intermediary status and consequent liability for hosted content, as well as penalization under the Information Technology Act, 2000 (IT Act).[118] If any information falls into the categories banned by this Rule, the user may contact the Grievance Officer of the relevant intermediary.[119] Upon receipt of the request, the intermediary must act within the timeframe[120] specified in the IT Rules, 2021.

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[112] *Id.*, s. 197(2).

[113] *Id.*, s. 212(1). The provision is titled 'Furnishing false information'.

[114] *Id.*, s. 212(2).

[115] *Id.*, s. 175. The provision is titled 'False statement in connection with an election'.

[116] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 were notified under s.87(2) of the Information Technology Act, 2000, superseding the earlier Information Technology (Intermediary Guidelines) Rules, 2011.

[117] Ministry of Electronics & IT, "Government of India Committed Towards Preventing Dissemination of Misinformation Including Deep Fakes on Internet" *PIB Delhi*, July 31, 2024, *available at*: https://pib.gov.in/PressReleasePage.aspx?PRID=2039640 (last visited on Jan., 11, 2025).

[118] The Information Technology Act, 2000 (Act 21 of 2000), s. 45; The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, rule 7.

[119] The IT Rules, 2021, *Id.*, rule 3 sub-rule 2.

[120] *Ibid.*

v) *The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023* (IT Amendment Rules, 2023):According to the IT Amendment Rules, 2023, social media platforms could be compelled to take down any content that has been verified as untrue by the Press Information Bureau's fact-check unit (FCU).[121] These rules aim to stop false information and fake news from spreading on social media. The central government can remove whatever information that the fact-checking unit deems untrue. The amendment included a provision that revokes the legal protection afforded to social media platforms and intermediaries,[122] if they fail to comply with the directives of the government.[123]

On January 31, 2024, a Division Bench of the Bombay High Court comprising Patel and Gokhale, JJ., delivered a split decision in the case of *Kunal Kamra* v. *Union of India*.[124] This case was concerned with the constitutional validity of the 2023 Amendment, since it allegedly took away the immunity or, safe harbour, granted to intermediaries from liability for third-party content uploaded on their platforms, if the intermediary failed to remove such content flagged by the FCU of the central government as fake, false, or misleading. As per Patel, J., the Amendment introduced restrictions to freedom of speech which were not reasonable in nature, and jeopardized the commercial interests of the intermediaries. Gokhale, J. ruled in favour of the Amendment, and upheld the setting up of fact-check units. The matter was referred to third judge, Chandurkar, J., who rejected the interim relief application. Thereafter, the central government notified the coming in force of FCU.[125]

Thereafter, the Supreme Court temporarily stayed the government from utilizing the services of fact-check units over social media content.[126] This ruling came after comedians,

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[121] The Press Information Bureau (PIB) has been at the forefront of proactive attempts to counteract fake news about the Indian government. In November 2019, PIB formed FCU to combat fake news about the Government of India, its different ministries, departments, public sector undertakings, and other central government organizations. See Press Information Bureau, "PIB Fact Check Unit", *available at*: https://pib.gov.in/aboutfactchecke.aspx?reg=3&lang=1 (last visited on Jan. 12, 2025).

[122] *Supra* note 118, s. 79.

[123] Hemendra Singh, "The IT Amendment Rules, 2023: Censorship in the Guise of Fact-checking" 58(43) *Economic & Political Weekly* (Oct. 28, 2023), *available at*: https://www.epw.in/journal/2023/43/commentary/it-amendment-rules-2023.html (last visited on Jan. 12, 2025).

[124] 2024 SCC OnLine Bom 360.

[125] Ministry of Information & Broadcasting, "Government Notifies PIB's Fact Check Unit Under IT Rules 2021" *PIB Delhi*, Mar. 20, 2024, *available at:* https://pib.gov.in/PressReleasePage.aspx?PRID=2015792 (last visited on Jan. 13, 2025).

[126] See *Editors Guild of India* v. *Union of India & Ors*, decision dated March 21, 2024, of the Supreme Court of India [SLP(C) No. 6871-6873/2024]. Also see Anmol Kaur Bawa, "Supreme Court Stays Centre's Notification Of 'Fact Check Unit' Under IT Rules Till Final Decision By Bombay HC" *Live Law*, Mar. 21, 2024, *available at*: https://www.livelaw.in/top-stories/supreme-court-kunal-kamra-editors-guild-notifying-fact-check-unit-it-rules-2023-252998 (last visited on Jan. 13, 2025).

journalists, and media organizations challenged one of the rules[127] under the IT Amendment Rules, 2023, which would allow the government to classify information about its activity as 'fake news', and requiring social media platforms to either remove such content or face losing legal protection.

A three-judge Bench, comprising Dr. D.Y. Chandrachud, J.B. Pardiwala, and Manoj Misra, JJ. overturned the Bombay High Court's ruling dated March 11, 2024, which refused to stop the execution of the 2023 Amendment Rules, as well as the subsequent order permitting the central government to notify the formation of FCUs. The Bench further highlighted that the concerned Rules raised some critical constitutional questions pertaining to freedom of speech and expression, and the Bombay High Court was asked to decide upon the challenges raised against the IT Amendment Rules, 2023. Chandurkar, J. upheld the judgment of Patel, J. and struck down the 2023 Amendment[128] for violating the principles of equality before law[129], freedom of speech and expression,[130] and freedom to practice any profession[131] etc., and for exceeding the scope of the Information Technology Act, 2000 (the “IT Act”).

vi) *The Digital Personal Data Protection Act, 2023* (DPDP Act): A data principal[132], *i.e.*, an individual whose data is being processed has been granted certain rights[133] and duties[134] under the Act. Apart from the right to access information about processing, the right to seek correction and erasure of personal data, grievance redressal, etc., the data principals have some duties as well. Duty to refrain from registering any false or frivolous complaint, and duty not to furnish any false particulars or impersonate another person in specified cases. In case of violation of these duties, the Act levies a penalty of upto rupees 10,000[135].

The Act clearly defines 'personal data'as 'names, photos, email addresses, social media posts, biometric data,[136] and online activities'; this ensures that deepfake incidents can be effectively addressed within the legal framework offered by the Act, and mandates the data fiduciaries,[137] *i.e.*, entities responsible for determining the purpose and means of

[127] Rule 3(1)(b)(v) of the IT Amendment Rules, 2023. The Rule mandates intermediaries to ensure that users do not host or share information identified as fake or misleading by a fact-check unit of the central government.
[128] *Kunal Kamra* v. *Union of India*,2024 SCC OnLine Bom 3025.
[129] The Constitution of India, art. 14.
[130] *Id.*, art. 19(1)(a).
[131] *Id.*, art. 19(1)(g).
[132] The Digital Personal Data Protection Act, 2023 (Act 22 of 2023), s. 2(j).
[133] *Id.*, ss. 11-14.
[134] *Id.*, s. 15.
[135] *Id.*, s. 33(1) read with the Schedule.
[136] *Id.*, s. 2(t).
[137] *Id.*, s. 2(i).

processing personal data, to have strong security measures to avoid any form of breach of personal data.

Suppose a social media website collects and retains users' facial biometric information for verification of their identities. Under the DPDP Act, this website needs to maintain strong security steps[138] like encrypting biometric data when storing and sending it, limiting access to only authorized staff, and carrying out frequent security checks to find its weaknesses. If the data fiduciary does not have requisite security measures in place which leads to data, it may lead to creation of deepfake photographs and videos using facial biometric data of users. In such a situation, the data fiduciary would be held responsible for such breach. The DPDP Act promotes pro-activity when it comes to data security, and reduces dangers related to deepfakes.[139]

vii) *The Telecommunications Act*, *2023*: It allows for temporary suspension of internet services to ensure law and order, public safety, and other related concerns. This action is carried out under the Telecommunications (Temporary Suspension of Services) Rules, 2024, issued under section 20(2) of the Telecommunications Act. Additionally, section 14(4) of the Act regulates the shutdown of telecommunication networks, except in cases of natural disasters or public emergencies. Earlier, the Indian Telegraph Act, 1885 provided the government with the authority to suspend internet services. Till 2017, internet shutdowns were primarily issued under section 144 of the recently repealed Code of Criminal Procedure, 1973. The content of the erstwhile provision remains unchanged, and can now be found under section 163 of the Bharatiya Nagarik Suraksha Sanhita, 2023. The relevant provision granted the District Magistrate, the authority to prohibit unlawful assemblies and instruct individuals to refrain from specific activities.

### 8.2 Executive Actions: Internet Shutdowns in India

Data from the Internet Shutdown Tracker maintained by Software Freedom Law Centre India,[140] reveals that our country witnessed a total of 60 mobile internet shutdowns in the calendar year 2024, which was the lowest in the last eight years.[141] This reduction was

[138] *Id.*, s. 8(5).

[139] Arhant Kumar and Akash Kumar Sahu, "Deepfakes and The DPDP Act: Can The DPDP Act Effectively Combat AI-Generated Misinformation" *Law, Humanities and Social Sciences Collective*, Oct. 14, 2024, *available at*: https://lhsscollective.in/deepfakes-and-the-dpdp-act-can-the-dpdp-act-effectively-combat-ai-generated-misinformation/ (last visited on Jan. 14, 2025).

[140] The first legal services organization in India focused solely on technology, law, and policy. It is a non-profit organization that works to empower Indian citizens about their digital freedom and rights. See Sfcl.in: Internet Shutdowns, "About Us", *available at*: https://internetshutdowns.in/about/ (last visited on Mar. 20, 2025).

[141] Aroon Deep, "Internet Shut Down 60 Times in 2024, Fewer Than Last Year" *The Hindu*, Dec. 29, 2024, *available at*: https://www.thehindu.com/news/national/internet-shut-down-60-times-in-2024-fewer-than-last-year/article69039755.ece (last visited on Mar. 20, 2025).

occasioned on account of fewer shutdowns in the troubled provinces of Manipur and Jammu & Kashmir in 2024[142].

Why does an internet shutdown take place first? The major arguments given by the government are on the lines of upkeep of national security and counter insurgency, as a response to communal violence and ethnic clashes, to counter the problems of mis/disinformation and hate speech, and maintenance of law and order.[143] Following the abrogation of article 370 of the Constitution in August 2019, internet shutdowns in Jammu and Kashmir were repeatedly prolonged in order to combat separatist propaganda and militant activity.[144] In 2023, to avert additional violence after ethnic hostilities in Manipur, mobile internet services were terminated.[145] During the anti-Citizenship Amendment Act (CAA) protests in 2019, and farm bill protests of 2020-2021, internet services were shut down to maintain public order in the sites of protest.[146] In September 2021, Rajasthan enforced a state-wide internet shutdown, specifically targeting mobile internet, SMS/MMS, and social media, in several districts to prevent cheating during the Rajasthan Eligibility Exam for Teachers (REET).[147] The Jharkhand state government had also imposed a blanket ban on internet services across the state in 2024 to guard against rumors with respect to prevalence of unfair practices in the Jharkhand General Graduate Level Combined Competitive Examination (JGGLCCE) in 2024. [148]

The issue which now arises is that if the Hon'ble Supreme Court of India has affirmed internet freedom under the article 19(1) (a) of the Constitution,[149] then to what extent is it

[142] Kanav Narayan Sahgal, "India's Internet Shutdown Crisis: A Growing Threat to Digital Rights" *Global Voices Advox*, Jan. 06, 2025, *available at*: https://advox.globalvoices.org/2025/01/06/indias-internet-shutdown-crisis-a-growing-threat-to-digital-rights/ (last visited on Mar. 23, 2025).

[143] Ivy Dhar, "Commentary: Navigating Tensions and Stabilising Public Safety with Internet Shutdowns" 5(2) *Indian Public Policy Review* 59 (2024).

[144] Geeta Seshu, "Kashmir Media Policy: Accentuating the Curbs on the Freedom of Press" *Economic and Political Weekly: Engage*, *available at*: https://www.epw.in/engage/article/kashmir-media-policy-accentuating-curbs-freedom-press (last visited on Mar. 22, 2025).

[145] Apar Gupta, "Apar Gupta Writes: In Manipur, Another Internet Shutdown, A Conflict Intensified" *The Indian Express*, Oct. 06, 2023.

[146] Manisha Madapathi, "Digital Barricades and Blackouts: A Case of Internet Shutdowns in India" 12 *Media and Communication* 8511 (Dec. 03, 2024), *available at*: https://www.cogitatiopress.com /mediaandcommunication/article/download/8511/4096 (last visited on Mar. 10, 2025)

[147] ANI, "Rajasthan Suspends Mobile Internet In Numerous Districts To Prevent Cheating In Teachers' Exam" *The Print*, Sep. 26, 2021, *available at*: https://theprint.in/india/education/rajasthan-suspends-mobile-internet-in-numerous-districts-to-prevent-cheating-in-teachers-exam/740572/ (last visited on Mar. 10, 2025).

[148] TOI News Desk, "Jharkhand Suspends Mobile Internet to Check Malpractice During Exam: All You Need to Know" *The Times of India*, Sep. 21, 2024, *available at*: https://timesofindia.indiatimes.com/india/jharkhand-suspends-mobile-internet-to-check-malpractice-during-exam-all-you-need-to-know/articleshow/113539597.cms (last visited on Mar. 10, 2025).

[149] *Anuradha Bhasin* v. *Union of India* (2020) 3 SCC 637.

justifiable and how long can such shutdown prevail? The public has right to access information and as highlighted in this Paper earlier, in contemporary times people rely upon internet mainly for such information because of low-cost, speed, and reach. Repetitive internet shutdowns apart from violating fundamental rights, also have certain other serious implications like economic impact,[150] unemployment,[151] difficulty in online filing of complaints by abused women, undermining of media and press freedom, disruption of education and health care, etc.

In *Foundation for Media Professionals* v. *Union Territory of Jammu and Kashmir &Anr.*,[152] the Supreme Court addressed a critical issue concerning the balance between national security and fundamental rights, particularly the right to freedom of speech and expression, and access to education, health, and business during a period of restricted internet access in Jammu and Kashmir. Referring to the earlier case of *Anuradha Bhasin*,[153] the Court emphasized that internet restriction should meet minimum standards, such as being proportionate, transparent, and temporary. While the Court found that the government had not provided sufficient reasoning for blanket enforcement of internet shutdown across all districts, it acknowledged the compelling circumstances of cross-border terrorism. Consequently, the Court did not find a constitutional violation, but ordered the formation of a Special Committee, led by the Union Home Secretary, to assess the necessity of the internet restrictions.[154]

## 9. Conclusion

Fake and distorted information can escalate social, political, and economic conflicts, erode public confidence in democratic institutions, and even put citizens' lives in jeopardy. This is particularly problematic in the age of social media when information spreads quickly. Maintaining democratic discourse and social cohesiveness requires striking a balance between the advantages of information availability and the threats posed by social media and AI. Ongoing efforts in technology standards and legislation are essential to control the possible risks of false information and synthetic content.

New technologies pose changing opportunities and problems in the information arena. The development of generative AI will amplify changes in the information

[150] *Ibid.*
[151] According to the Internet Society's Net Loss Calculator, a single day of shutdown in India can result in the unemployment of up to 379 persons. [See Aditi Agrawal, "India Leads in Global Internet Shutdowns for 6th Year in A Row: Report" *Hindustan Times*, May 15, 2024].
[152] (2020) 5 SCC 746.
[153] *Supra* note 149.
[154] *Supra* note 152.

environment even further. AI solutions can accurately detect a wide range of misleading information and recognize disinformation strategies used by bots and deepfakes. At the same time, the technical limits of AI and other technologies highlight the necessity for a hybrid strategy that combines human engagement with technological tools. To effectively develop and implement such techniques, governments must facilitate collaboration among researchers, industry professionals, and the scientific community.

The government should actively recognize its crucial role in ensuring the integrity of the information space. This can be achieved through regulations that enhance transparency, accountability, and diversity of information sources, covering both traditional media and digital platforms. Regulatory measures should focus on promoting media pluralism, ensuring media independence, and holding online platforms accountable for their role in the information ecosystem. There is a need to push for greater transparency within digital platforms. This includes initiatives that require platforms to disclose more about their risk management processes, algorithms, data flows, and content moderation mechanisms. By improving access to such information, government can better hold platforms accountable and ensure that they operate in a manner that respects public interest.

The same human rights protections afforded to offline conduct must be extended to online activities. The government should ensure that any legal limitations on online expression are enforced in a consistent, transparent, and fair manner, upholding due process while respecting freedom of speech. As individuals encounter an increasing array of information sources, from traditional media to social media, it is crucial to equip them with the tools necessary to navigate this complexity. Lastly, there is no single solution to tackling misinformation and disinformation. Rather, a multi-faceted approach that integrates regulatory measures, educational initiatives, and collaborative efforts across sectors is key to effectively addressing these challenges.

# Freedom of Speech in the Digital Age: Legal and Judicial Responses to Fake News in Indian Democracy

*Deepak Sharma* & Vidit ***

**ABSTRACT**

*The advent of online Digital Platforms has significantly expanded the scope of freedom of speech and expression, offering new avenues for public discourse and democratic participation. However, this empowerment has been accompanied by the rapid proliferation of fake news, posing serious risks to public order, democratic integrity, and individual rights. This research paper critically examines the legal framework and judicial responses in India concerning the regulation of fake news. It highlights the inherent challenges in addressing Misinformation, including the regulatory gaps, inefficiencies, and limitations of the existing self-regulatory mechanisms. The study finds that current approaches are often reactive, fragmented, and inadequate to meet the scale and complexity of the problem. To address these shortcomings, the paper recommends transitioning towards a co-regulatory model, wherein Intermediaries and Digital Platforms are held accountable under a framework combining state oversight with industry participation. The paper also advocates for regulation of automated content moderation tools and democratized deployment of correction, debunking and fact-checking to ensure that regulatory interventions uphold fundamental rights while effectively countering the menace of fake news. Through this analysis, the paper aims to contribute to the evolving discourse on balancing free speech and information integrity in the digital age.*

**Keywords:** *Fake news, Misinformation, Disinformation, Co-regulation, Algorithmic Accountability.*

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## 1. Introduction

In the digital age, multiple and often conflicting versions of the event rapidly circulate across the Internet once an incident occurs. This deluge of information—frequently unverified and emotionally charged—creates what the World Health Organization aptly terms an *"infodemic"*, making it increasingly difficult to discern what is actually true.[1] Postmodernism, with its inherent scepticism toward objective truth and its emphasis on subjectivity and pluralism, further complicates this scenario. It encourages the coexistence of diverse narratives, often blurring the lines between fact, opinion, and interpretation. As a result, truth becomes fragmented and obscured.[2]

The Human Rights defenders were not entirely wrong when they hailed the online digital media platforms, believing that these platforms would strengthen the democratic processes and would revitalize the freedom of speech and expression. These platforms conferred enormous powers in the hands of the Populace, wherein the individuals are self-publishers of content, and there is no obligation on them to check the veracity of the Information. The unchecked growth of these platforms, coupled with the safe harbour protection, transformed the fourth pillar of democracy, and these platforms became the source of proliferation and dissemination of fake news, which had ramifications on the social and democratic fabric of the countries.[3]

Artificial intelligence has further exacerbated the challenge as it has the potential to generate manipulative content, disseminate harmful Disinformation and perpetuate systematic biases on a massive scale without meaningful human oversight, transparency and statutory regulation. The online platforms have significantly contributed for the spread of fake news due to biased and selective sharing (fueled by algorithms designed to maximize the User Engagement) of both true and false news skews overall constructions of reality for users. Combined with a lack of trust in quality information and a lack of overall media and Information Literacy, this creates an information environment in which citizens are vulnerable to false and misleading content with potentially negative social consequences.[4]

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1 John Zarocostas, "How to Fight an Infodemic" 395 *The Lancet*, 676 (2020).

2 Saul Newman, "Post-Trust, Postmodernism and the Public Sphere" in Maximilian Conrad, Guðmundur Hálfdanarson, *et.al.* (eds.), *Europe in the Age of Post-Trust Politics: Populism, Disinformation and the Public Sphere* 13–30 (Palgrave Macmillan, 2023).

3 Luís Roberto Barroso and Luna van Brussel Barroso, "Democracy, Social Media, and Freedom of Expression: Hate, Lies, and the Search for the Possible Truth" 24 *Chicago Journal of International Law* 51–70 (2023).

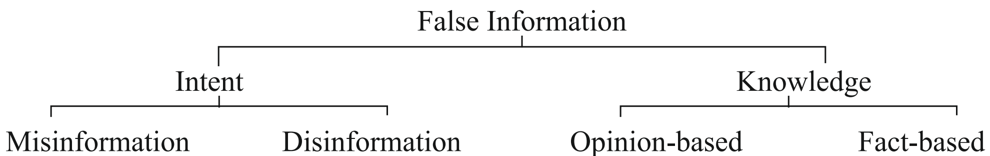
4 *Ibid.*

## 2. Evolution, Causes and Impact of Fake News in India

### 2.1 Definition of Fake News

Different terms have been used interchangeably to describe fake news, such as Rumour, Hoaxes, Satire, Parody, Propaganda, Clickbait, Misinformation, Disinformation, Mal-information, False Information, Alternative Facts, Information Disorder, etc. Fake news is defined as fabricated information that mimics legitimate news in form but lacks the editorial norms of credible journalism. It is a subset of Misinformation and has become a significant concern in the digital age.[5] Fake news is a sub-category of misinformation. *Egelhofer* and *Lecheler* described fake news as a two-dimensional phenomenon. It has been regarded both as a *genre* and a *label*. The fake news genre is described as the deliberate creation of *pseudojournalistic* Disinformation, and the fake news label is described as the *political instrumentalization* of the term to delegitimize news media.[6] They identified three recurring definitional characteristics: an item can be considered fake news when it is low in facticity, was created with the *intention to deceive* and is presented in a *journalistic format*.[7]

False information was categorized by *Kumar and Shah* in the following manner[8]:




Misinformation is false or misleading content shared without harmful intent though the effects can still be harmful, e.g. when people share false information with friends and family in good faith. Disinformation is false or misleading content that is spread with the intention to deceive or secure economic or political gain and which may cause public harm. The nuances between the two terms lies in the intention for dissemination, which may be challenging to determine a priori.[9]

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[5] David M. J. Lazer, Matthew A. Baum, *et.al.*, "The Science of Fake News" 359 *Science* 1094-1096 (2018).

[6] Jana Laura Egelhofer and Sophie Lecheler, "Fake News as a Two –Dimensional Phenomenon: A Framework and Research Agenda" 43 *Annals of the International Communication Association* 97-116 (2019).

[7] *Id.* at 99.

[8] Srijan Kumar and Neil Shah, "False Information on Web and Social Media: A Survey," *arXiv* (2018), *available at:* https://arxiv.org/pdf/1804.08559 (last visited on Apr. 27, 2025).

[9] *Ibid.*

**2.2 Causes of Fake News**

Users predominantly select and share content aligned with their existing beliefs, often ignoring opposing views. Social homogeneity drives content diffusion, leading to the formation of polarized, like-minded communities. This reinforces Confirmation Bias, segregation and the spread of Misinformation.[10] Acceptance of news often depends more on social norms and belief alignment than factual accuracy[11] Confirmation Bias is one of the most significant behavioural problem that motivates the spread of Misinformation.[1] Content selective exposure is the primary driver of content diffusion and generates the formation of homogenous clusters i.e. Echo Chambers. Filter Bubbles exploit Confirmation Bias and emotional content, invisibly tailoring information to users' beliefs, which boosts the spread of fake news while reinforcing ideological divisions and miseducation.[13] After examining the 1,26,000 cascades of news stories on Twitter from 2006 – 2017, *Soroush Vosoughi et. al.* found that that false news was 70% more likely to be retweeted that the truth. The Robots accelerate the spread of true and false news at the same rate. However, humans are more likely to share novel information.[14]

**2.3 Impact of Fake News**

The public opinion shaped by such Misinformation can distort democratic decision-making and push policies in directions that might not reflect the actual needs or values of a well-informed citizenry. Misinformation and disinformation have been reported as the top short-term risks for the Indian economy by the World Economic Forum in its Global Risks Report 2025 for the second consecutive year, threatening societal cohesion and undermining trust in governance. These risks can fuel instability, exacerbate divisions and complicate cooperation on shared crises.[15] The persistence and influence of fake news thus challenge the foundational democratic ideal that citizens make rational judgments based on accurate information, raising concerns about the health and functionality of modern democracies.[16] Overestimations of welfare dependency, immigration levels, and crime rates

[10] Michela Del Vicario, Alessandro Bessi, *et.al.*, "The Spreading of Misinformation Online" 113 *Proceedings of the National Academy of Sciences (PNAS)* 554 (2016).

[11] *Ibid.*

[12] *Supra* note 7.

[13] Eli Pariser, *The Filter Bubble: What the Internet is Hiding from You* (Penguin Books Limited, United Kingdom, 2011).

[14] Soroush Vosoughi, Deb Roy, *et.al.*, "The Spread of True and False News Online" 359 *Science* 1146-1151 (2018).

[15] World Economic Forum, "Global Risk Report 2025" (2025) at 30, *available at:* https://reports.weforum.org/docs/WEF_Global_Risks_Report_2025.pdf (last visited on Aug. 5, 2025).

[16] James H. Kuklinski, Paul J. Quirk, *et.al.*, "Misinformation and the Currency of Democratic Citizenship" 62 *The Journal of Politics* 790-816 (2000).

lead to anti-welfare, anti-immigration, and punitive policy attitudes respectively, while resistance to vaccine-related knowledge has caused a resurgence of preventable diseases like measles. These examples highlight how misperceptions and knowledge resistance fueled by fake news can distort public opinion and harm societal outcomes.[17]

False news can drive misallocation of resources during terror attacks and natural disasters, the misalignment of business investments and can misinform elections. In a review of social media research on Misinformation from the perspective of disaster, health and politics emerged as 3 domains where Misinformation can cause severe harm, often leading to casualties or even irreversible effects.[18] Ofcom has concluded that people consuming news via social media platforms are more likely to be polarised than those who use search engines and news aggregator apps. This shows that problematic outcomes in terms of polarisation is due to the way the recommender system chooses and prioritises the content in user's feed.[19]

### 2.4 Strategies to Combat Fake News

Corrective Algorithms, displaying corrective information as 'related stories' for Misinformation have been frequently applied strategies to deal with fake news. Though correction is a reactive solution but if applied properly, it would prove to be a great solution to deal with Misinformation. Debunking was suggested as a measure to deal with the issue of Misinformation. However, in order to make it effective, following factors need to be considered i.e. (i) which Misinformation to prioritize for correction, (ii) how to best correct Misinformation and (iii) what else can be done pre-emptively to protect the public from future misdirection.[20]

Fact Checking is another strategy which is frequently deployed but it is not scalable as it requires substantial time and effort in examining the veracity of an information and all

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[17] Elena Broda and Jesper Stromback, "Misinformation, Disinformation and Fake News: Lessons from an Interdisciplinary, Systematic Literature Review" 48 *Annals of the International Communication Association* 139 (2024).

[18] Sadiq Muammed T and Saji K. Mathew, "The Disaster of Misinformation: A Review of Research in Social Media" 13 *International Journal of Data Science and Analytics* 271 (2022).

[19] OfCom, "Media Plurality and Online News: Discussion Document" (2022), *available at:* https://www.ofcom.org.uk/siteassets/resources/documents/research-and-data/multi-sector/media-plurality/discussion-media-plurality.pdf?v=328775 (last visited on Apr. 17, 2025).

[20] The REACT model was suggested for debunking; it stands for repetition, empathy, alternative explanations, credible sources, and timeliness. Emily K. Vraga, Ullrich K.H. Ecker, *et.al.*, "To Debunk or Not to Debunk? Correcting (Mis)Information," in Tina D. Purnat, Tim Nguyen, *et.al.* (eds.), *Managing Infodemics in the 21st Century: Addressing New Public Health Challenges in the Information Ecosystem* 85–98 (Springer, Singapore, 2023).

the information cannot be fact-checked, it is done post-event and is usually not affecting while virality of content is at its peak, warning levels may not be effective with the passage of time.[21]

Fake news detection models have been developed on the basis of machine learning, natural language processing and network analysis. However, it has been found problematic since true and false character cannot be black and white. Since, Misinformation content develops rapidly, it would be difficult to keep the training data set updated to provide meaningful real-time assistance in tackling fake news.[22] Cyber security and forensics based AMITT, TTP and MITRE ATTk models have been developed. The Credibility Coalition Misinfosec Working Group developed AMITT framework to detect Misinformation is worth noting.[23] However, it has been found that most of the detection frameworks have been deployed in artificial settings and there is little known empirical evidence to establish efficacy real world with original data sets.[24] Moreover, as people interact with content, news aggregator algorithms update in real time, often amplifying fake or false information based on user engagement. This real-time responsiveness makes it increasingly difficult to detect fake or false news, as popular false articles may be ranked more prominently simply due to high user engagement.[25]

## 3. Freedom of Speech in the Digital Age

Freedom of speech and expression is regarded as basic Human Rights and finds mention in the Article 19 of the Universal Declaration of Human Rights, 1948 as well as Article 19 of the International Covenant on the Civil and Political Rights, 1966. Article 10 of the European Convention on Human Rights protects freedom of speech and expression. Realizing the significance of freedom of speech, the United Nations 2030 Agenda for Sustainable Development (United Nations, 2015) recognizes that freedom of expression, access to information, and the safety of journalists are pivotal to building peaceful, just and inclusive societies. Sustainable Development Goal (SDG) 16, Target 10 calls for 'fundamental freedoms and public access to information'. This target is measured through

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[21] Gordon Pennycook and David G. Rand, "The Psychology of Fake News" 25 *Trends in Cognitive Sciences* 388 – 402 (2021).

[22] *Ibid.*

[23] John F. Gray and Sara-Jayne Terp, "Misinformation: We're Four Steps Behind Its Creators," *available at:* https://cyber.harvard.edu/sites/default/files/2019-11/Comparative%20Approaches%20to%20Disinformation%20-%20John%20Gray%20Abstract.pdf (last visited on Mar. 30, 2025).

[24] *Supra* note 14.

[25] J.N. Matias, "Influencing Recommendation Algorithms to Reduce the Spread of Unreliable News by Encouraging Humans to Fact-Check Articles, in a Field Experiment" 13 *Scientific Reports* 1 (2023).

SDG indicator 16.10.1 on the safety of journalists and SDG indicator 16.10.2 on public access to information. Indicator 16.10.2 measures: (i) constitutional and/or statutory guarantees of public access to public-sector information; and (ii) effective implementation of statutory guarantees of public access to public sector information.

The right to information has been regarded as a "survival right" essential for people's lives, health, and safety by the Special Rapporteur particularly in armed conflicts.[26] The Windhoek+30 Declaration recognizes information as a public good and stresses incorporating Information Literacy into strategies to strengthen citizens' resilience to Misinformation and Disinformation. It urges technology companies to ensure transparency in their human and automated systems, provide fair notice, appeals, and complaint processes for users, and conduct transparent Human Rights risk assessments to safeguard freedom of expression, access to information, and privacy.[27] Similarly, the UNESCO Guidelines propose a co-regulation model where governments set Human Rights-based legal frameworks, and digital platforms are required to ensure transparency, accountability, and user empowerment. Platforms must integrate Human Rights standards into Content Moderation, risk assessments, and reporting processes. Users, civil society, and researchers play key watchdog roles to uphold freedom of expression and access to information. Regulation focuses on platform systems rather than individual content, ensuring a safe, open, and democratic Digital Space.[28]

**3.1 United States**

Freedom of speech and expression is regulated differently in several jurisdictions. For instance, expansive protection is afforded to freedom of speech and expression in the United States online and offline. Section 230 of the Communications Decency Act, 1996 (CDA) provides that platforms may not be treated as publishers or speakers of any content provided by users. This provision applies regardless of whether an intermediary is aware of objectionable content and/or whether such content is removed or disabled.

**3.2 European Union**

The Digital Services Act, 2024 and the Code of Conduct are pioneering piece of

[26] UN General Assembly, "Disinformation and Freedom of Opinion and Expression During Armed Conflicts," UN Doc A/77/288 (Aug. 12, 2022), *available at:* https://docs.un.org/en/A/77/288 (last visited on Apr. 27, 2025).

[27] UNESCO, "Windhoek+30 Declaration: Information as a Public Good", May 3, 2021, *available at:* https://unesdoc.unesco.org/ark:/48223/pf0000378158/PDF/378158eng.pdf.multi (last visited on Feb. 24, 2025).

[28] UNESCO, "Guidelines for the Governance of Digital Platforms", 2023, *available at*: https://unesdoc.unesco.org/ark:/48223/pf0000387339 (last visited on Apr. 26, 2025).

legislation which regulate online platforms and tech giants. The DSA regulates intermediary, hosting, and online platforms, particularly very large ones, aiming to safeguard user rights and promote operational transparency. It sets harmonized standards for tackling illegal content, introduces mechanisms for flagging unlawful material, challenging moderation decisions, and limiting abuses by major platforms. Platforms must increase transparency, curb ad revenue incentives for fake news, and grant researchers limited data access. The accompanying Code strengthens measures against manipulative behaviors like fake accounts and deepfakes, enhances user tools for identifying Disinformation, promotes media literacy, and requires transparent, safer recommender system designs to limit the spread of Disinformation.

**3.3 United Kingdom**

The Online Safety Act, 2023, is enacted to protect UK citizens from online harm, describing fake news as one of the many concerns that harm citizens. This Act imposes statutory duties of care on online platforms to protect users, particularly children, from harmful content. Law requires platforms to assess and manage risks, with Ofcom as the regulator empowered to set codes of practice and impose penalties. Platforms can propose alternative measures, but they must be demonstrably effective and subject to Ofcom's oversight.

Another critical dimension is visible in the approach taken by Texas and Florida, which diverges from the above regulatory trends in the EU and the UK. Recent legislations in these states seek to prohibit online platforms from removing or restricting content based on viewpoint, particularly political speech. They are based on the premise that social media companies disproportionately censor conservative voices.[29]

Though the legislation is bulky and its effect on the freedom of speech and expression is yet to be seen. However, apprehensions have been expressed that the enforcement power has gradually shifted to non-state actors (private corporations).[30] Excessive regulation has also created the fear of censorship of content. It has been argued that the OSA does not reflect a Human Rights-based approach to regulation since the term harm is ambiguous.[31] The

[29] Pooja Salhotra, "Does The First Amendment Apply to Social Media Moderation? The U.S. Supreme Court Will Decide" *The Texas Tribune*, Feb. 26, 2024, *available at:* https://www.texastribune.org/2024/02/26/texas-social-media-law-supreme-court/ (last visited on Apr. 26, 2025).

[30] Eliza Bechtold, "Regulating Online Harms: An Examination of Recent Developments in the UK and the US through a Free Speech Lens" 16 *Journal of Media Law* 358–389 (2024).

[31] *Ibid.*

government's focus is on Content Moderation and not on dealing with the problematic business model of these tech companies, which focus on ad revenue and monetizing the user's attention.[32]

## 4. Legislative Response

Article 19(1)(a) guarantees freedom of speech and expression. It states: “All citizens shall have the right to freedom of speech and expression.”[33] This freedom is crucial in democratic setup as it empowers citizens to participate in democratic processes, hold authorities accountable and foster public discourse. It acts a check against authoritarianism by ensuring open dialogue. Though the Freedom of the Press is not mentioned directly in Article 19(1)(a), it is very much implied within the provision. However, the freedom is not absolute rather it is subject to reasonable restrictions mentioned in clause (2) of Article 19. The state can impose reasonable restrictions on this right in the interest of sovereignty and integrity of India, security of the state, friendly relations with foreign states, public order, decency or morality, contempt of court, defamation and incitement to an offense. Restrictions must be lawful, reasonable, and proportionate, and they must not arbitrarily curtail the right. Upholding broader democratic principles, the media has been primarily left to self-regulation, and the judiciary has frowned upon any attempt by the State. In the digital age, this provision extends to online expression but issues like internet shutdowns, content regulation and social media censorship pose challenge.

Statements/speech made by a person in certain circumstances, or those leading to specific consequences have been criminalized under the Bhartiya Nyaya Sanhita, 2023.[34] These include: act endangering sovereignty, unity and integrity of India (Section 152), promoting enmity between groups (Section 196), obscene publication (Section 294 – 296), deliberate acts to outrage religious feelings (Section 302), defamation (Section 356), statements creating or promoting enmity, hatred etc. (Section 353(2)). Here, it is likely that tangible harm or prejudice will be caused.

There are several other laws/legal provisions dealing with content regulation. For instance, Section 98 of the Bhartiya Nagarik Suraksha Sanhita, 2023,[35] the Cinematography

[32] ARTICLE 19, “UK: Online Safety Bill is a Serious Threat to Human Rights Online” (Apr. 25, 2022), *available at:* https://www.article19.org/resources/uk-online-safety-bill-serious-threat-to-human-rights-online/ (last visited on Apr. 26, 2025).

[33] The Constitution of India, art. 19(1)(a).

[34] Act 45 of 2023.

[35] Act 46 of 2023.

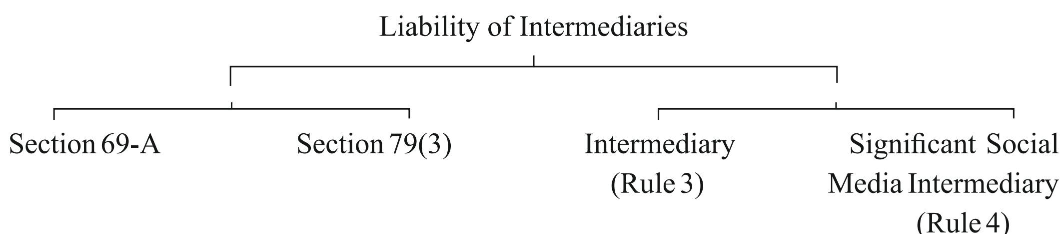
Act, 1952,[36] the Press Council Act, 1978,[37] the Cable Television Networks (Regulation) Act, 1995[38] and the rules made thereunder.

Fake news presents a complex, multi-sectoral legal challenge. Several sectoral laws have been enacted to deal with harmful or deceptive speeches. For instance, false/misleading advertising does not fall within the ambit of free speech and is regulated by the Consumer Protection Act, 2019. Beyond Consumer Law, multiple legal domains – including Securities Regulation, Anti-Trust, Labour and Employment Laws, Intellectual Property, Contracts and Torts – contain specific provisions to address Misinformation or misrepresentation within their respective scopes.[39]

Though the term fake news is not defined in any legal provision in India, glimpse of its regulation may be gathered from the following provisions: Section 353 of the Bhartiya Nyaya Sanhita, 2023 (statement conducing to public mischief), Section 54 of the Disaster Management Act, 2005 (punishment for false warning).

The content shared in digital environment is regulated by Sections 67A (Punishment for publishing or transmitting of material containing sexually explicit act, etc., in electronic form), 67B (Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc., in electronic form) etc. and by the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. Section 67C imposes regulatory burden on the intermediaries to preserve and retain the information required by the government.

The media is self-regulated to a great extent in India be it print media, electronic media or digital media. Digital media platforms are treated as intermediaries and enjoy safe harbour protection under the Information Technology Act, 2000. However, the immunity is conditional subject to the fulfilment of due diligence obligations under the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.




[36] Act 37 of 1952.

[37] Act 37 of 1978.

[38] Act 7 of 1995.

[39] Leslie Gielow Jacobs, "Freedom of Speech and Regulation of Fake News" 70 *The American Journal of Comparative Law* 278-311 (2022).

The due diligence obligation requires intermediaries to make reasonable efforts by itself and to cause the users of its computer resource to not host, display, upload, modify, publish, transmit, store, update or share any information falling under several sub-clauses of Rule 3(1)(b). It is interesting to note that the term 'fake news' is not used even under the Information Technology Act and 2021 Rules, Rule 3(1)(b)(v) use the following terms '…any Misinformation or information which is patently false and untrue or misleading in nature…'[40] Also, the term harm is used specifically with respect to online games and child.[41] It is interesting to note that the term 'harm' is not used with respect to dissemination of false or misleading information.

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 imposes added obligation of due diligence on the significant social media intermediaries[42] under Rule 4. Rule 4 provides that the significant social media intermediaries are encouraged (but not strictly required) to deploy automated tools to proactively detect and block content related to rape, child sexual abuse, or previously removed unlawful material. Such efforts must be proportionate to users' rights, include human oversight, and undergo regular reviews to evaluate fairness, accuracy, and potential bias or privacy risks. It is further to be noted that the Grievance Redressal Mechanism is provided for users or victims so that they can redress their grievances regarding Content Moderation. Also, due diligence obligation requires the intermediaries to provide an effective and meaningful grievance redressal mechanism to their users. It is to be noted that the power of the Central government is limited under Section 69-B and 79(3) to issue directions for blocking public access to information on grounds similar to restrictions mentioned under Article 19(2) of the Constitution.

Two private members' bills were introduced in the Lok Sabha to curb the menace of fake news. These are: the Fake News (Prohibition) Bill, 2019[43] and Prohibition of Fake News on Social Media Bill, 2023.[44] The Government has also launched SAHYOG portal. Almost 36 intermediaries have agreed to join the portal. However, Twitter has refused to be part of SAHYOG portal launched by the Central Government.[45]

[40] The Constitutional validity of the provision was challenged before the Bombay High Court which is discussed in the next Section below.

[41] Here the term 'harm' is defined in the explanation appended to Rule 3(1)(b) in the following manner: *'In this clause, "user harm" and "harm" mean any effect which is detrimental to a user or child, as the case may be.'*

[42] Ministry of Electronics and Information Technology (MeitY), Government of India, "Significant Social Media Intermediary: Threshold Notification," *available at:* https://www.meity.gov.in/static/uploads/2024/05/Gazette-Significant-social-media-threshold.pdf (last visited on Apr. 11, 2025).

[43] Lok Sabha Secretariat, *The Personal Data Protection Bill, 2019*, Bill No. 138 of 2019.

[44] Lok Sabha Secretariat, *The Digital Personal Data Protection Bill, 2023*, Bill No. 47 of 2023.

[45] *Shabana* v. *Govt. of NCT of Delhi and Others* W.P.(CRL) 1563/2024: 2025 SCC OnLine Del 1791.

## 5. Judicial Response

### 5.1 Judicial Standards in Free Speech Adjudication

The issue is canvassed from the perspective of the regulation of digital content. The restrictions under Article 19(2) can be imposed only by or under the authority of a law, no restriction can be imposed by executive action alone without there being a law to back it up. Each restriction must be reasonable. For adjudging the reasonableness of a restriction, the courts consider such factors as: the duration and the extent of the restriction, the circumstances under which, and the manner in which, that imposition has been authorized. The nature of the right infringed, the underlying purpose of the restriction imposed, the extent and the urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, all these considerations enter into the judicial verdict.[46] The burden of showing that the restriction is reasonable is on the state.

The Supreme Court has upheld pre-censorship of movies, considering global trends, and concluded that motion arts must be treated differently.[47] Prior restraint on publication has been held to be invalid in *R. Rajgopal*.[48] The post-censorship of free speech often manifests through arbitrary executive actions such as arrests or other forms of coercion.[49] Also, the Supreme Court has expansively interpreted the freedom of speech and expression and narrowly interpreted the restrictions in Article 19(2). The Court has examined the legal provision's purported effect and not the legislation's or governmental action's purpose or policy. Uncertainty, vagueness, overbreadth, chilling effect, etc., have also been considered[50] along with the proportionality principle while adjudicating claims of freedom of speech and expression violation.[51]

While dealing with the issue of fake news amid the COVID-19 Pandemic, the Supreme Court cautioned the media (print, electronic or social) to maintain a strong sense of responsibility and ensure that unverified news capable of causing panic is not disseminated.[52]

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[46] *State of Madras* v. *V. G. Row* AIR 1952 SC 195; *Chintaman Rao* v. *State of Madhya Pradesh* AIR 1951 SC 118.

[47] *K. A. Abbas* v. *Union of India* (1970) 2 SCC 780; *Bobby Art International* v. *Om Pal Singh Hoon* (1996) 4 SCC 1.

[48] *R Rajgopal* v. *State of Tamil Nadu* (1994) 6 SCC 632.

[49] *Aveek Sarkar* v. *State of West Bengal* (2014) 4 SCC 257; *Devidas Ramachandra Tuljapurkar* v. *State of Maharashtra* (2015) 6 SCC 1; *N. Radhakrishnan* v. *Union of India* (2018) 9 SCC 725; *Imran Pratapgarhi* v. *State of Gujarat* 2025 INSC 410.

[50] *Shreya Singhal* v. *Union of India* (2015) 5 SCC 1.

[51] *Anuradha Bhasin* v. *Union of India* (2020) 3 SCC 637.

[52] *Alakh Alok Srivastava* v. *Union of India* (2021) 19 SCC 689.

Later, the issue concerning the Fact Check Unit (hereinafter referred to as "FCU"), constituted under Rule 3(1)(b)(v) of Digital Media Ethics Code, 2021 for the purpose of checking the fake news was considered by the Bombay High Court[53] in which Rule 3(1)(b)(v)[54] was under challenge and with respect to contours of the terms 'Fake', 'False' or 'Misleading', Justice G. S. Patel observed that the existence of a fact and its veracity is established not absolutely but on the basis of probabilities. Different judicial standards are applied in terms of evidence law, such as 'belief', 'probability', 'prudence', 'supposition'. Hence, absolute determination of truth may not be possible in all circumstances (i.e., whether a particular news/information presented as fact is fake, false, or misleading).[55]

At the other side lie statements that are neither true nor false: expressions of opinions, hopes, desires. But what the impugned Rule is concerned with is content and information that lies between these polarities: subjective assessments even on objective data, or questioning of the data. With respect to the functioning of the FCU and its validity, the Court opined that nobody knows the basis on which the FCU will make this determination, raising questions as to whether the process will rely on an objective standard and material, if that material is publicly accessible, and if the factual reference material itself is tested for 'truth' or 'accuracy'. This is crucial because if 'fake, false or misleading' does not lend itself to precision and accuracy, then there is the issue of vagueness and overbreadth.[56]

The validity of the impugned provision was also tested on the touchstone of Article 14 as only government data was included for fact-check and not all other data, which amounts to class legislation and not reasonable classification. Class legislation is prohibited by the equality principle enshrined under Article 14.[57]

Regarding the vagueness of "business of the Central Government", primacy has been accorded to the Union Government with respect to subjects falling under the Concurrent List. Articles 73, 77, and 248 further widen the scope of the term 'business of the central government' and virtually everything falls within the ambit of the business of the government.[58]

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[53] *Kunal Kamra* v. *Union of India*, Writ Petition (L) No. 9792 OF 2023; 2024: BHC-OS:1575-DB. The matter was heard by Division Bench comprising of Justice G. S. Patel and Neela Gokhale. Majority view [3rd Opinion] rendered by Justice A.S. Chandurkar – 20th Sept, 2024. Justice A.S. Chandurkar concurred with the opinion of Justice G. S. Patel and the impugned portion of the 2021 Rules was declared unconstitutional.

[54] Digital Media Ethics Code, 2021, rule 3(1)(b)(v). The part of the rule challenged was - [or, in respect of any business of the Central Government, is identified as fake or false or misleading by such fact check unit of the Central Government as the Ministry may, by notification published in the Official Gazette, specify].

[55] *Supra* note 53 at para. 111 – 115.

[56] *Id.* at para.109.

[57] *Id.* at para. 184.

[58] *Id.* at para. 181.

### 5.2 Governing Digital Media Content

Compelling arguments were made by the Additional Solicitor General in *Shreya Singhal v. Union of India,*[59] wherein print and other media were distinguished from digital media. The Supreme Court accepted those arguments without qualification, and that there can be creation of offences applied to free speech over the internet alone as opposed to other mediums of communication. However, the Supreme Court also observed that while it may be possible to narrowly draw a section creating a new offence, such as Section 69-A, for instance, yet the validity of such a law will have to be tested on the touchstone of the tests already indicated above.

The argument made by Mr. Shadan Farasat is appealing, i.e., that the law requires two different sets of rules for the media. This is because all major newspapers published in print also have a presence on social media platforms. If the same news is published in a print newspaper, it will be immune from Rule 3(1)(b)(v) of the Digital Media Ethics Code, 2021. However, the above provision will apply if the same news is published on a website or social media handle.[60] While this argument seems to have prima facie merit, it overlooks the concerns raised by Solicitor General Tushar Mehta, which remain unresolved. He raised several illustrative circumstances, such as an old video from another country being shared with a caption claiming atrocities committed by defence personnel in the valley following the enforcement of the J&K Reorganization Act, 2019. He also provided many other examples.[61]

### 5.3 Opacity in the Use of the National Security Exception

While dealing with ban on news channel MediaOne, the Supreme Court held that a reasoned order is integral to the right to freedom of speech and expression under Article 19(1)(a) of the Constitution, as it ensures transparency, accountability, and the ability to seek judicial review. The national security exception, though valid, must not be used as a blanket justification to suppress dissent or evade procedural fairness.[62] Sealed cover procedure violates principles of natural justice and open justice. Such a procedure denies the affected party a fair hearing and deprives them of the opportunity to rebut or challenge the

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[59] (2015)5 SCC 1, at para. 31.

[60] *Supra* note 44 at para. 168.

[61] Kindly refer to the submissions made by learned Solicitor General Tushar Mehta at p.no. 38 of the opinion of Justice Neela Gokhle.

[62] Following observation in *Manohar Lal Sharma* v. *Union of India* 2021 SCC OnLine SC 985 is pertinent: "Though the extent of judicial review in matters concerning national security is limited, it does not mean that the State gets a free pass every time the argument of national security is made. This Court held that the State must plead on affidavit and prove that disclosure of information would injure national security."

evidence used against them, thus chilling free speech and undermining press independence.[63]

Recording of reasons was also emphasized by the Supreme Court while dealing with the internet ban in Jammu & Kashmir.[64] It was further observed that national security cannot be a talismanic incantation to bypass constitutional rights, and any restriction must adhere to the principle of proportionality and be subject to periodic review. The Court declared that the freedom of speech through the internet is protected under Article 19(1)(a) and can only be curtailed following Article 19(2).

From the above discussion, it can be argued that Rule 16[65] should be reconsidered by the Supreme Court on the grounds of the confidentiality clause and the national security perspective. It is submitted that though the proportionality principle may be invoked to examine the validity of the impugned provision, the national security exception permits the government to resort to exceptional measures in national security matters.

**5.4 Due Diligence Obligations of Intermediaries**

The Supreme Court in *Google India Pvt. Ltd.* clarified that intermediaries are not completely immune from liability; their safe harbour is conditional upon compliance with due diligence obligations.[66] In *Shreya Singhal,* Section 79(3)(b) was read down to mean that intermediaries are liable only upon actual knowledge through a valid court order, ensuring they are not burdened with assessing millions of takedown requests. Such orders must strictly relate to grounds under Article 19(2).[67] The Delhi High Court observed that statutory mechanisms must be exhausted before seeking writ relief under Article 226 against Intermediaries; their obligations regarding Content Moderation remain grounded in statutory compliance.[68] However, with respect to contractual obligations, platforms like 'X' (formerly Twitter) are not amenable to such jurisdiction absent a public duty.[69]

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[63] *Madhyamam Broadcasting Limited* v. *Union of India & Ors* (2023) 13 SCC 401; supplying of information in sealed cover was considered a well-established practice by the Supreme Court in service jurisprudence but not favoured with respect to matters affecting fundamental rights. For instance, in *P. Chidambaram* v. *Directorate of Enforcement* (2020) 13 SCC 791.

[64] *Supra* note 51.

[65] Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009, rule 16.

[66] *Google India Pvt. Ltd.* v. *Visaka Industries and Others* MANU/SC/1708/2019.

[67] *Supra* note 50.

[68] *Mohammed Hamim* v. *Facebook India Online Services Pvt. Ltd.* Writ Petition (Civil) 1227/2024; 2024:DHC:692.

[69] *Sanchit Gupta* v. *Union of India* W.P.(C) 10030/2024, 2024:DHC:5713.

## 6. Regulatory Challenges and Gaps in Tackling Fake News

Various forms of content shared on digital platforms are already subject to regulation under multiple existing laws addressing different aspects of mis/disinformation, including the IT Act and the 2021 Rules made thereunder. However, the modern notion of fake news as perceived has definitional ambiguity. There is no precise scope of the term. It is worth mentioning that due to definitional ambiguities, the term 'fake news' is avoided in legal discourse. The United Nations,[70] European Democracy Action Plan (EDAP) and the United Kingdom[71] have used Misinformation and Disinformation. In the 2021 Rules, false or misleading information is used.[72] Without a clear definition, it becomes difficult to decide which information amounts to fake news. A decision on a claim of Misinformation requires interpretation and agreement on what distinguishes legitimate information from Misinformation. Regulatory action needs to be informed by robust evidence. An opinion/value judgment cannot simply be dismissed merely because those views do not conform to the existing majority belief system.[73]

Secondly, due to the very nature of the content, it becomes viral the moment it appears online, and it spreads rapidly, and it becomes strenuous to identify the originator of the content. It may be difficult legally to impute any criminal intent simply by sharing the content without verifying the truthfulness of it. Moreover, the person charged with sharing fake news will always have an *alibi* that it was shared innocently unless the contrary is proved.

Excessive blocking of content and aggressively targeting people for sharing false/misleading information would amount to transgressing the State's limits by violating the freedom of speech and expression. Conferring excessive authority to law enforcement agencies to track and arrest the offender may result in a violation of privacy rights as well.[74]

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[70] United Nations, "Countering Disinformation," *available at:* https://www.un.org/en/countering-disinformation (last visited on Mar. 30, 2025).

[71] UK Government, "Disinformation and 'Fake News': Government Response to the Committee's Fifth Report of Session 2017–19" (2019), *available at:* https://publications.parliament.uk/pa/cm201719/cmselect/cmcumeds/2184/2184.pdf (last visited on Mar. 29, 2025).

[72] The impugned part of Rule 3(1)(b)(v) wherein the term 'fake news' was used, which was added by 2023 Amendment, has already been declared unconstitutional by the Bombay High Court.

[73] Zoe Adams, *et.al.*, "(Why) is Misinformation a Problem?" 18 *Perspective on Psychological Science* 1436 (2023).

[74] *WhatsApp LLC* v. *Union of India*, W.P.(C) No. 7284 of 2021 (Del HC);
*Facebook Inc.* v. *Union of India*, W.P.(C) No. 7281 of 2021 (Del HC);
"Explained: Why is WhatsApp Challenging Indian Govt's Order Over Privacy?", *LiveMint*, *available at:* https://www.livemint.com/news/india/explained-why-is-whatsapp-challenging-indian-govts-order-over-privacy-11714101587758.html (last visited on Apr. 13, 2025).

Moreover, there is little to no answer as to how it impacts individuals in the short or long term. There may be a political impact, increasing cynicism and apathy to encourage extremism.[75] However, in the case of fake news, such harm – often manifesting as Misinformation, manipulation or public confusion – may be diffuse or difficult to quantify in conventional legal terms. A crucial requirement of establishing a causal link between the speech and the harm it allegedly causes appears absent. Focusing on individual harm further weakens the argument to regulate fake news.

Global nature of the internet presents significant jurisdictional and enforcement challenges. Since Intermediaries frequently operate across multiple jurisdictions, disinformation often crosses national boundaries and complexities arise in enforcement of domestic laws. The regulation of online disinformation intersects directly with freedom of speech and expression. The technological complexity and scale further complicate regulation. The sheer volume, velocity, and variety of online information make manual oversight impractical.

The rise of encrypted and closed-platform communication channels, such as WhatsApp or Telegram, poses distinct regulatory issues. Though end-to-end encryption is essential for privacy and security but it impedes the ability to trace sources of disinformation and thereby limits law enforcement capabilities and regulatory oversight.[76] Moreover, any attempt to weaken encryption to facilitate regulatory monitoring inevitably raises significant privacy, cybersecurity, and human rights concerns.[77]

OTT platforms directly deliver content to the consumers via internet and fall in the category of the intermediary, and thereby bypass the traditional broadcasting laws like the Cable Television Networks (Regulation) Act, 1995. Moreover, OTT platforms increasingly feature user-generated or third-party content e.g., documentaries, podcasts, talk shows etc. with little editorial control. In the absence of licencing and editorial oversight, the inclusion of such diverse sources of information heightens the risk of unchecked disinformation or misinformation. Also, oversight and fact-checking mechanisms might be weaker compared to mainstream media, given the scale and diversity of content.

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[75] *Supra* note 3.

[76] Anirudh Burman, "Considering India's Encryption Policy Dilemma" *Carnegie Endowment for International Peace* (2023)*, available at:* https://carnegieendowment.org/research/2023/11/considering-indias-encryption-policy-dilemma?lang=en (last visited on Aug. 4, 2025).

[77] BSR, *Human Rights Impact Assessment: Meta's Expansion of End-to-End Encryption*, *available at:* https://www.bsr.org/reports/bsr-meta-human-rights-impact-assessment-e2ee-report.pdf (last visited on Aug. 4, 2025).

It is well-established that digital platforms i.e. social media intermediaries and OTT platforms are driven by advertising revenue and thrive on maximizing user engagement. To this end, they employ algorithms and artificial intelligence to personalize and prioritize content in ways that often lack transparency. There is no transparency regarding how algorithms determine content virality, why certain posts appear on a user's timeline, or how content is prioritized and disseminated. This opacity makes it difficult to understand how and why fake news spreads rapidly, and raises serious concerns about the lack of accountability in Content Moderation practices.[78] Behavioural advertisements run on digital media platforms, particularly during elections sponsored by political parties, may be weaponized to manipulate democratic processes by targeting individuals.[79]

The lack of transparency in content amplification, mainly through paid promotions and algorithmic systems, makes it difficult to distinguish genuine narratives from sponsored ones. Amid evolving political narratives and social unrest, this opacity enables the spread of Misinformation, fosters polarization, and undermines the electorate's ability to make informed decisions.

The self-regulation approach has been incorporated in the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, and the Digital Personal Data Protection Act, 2023.[80] Automated tools are also recognized under both legal instruments.[81] However, the regulation of such tools remains largely unaddressed. Their deployment is left to the discretion of the intermediaries, with no defined benchmarks for their efficacy, transparency, or accountability. Indian law lacks formal requirements for algorithmic audits, systemic risk assessments, or independent data access for researchers. As a result, there is no structured mechanism to evaluate the effectiveness, fairness, or broader societal impact of automated moderation systems, highlighting a significant regulatory gap. In essence, while India's framework provides reactive mechanisms for content regulation, it does not mandate proactive risk mitigation, algorithmic transparency, or independent oversight.

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[78] Digital Platforms Regulator Forum, Government of Australia, "Working Paper 1: Literature Summary – Harms and Risks of Algorithms", June, 2023, *available at:* https://dp-reg.gov.au/sites/default/files/documents/2023-11/Working%20 paper%201%20Literature %20Summary%20-%20Harms%20and%20risks%20of %20algorithms.pdf (last visited on Apr. 20, 2025).

[79] Anthony Nadler, Matthew Crain, and Joan Donovan, "Weaponizing the Digital Influence Machine: The Political Perils of Online Ad Tech" *Data & Society*, *available at:* https://datasociety.net/wp-content/uploads/2018/10/DS_Digital_Influence_Machine.pdf (last visited on Apr. 20, 2025).

[80] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, rule 4(4) and proviso 2 and 3.

[81] Digital Personal Data Protection Act, 2023 (Act 22 of 2023), s. 2(b), (h), (x).

## 7. Conclusion

The spread of fake news has been significant about various incidents, such as the Kumbh Mela, the Manipur violence, and the circulation of deepfake videos featuring celebrities and politicians during elections. However, no empirical research has yet been conducted to systematically assess the causes, motivations, impacts, attitudes, and behavioural changes of both the perpetrators and the public at large.

The absence of specific legal frameworks imposing a clear burden on intermediaries to address fake news has created significant regulatory gaps in the digital ecosystem. Despite their pervasive role in public discourse, social media platforms' automation and artificial intelligence (AI) tools remain largely unregulated. This opacity makes it difficult to understand how and why fake news spreads rapidly, and raises serious concerns about the lack of accountability in Content Moderation practices. Further, deliberate non-compliance resulting in complete ban of OTT platforms further establishes the weakness of the self-regulatory model.[82] This gap raises essential questions about the efficacy of the existing self-regulatory framework and accountability of the social media intermediaries.

Moreover, the absence of binding obligations to ensure fairness, consistency, transparency, accountability or procedural safeguards concerning Algorithmic Amplification of content, detecting fake news, and de-ranking misleading content undermines both user rights and the broader democratic ethos. There is an urgent need for legislation that regulates the technological architecture of content dissemination and enforces procedural fairness and user-centric accountability.

Based on the conclusions drawn above, the following suggestions are put forward: The quantitative and qualitative research, grounded in first-hand data, to evaluate public awareness, attitudes, and behavioural patterns in distinguishing fake news from authentic information must be undertaken. Longitudinal studies should supplement this to ensure the reliability and relevance of findings over time. A co-regulatory model that combines state oversight with industry participation should be adopted, given the weak compliance associated with the self-regulatory framework.[83] AI based automated tools deployed for

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[82] Press Information Bureau, "Government Enforces Norms of Journalistic Conduct through PCI, Programme Code and IT Rules to Curb Fake and Defamatory Content across Print, TV & Digital Platforms," July 30, 2025, *available at:* https://www.pib.gov.in/PressReleasePage.aspx?PRID=2150335 (last visited on Aug. 5, 2025).

[83] Archit Lohani, "Countering Disinformation and Hate Speech Online: Regulation and User Behavioural Change" *Observer Research Foundation*, Jan. 25, 2021, *available at:* https://www.orfonline.org/research/countering-disinformation-and-hate-speech-online (last visited on Aug. 5, 2025).

content moderation must be regulated through appropriate legislation to ensure fairness, transparency and accountability. Due to the black-box nature of AI tools used in content moderation and fact-checking, it is suggested that the State should continue its efforts in correction, debunking, and fact-checking, despite their limitations. However, to enhance effectiveness and public trust, these processes must be democratized by ensuring transparency, involving independent bodies, and preventing potential misuse for political ends. Horizontal application of fundamental rights against private entities must be encouraged to adjudicate public law issues involving platform liability, private censorship, and non-State restrictions on free speech, particularly relevant in cases involving significant social media intermediaries.[84] Apart from legal regulation, it is necessary that individuals adopt responsible online behaviour and develop critical thinking skills to counter fake news effectively. Digital Media Literacy should be introduced early in education and go beyond safety to include verifying information. It must be accessible to all age groups and integrated into teacher training and higher education to build an informed and resilient society.[85]

[84] *Kaushal Kishore* v. *State of U.P.* (2023) 4 SCC 1.

[85] Peter Coe, "Tackling Online False Information in the United Kingdom: The Online Safety Act 2023 and its Disconnection from Free Speech Law and Theory" 15 *Journal of Media Law* 213-242 (2023).

# Awareness and Access: Whether Western Himalayan Tribe Knows their Rights Under FRA, 2006

*Prakash Tripathi**

## ABSTRACT

*The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA), was enacted to correct historical injustices faced by forest-dependent communities across India. It aims to provide land tenure, livelihood security, and participatory governance rights to marginalized groups. However, despite its progressive legal framework, the implementation of FRA in the Himalayan region remains fraught with challenges. This ethnographic study explores the levels of awareness, understanding, and practical access to forest rights among the Tharu tribe of Uttarakhand—a community with deep cultural and ecological ties to forest lands.*

*Based on immersive fieldwork in a tribal village of the district Udham Singh Nagar, the study reveals that most Tharu villagers remain unaware of the FRA and its provisions, particularly the rights to minor forest produce, community governance, and forest conservation. Where knowledge exists, it is often partial or distorted due to complex legal language, bureaucratic neglect, and resistance from the forest department. The required evidence of continuous forest dependence, especially for Other Traditional Forest Dwellers (OTFDs), is difficult to produce in a largely oral society, leading to widespread rejection of claims. Administrative bottlenecks, absence of dedicated implementing bodies, and lack of political will further weaken the realization of forest rights.*

*This ethnographic study discusses the forest governance and highlights the implementation of FRA, 2006 and its success and failure in India. The paper, taking example of the Tharu Tribe of Uttarakhand, explains the challenges and hindrance in the implementation of the FRA, 2006 in the Western Himalayan region.*

***Keywords:*** *Forest Rights, Tribals, Livelihood, Displacement, Awareness, Implementation.*

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## 1. Introduction

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006—commonly known as the Forest Rights Act (FRA)—marked a significant milestone in India's legal history. It was enacted as a corrective mechanism to undo the historical injustices suffered by forest-dwelling communities, particularly Indigenous tribes, who were systematically alienated from the forests that had sustained them for generations. These injustices stemmed from the consolidation of state forests during the colonial period and continued in independent India, where traditional rights to forest land were not adequately recognized.[1] The legislation recognizes the forest as more than a natural resource—it is a living space, a sacred geography, and an ecosystem of cultural and economic sustenance for Adivasi communities. The Act also recognizes and vests individual and community forest rights to these communities, providing them with legal entitlements to land and resources. The Act does not limit to land tenures and resource access to tribal communities, but it also empowers women and other forest dependent communities through joint titles and decision-making participation.

Forest and its resources are crucial for the sustenance of marginalized forest-dependent populations, especially tribal communities. These communities rely heavily on forests for their livelihoods, cultural identity, and sustenance. Approximately 147 million villagers live in or around forests, with another 275 million villagers depending heavily on forests for their livelihoods and cultural practices.[2] Their long-standing relationship with forests has led them to develop sophisticated knowledge systems and practices aimed at sustainability and conservation. However, the access to these resources has been severely restricted due to historical exploitation and legal frameworks that have marginalized these communities.[3] The heavy restrictions on access to forestland and resources have resulted in many forest-dependent people becoming some of the most marginalized in the country. Livelihood security for these populations is critically linked to ecological security and access to natural resources, indicating that many forest-dependent people have become marginalized due to restrictions on their access to these resources.[4] The categorization of forests as "state forests" often leads to conflicts where conservation goals may overshadow

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1 Savyasaachi, “Forest Rights Act 2006: Undermining the Foundational Position of the Forest” *Economic and Political Weekly* 55–62 (2011).

2 Ashish Kothari, Neema Pathak and Anuradha Bose, “Forests, Rights and Conservation: FRA Act 2006, India”, in H. Scheyvens (ed.), *Critical Review of Selected Forest-Related Regulatory Initiatives: Applying a Rights Perspective* 19–50 (Institute for Global Environmental Strategies, 2011).

3 A. Mishra and P. Tripathi, “Scheduled Tribes and Their Lost Forests: An Analysis of the Implementation of FRA, 2006 in India” 13 *Sodh Drishti* 21–28 (2022).

4 *Supra* note 2.

the rights and livelihoods of tribal communities. This tension is evident in the management of forest resources, where the needs of local populations may be side-lined in favour of environmental preservation. The Van Gujjars, for instance, have historically maintained access to forest resources, yet face challenges in asserting their rights against state interests.[5]

The historical experience of forest-dependent tribal and non-tribal communities in India has been marked by persistent exploitation at the hands of various "invading" forces—ranging from pre-colonial rulers and their intermediaries, to traders, colonial administrators, and, in the post-independence era, state agencies and corporate entities.[6] In the pre-independence era, the colonial government prioritized revenue generation from forests, leading to the exploitation of forest-dependent communities. The management of forests was largely left to local rulers and traders, who were primarily interested in tax collection rather than the welfare of the communities. The colonial restrictions on forest use in India were primarily driven by the British government's revenue and resource extraction goals. The British established a centralized bureaucracy, the Forest Department, to administer forest resources. Forests were categorized as *reserved, protected, or village forests*, with reserved and protected forests under strict state control.[7] The Indian Forest Act, 1927, India's main forest law, had nothing to do with conservation. It was created to serve the British need for timber. Enacted during British colonial rule, the Indian Forest Act, 1927, was primarily designed to consolidate and control forest resources for commercial exploitation and state revenue generation rather than for community welfare or environmental sustainability. It categorized forests into reserved, protected, and village forests, with the reserved forests receiving the strictest protection and exclusion of local communities. The Act authorized the state forest department to have exclusive ownership and control over forests, severely restricting the traditional rights of indigenous peoples and other forest-dependent communities to use forest land and resources. The law criminalized many customary activities of forest dwellers, such as gathering firewood, grazing livestock, hunting, and accessing minor forest produce without permits. Penal provisions for "illegal" forest access caused widespread alienation and marginalization of tribal communities. The law says that, at the time a "forest" is declared, a single official (the Forest Settlement Officer) is to enquire into and "settle" the land and forest rights people had in that area. These all-powerful officials unsurprisingly either did nothing or recorded only the rights of powerful communities. The Indian Forest Act institutionalized centralized, bureaucratic forest

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[5] P.A. Paquet and E. Kuroyedov, "Everyday Forest Rights: Claiming Territories and Pastoral Livelihoods in Uttar Pradesh and Uttarakhand, India" 19(4) *Conservation & Society* 236–247 (2021).

[6] *Supra* note 2.

[7] T. Apte and A. Kothari, *Joint Protected Area Management: A Simple Guide* (Kalpavriksh, Pune, 2000).

management with minimal participation or recognition of community rights. It did not provide any mechanisms for recognizing or protecting the customary rights of forest inhabitants. It was the first and most significant Act which curtails forest dwellers rights to access forest and put restriction if they access any resource. The tyranny started in 1927 continued in future and similar model was subsequently followed into the Wild Life Protection Act, passed in 1972, with similar consequences. Local communities were largely excluded from forest management and use. The colonial government viewed them as encroachers or destroyers of forests, and their rights were either heavily regulated or extinguished altogether.[8] The colonial government documented privately owned land and took over the rest as state property, ignoring the communal resource management practices of local communities.[9] Practices like shifting cultivation, hunting, and gathering were curtailed. Shifting cultivation was opposed because it hindered tax collection, and hunting by local communities was restricted to protect commercially valuable species.[10] Large areas were declared game reserves for elite hunting, further restricting access for local communities. Hunting by elites led to the decline of several species, while local hunters were penalized for using traditional methods. Forest fires, used by communities for agriculture or protection from wild animals, were controlled as they were seen as damaging to commercially valuable crops. Forests were cleared aggressively for timber extraction and cultivation to maximize tax revenue. This led to large-scale deforestation and ecological degradation.[11]

## 1.1 Forest Governance: India and Western Himalaya

Post-independence forest policies in India have been shaped by a legacy of colonial restrictions and a focus on state control over forest resources. This led to the alienation of forest-dependent communities from their traditional rights and management practices. Joint Forest Management (JFM), Introduced in the 1988 Forest Policy, aimed to involve local communities in the management and protection of forests. However, it often faced criticism for being imposed on existing community management systems and for not granting legal rights or long-term security to communities.[12] The Forest Conservation Act of 1980 was intended to slow down deforestation and protect forest lands. The Act was introduced to regulate the diversion of forest land for non-forest purposes. While aimed at forest

[8] *Ibid.*

[9] M. Rangarajan, "Nature, Culture and Empires; Conservation; and Towards Preservation", in V. Saberwal, M. Rangarajan and A. Kothari (eds.), *People, Parks and Wildlife: Towards Coexistence.* (Orient Longman Limited, New Delhi, 2000).

[10] *Ibid*.

[11] *Supra* note 2.

[12] *Supra* note 7.

conservation, the Act often led to unintended consequences of further marginalizing forest-dependent communities. It imposed stringent controls that restricted even traditional uses, leading to increased conflict between forest departments and local people. However, it has been criticized for further alienating local communities and for not adequately addressing their rights and needs. The Act reinforced the dominance of the forest bureaucracy and often side-lined or ignored the rights and claims of tribal and other traditional forest dwellers. The policies have often prioritized commercial interests over the livelihoods of forest-dependent communities, leading to increased marginalization. Due to its strict prohibition on forest land diversion, the Act became a tool that forest officials frequently used to deny rights claims under the Forest Rights Act (FRA), treating FRA's community rights provisions as contradictory or subordinate to forest conservation priorities. The heavy restrictions on access to forest resources have resulted in many communities facing hardships. Many of them have been removed from their native homes in the name of forest and biodiversity protection. An estimated 300,000 families have been evicted from protected areas in the past five years, highlighting the significant number of people affected by restrictions on forest access.[13]

The legal framework governing forest management in the Western Himalayas is complex, involving historical and contemporary challenges in enforcement. The region has seen various institutional arrangements over the past 150 years, with local communities often negotiating with the state for rights and responsibilities in forest management. Despite these efforts, enforcement remains problematic due to socio-economic and political factors. This answer explores the legal framework and enforcement challenges in the Western Himalayan forests, drawing insights from various contexts. In the Western Himalayas, historical arrangements involved co-parcenary bodies of cultivators negotiating with the state for rights over forest resources. These arrangements included sharing proceeds from timber sales and managing non-timber forest products.[14] The legal framework has evolved, with attempts to create village-level institutions for co-management, but these efforts often overlook the historical ability of communities to negotiate and manage resources effectively.[15]

Enforcement of forest laws is hindered by socio-economic dependencies on illegal

[13] National Forum for Forest People and Forest Workers, *Forest Rights Act: A Weapon of Struggle* (National Forum for Forest People and Forest Workers, New Delhi, 2007).

[14] A. Chhatre, "Forest Co-Management as if History Mattered: The Case of Western Himalayan Forests in India*" ISB* (2000), *available at:* https://eprints.exchange.isb.edu/id/eprint/998/(last visited on June 18, 2025).

[15] *Ibid.*

activities, limited resources for law enforcement, and external pressures from vested interests. Inconsistencies in legal implementation and a lack of public awareness further exacerbate enforcement challenges, making it difficult to deter illegal activities and protect ecosystems. The political economy of forest use, including patronage networks, complicates enforcement, as laws are often selectively applied to favour dominant interests, marginalizing local communities. The violations of forest management regulations and indigenous peoples' rights are often linked to illegal logging activities. These violations can create a façade of legality, making it difficult for traders and consumers to discern the legality of timber products.[16] Madhu Sarin identifies three main obstacles to sustainable and just forest management Poor procedures for defining and identifying forests; Dissonance between tribal and conservation laws and Neglect of democratic decentralization of forest governance. In Nepal, similar challenges exist where state-declared protected areas often ignore indigenous management systems, leading to conflicts and undermining local governance.[17] These issues undermine both conservation efforts and social justice for local communities and further explains that there is a significant conflict between conservation laws and the rights of tribal communities. The rigid application of conservation laws often negates communal tenures and the cultural significance of forests for tribal people, violating constitutional provisions meant to protect their rights, which was found to be true in the case of Western Himalaya.[18] There was a need for democratic decentralization in forest governance. Centralized management has been criticised for focusing on revenue generation and failed to meet the objectives of biodiversity conservation and social justice. Existing Legal frameworks tried to support this decentralization, but they were often ignored in practice.[19] It has been found that when traditional knowledge and state policies work hand in hand forest diversity remain intact and maintained.[20]

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[16] M. Colchester, M. Boscolo, A. Contreras-Hermosilla, F. Del Gatto, J. Dempsey, G. Lescuyer, K. Obidzinski, D. Pommier, M. Richards, S. N. Sembiring, L. Tacconi, M. T. V. Rios and A. Wells, "Global Forest Law Enforcement Initiatives: The Context for This Study" *Justice in the Forest: Rural Livelihoods and Forest Law Enforcement* 1–4 (Center for International Forestry Research, 2006), *available at*: http://www.jstor.org/stable/resrep02059.7 (last visited on June 18, 2025).

[17] S. Stevens, "National Parks and ICCAs in the High Himalayan Region of Nepal: Challenges and Opportunities" 11(1) *Conservation and Society* 29 (2013).

[18] M. Sarin, "Laws, Lore and Logjams: Critical Issues in Indian Forest Conservation" *International Institute for Environment and Development* (2005), *available at:* http://www.jstor.org/stable/resrep01818 (last visited on June 18, 2025).

[19] *Ibid.*

[20] *Supra* note 17.

While the Western Himalayan region faces significant challenges in forest governance and enforcement, there are opportunities to learn from indigenous practices and international precedents. Collaborative approaches that involve local communities and respect traditional management systems could enhance the effectiveness of legal frameworks and enforcement strategies. Additionally, regional cooperation and treaty-based frameworks, as seen in other parts of the Himalayas, could provide a more cohesive approach to managing shared environmental resources.[21]

### 1.2 Forest Policies in India and their Impact on Tribal Communities

The history of forest policies in India is deeply intertwined with the dispossession and marginalization of tribal communities.[22] Successive policies—colonial, post-independence, and rights-based—have shaped how forest-dependent groups access and control their ancestral resources. While the Forest Rights Act (FRA), 2006 represents a landmark attempt to correct historical wrongs, its effectiveness must be understood against the background of earlier laws and policies that entrenched state dominance over forests.

The Indian Forest Act of 1865 and its amendment in 1878 created the categories of "Reserved" and "Protected Forests," vesting control with the colonial state. This criminalized shifting cultivation, grazing, and hunting, thereby eroding tribal livelihoods. The Indian Forest Act, 1927 consolidated these restrictions and empowered the Forest Department to extinguish customary rights. This Act institutionalized the perception of tribals as "encroachers," while privileging timber extraction for colonial revenue.[23] Thus, far from conserving forests, colonial policy systematically alienated communities from the very ecosystems they had sustainably managed for centuries. Independent India inherited this legacy and largely reproduced it in its early decades. The Forest Policy of 1952 emphasized the economic role of forests in national development, declaring that one-third of the country's geographical area should be under forest cover. Tribal subsistence was acknowledged only as "concessions" rather than legal rights.[24] This approach merged with the post-independence development agenda, where large dams, mines, and plantations displaced tribal communities without adequate rehabilitation. The Wildlife Protection Act,

[21] N. A. Robinson, "Marshalling Environmental Law to Resolve the Himalaya-Ganges Problem" 7(3) *Mountain Research and Development* 305–315 (1987).

[22] Asmita, Kabra, and Budhaditya Das, "Aye For The Tiger: Hegemony, Authority, and Volition in India's Regime of Dispossession for Conservation" 50 *Oxford Development Studies* 44 (2022).

[23] Madhu Sarin, *Disempowered by Law: FRA and Tribal Rights* (National Centre for Advocacy Studies, Pune, 2005).

[24] Madhav Gadgil and Ramachandra Guha, *Ecology and Equity: The Use and Abuse of Nature in Contemporary India* (Penguin Books, New Delhi, 1995).

1972, as discussed above, further exacerbated exclusion by introducing a fortress model of conservation. Protected Areas (PAs), such as sanctuaries and national parks, were established by evicting or restricting tribal access to forest resources. Communities such as the Van Gujjars and Baigas faced eviction, harassment, and criminalization, even though their traditional practices posed minimal ecological threat.[25] Similarly, the Forest Conservation Act, 1980 centralized decision-making by requiring central government approval for forest land diversion. While intended to prevent deforestation, the Act side-lined tribal needs and strengthened bureaucratic control.[26] A gradual paradigm shift in tribal forest rights occurred in the late 20th century with the implementation of the National Forest Policy of 1988 which explicitly recognized that "the life of tribals and other poor people living within and near forests revolves around forests" and prioritized meeting their subsistence needs.[27] It emphasized community participation and ecological balance, signalling a departure from revenue-centric policies. Building on this, the Joint Forest Management (JFM) resolution of 1990 sought to involve communities in protecting forests in return for usufruct rights. However, JFM was criticized for being tokenistic, as forest departments retained ultimate control and community rights remained conditional.[28] In effect, communities were co-opted into conservation schemes without genuine empowerment.

The Panchayats (Extension to Scheduled Areas) Act, 1996 (PESA) represented a stronger step towards tribal self-governance. Amita Bhaviskar found that by extending constitutional recognition to Gram Sabhas in Scheduled Areas, PESA empowered local communities to manage natural resources but its implementation was patchy, with state governments and forest departments often reluctant to cede authority. The most radical corrective, however, came with the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA). FRA acknowledged the historical injustices inflicted upon forest dwellers and vested them with Individual Forest Rights (IFRs) and Community Forest Rights (CFRs). Following pages discuss the provision, significance and implementation of FRA in India and its impact on the tribal communities.

### 1.3 Forest Rights Act, 2006 and its Importance among the Tribal Communities

In 2006, the Parliament of India enacted the *Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act*, commonly referred to as the *Forest*

[25] Ashish Kothari, Neema Singh and Saloni Suri, *People and Protected Areas: Rethinking Conservation in India* (Sage Publications, New Delhi, 1989).

[26] Ministry of Environment and Forests, *Forest Conservation Act, 1980* (Government of India, New Delhi, 1980).

[27] Ministry of Environment and Forests, *National Forest Policy, 1988* (Government of India, New Delhi, 1988).

[28] Nandini Sundar, *Beyond the Boundaries: JFM and Tribal Rights* (Oxford University Press, Delhi, 2001).

*Rights Act (FRA), 2006*. This landmark legislation was introduced as a corrective measure to address the systemic marginalization and dispossession experienced by tribal and other forest-dependent communities during both colonial rule and the post-independence governance period. For decades, these communities were denied legal recognition of their traditional rights over forest land and resources, resulting in socioeconomic deprivation and cultural dislocation. The Act defines "forest dwelling Scheduled Tribes" as members or communities of Scheduled Tribes who primarily reside in and depend on forests or forest lands for bona fide livelihood needs, including Scheduled Tribe pastoralist communities.[29] "Other traditional forest dwellers" are defined as any member or community who has primarily resided in and depended on the forest or forest lands for bona fide livelihood needs for at least three generations prior to 13th December 2005, with each generation comprising twenty-five years. These rights are recognised and vested by the Central Government, provided the Scheduled Tribes or other traditional forest dwellers had occupied the forest land before 13th December 2005. The Act came into effect on 1st January 2008, marking a significant step towards participatory governance, environmental justice, and the recognition of indigenous knowledge systems within India's legal and ecological framework.[30]

The Forest Rights Act (FRA) was introduced in this context to address the rights of these communities to the land they occupy and the resources they use. It aims to recognize and secure the rights of forest-dwellers, which could lead to greater democratization of forest management and empower communities to manage their resources sustainably. The Act was designed to address the longstanding insecurity of tenure and access rights of these communities, including those displaced due to development interventions. The FRA has been seen as a powerful tool for tenure transition and governance reform in areas where land and user rights have been effectively devolved. However, the implementation of the Act has faced challenges, including irregularities in the recognition of CFRs and a lack of respect for the Act in many regions of India. The FRA aims to regularize the situation of traditional forest dwellers by redistributing land titles. The act places a dual responsibility on forest dwellers: while it acknowledges and secures their rights to reside and use forest land, it also mandates them to conserve and manage these forests sustainably. A key feature of the Act is the role assigned to the Gram Sabha, which is entrusted with the protection of biodiversity, wildlife, and forest resources. Furthermore, the Act facilitates the allocation of forest land for essential development projects, ensuring that basic amenities such as education, roads, and healthcare reach forest-dependent communities.[31]

[29] The Scheduled Tribes and Other Traditional Forest Dwellers Act, 2006 (Act 2 of 2007).

[30] *Ibid.*

[31] P. S. Sahoo, S. Bang and G. Sahil, “Forest Conservation and Development in India – An Analysis of the Forest Rights Act, 2006 and Its Impact on the Forest System” 12(2) *JurnalCitaHukum* (2024).

However, the implementation of CFRs has faced challenges, with irregularities reported in granting these rights, particularly for those who are not officially recognized as "tribal status" holders. More than 88% of community-land conflicts stem not from claimant shortcomings but from FRA violations and displacement policies enforced by forest administration and conservation projects Despite the hopes for swift regularization, many regions still do not respect the provisions of the FRA, leading to disappointment among communities and activists advocating for forest rights. The act also reflects a broader trend in forest tenure reform, where there is a growing recognition of the importance of local communities in forest management. However, the implementation of the act and the security of these rights can be complex, often influenced by the existing bureaucratic structures and regulations that may still favour state control over forest resources.[32]

The various types of forest rights secured under this Act, which can be individual, community tenure, or both, include- i) Right to hold and live in forest land which covers individual or common occupation for habitation or self-cultivation for livelihood. The area for self-cultivation is restricted to the actual occupation and cannot exceed four hectares; ii) Community rights includes customary common forest land within traditional village boundaries, or seasonal use of landscape for pastoral communities, encompassing reserved forests, protected forests, Sanctuaries, and National Parks to which the community had traditional access; iii) Right of ownership, access to collect, use, and dispose of minor forest produce traditionally collected within or outside village boundaries. Minor forest produce includes all non-timber forest produce of plant origin, such as bamboo, honey, medicinal plants, and more; iv) Rights to collect fish and other products from water bodies, grazing (both settled or transhumant), and traditional seasonal resource access for nomadic or pastoralist communities; v) Habitat and habitation rights for specific groups include community tenures of habitat and habitation for primitive tribal groups and pre-agricultural communities. Here "Habitat" encompasses customary habitats and other habitats in reserved and protected forests vi) Rights over disputed lands rights in or over lands under any nomenclature in any State where claims are disputed; vii) Rights for converting Pattas, leases, or grants issued by any local authority or State Government on forest lands into titles; viii) Rights of settlement and conversion of all forest villages, old habitation, unsurveyed villages, and other villages in forests (whether recorded or notified) into revenue villages. Forest villages are settlements established inside forests for forestry operations or converted through the forest reservation process; ix) Right to protect, regenerate, conserve, or manage community forest resources empowers communities to manage resources they have traditionally protected and conserved for sustainable use; x) Rights recognised under other

[32] A. M. Larson and G. R. Dahal, "Introduction: Forest Tenure Reform: New Resource Rights for Forest-Based Communities?" 10 (2) *Conservation and Society* 77 (2012).

laws such as state law, laws of Autonomous District Councils or Regional Councils, or those accepted as tribal rights under any traditional or customary law of the concerned tribes; xi) Rights to access to biodiversity, and community rights to intellectual property and traditional knowledge related to biodiversity and cultural diversity xii) Any other traditional right customarily enjoyed by the forest dwelling Scheduled Tribes or other traditional forest dwellers, excluding the traditional right of hunting, trapping, or extracting a part of the body of any wild animal; xiii) Rights to alternative land for Scheduled Tribes and other traditional forest dwellers who were illegally evicted or displaced from forest land without receiving their legal entitlement to rehabilitation prior to 13th December 2005. This also applies where land acquired for State development interventions has not been used for its intended purpose within five years of acquisition.

The Act also specifies that the forest rights recognised are heritable but are not alienable or transferable. They must be registered jointly in the name of both spouses for married persons or in the name of the single head for single-person households, and pass to the next-of-kin in the absence of a direct heir. Holders of these rights cannot be evicted or removed from their occupied forest land until the recognition and verification procedure is complete. These rights are conferred free of encumbrances and procedural requirements, including clearances under the Forest (Conservation) Act, 1980, and the requirement of paying 'net present value' or 'compensatory afforestation' for forest land diversion, unless specifically required by this Act.

Furthermore, the Act permits the diversion of forest land for specific government-managed facilities (like schools, hospitals, roads, etc.), provided the land is less than one hectare and the diversion is recommended by the Gram Sabha. However, this is a provision for land use by the government, distinct from the forest rights vested in the communities themselves.

Holders of forest rights, Gram Sabhas, and village-level institutions also have duties under the Act, including protecting wildlife, forests, and biodiversity, ensuring the protection of sensitive ecological areas and water sources, preserving the habitat of forest dwellers from destructive practices, and ensuring compliance with Gram Sabha decisions to regulate access to community forest resources.

### 1.4 Socio-legal Provisions of the Forest Rights Act, 2006

The FRA 2006 is designed to correct the historical wrongs done to forest-dwelling communities by recognizing and securing their rights over forest land and resources. The Act recognizes the rights of Scheduled Tribes and other traditional forest dwellers to forest land and resources. These rights include the right to hold and live on forest land, and to

protect, regenerate, conserve, and manage forest resources'.[33,34] FRA distinguishes between individual forest rights (IFR) and community forest rights (CFR). IFRs are granted to families or individuals who have been occupying forest land prior to December 13, 2005, while CFRs are granted to communities for the use, management, and conservation of forest resources.[35] The act mandates the Gram Sabha (village assembly) as the authority to initiate the process of recognizing and vesting forest rights. This provision aims to decentralize decision-making and ensure community participation in forest governance.[36]

The Act emphasizes the importance of sustainable forest management and conservation. It encourages communities to protect and conserve forest resources while ensuring their livelihood needs are met.[37]

### 1.5 Process of Reclaiming the Rights

Section 6 of the *Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006* establishes a robust and participatory framework for determining the rightful claimants of forest rights.[38] The procedure is designed to be transparent, inclusive, and community-driven, ensuring that the voices of forest dwellers are central to the decision-making process. This determination follows a structured three-step process:

i. *Initiation at the Gram Sabha Level:* The process begins with the Gram Sabha, the foundational democratic institution at the village level. It is vested with the authority to verify and recommend claims concerning forest rights. This includes identifying individuals and communities based on evidence of cultivation, habitation, collection of minor forest produce, and other traditional practices. The Gram Sabha's recommendation is rooted in community knowledge, historical usage patterns, and customary practices.

[33] S. S. Dayal and D. Sharma, "Tribal Aspiration Regarding Self-Governance: Pathalgadi Movement and Implementation of PESA & Forest Right Act in Jharkhand" 44(3) *Library of Progress – Library Science, Information Technology & Computer* (2024).

[34] R. Hebbar, "Undoing Historical Injustice? Critical Reflections on India's Forest Rights Act, 2006" 52(4) *Social Change* 491–504 (2022).

[35] A. Khosla and P. Bhattacharya, "Use of Composite Index to Critically Assess the Post Rights Recognition Impact of Forest Rights Act, 2006: A Case Study from the Tribal State of Tripura, India" 2 *Trees, Forests and People* 100023 (2020).

[36] *Supra* note 26.

[37] *Supra* note 28.

[38] *Supra* note 30.

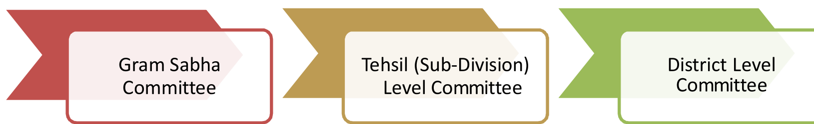



*Image 1: Process involve in reclaiming the Forest Rights under FRA, 2006.*

ii. *Scrutiny by Sub-Divisional and District-Level Committees:* The recommendations of the Gram Sabha are forwarded to two successive screening bodies — first at the *Sub-Divisional (Tehsil)* level and subsequently at the *District* level. These committees are tasked with examining the validity of claims based on documentary and oral evidence, ensuring procedural compliance, and addressing any objections raised during the process.

iii. *Final Determination by the District-Level Committee:* As per Section 6(6) of the Act, the *District-Level Committee* serves as the final adjudicating authority in the recognition process. Its decisions are binding and constitute the formal recognition of forest rights under the Act. Importantly, this committee ensures that the decision-making process upholds principles of natural justice, transparency, and administrative fairness.

Each of these committees is composed of six members — three elected representatives and three government officials — ensuring a balance between administrative oversight and democratic representation. This tripartite structure aims to minimize bureaucratic arbitrariness, foster local accountability, and uphold the integrity of the forest rights recognition process.

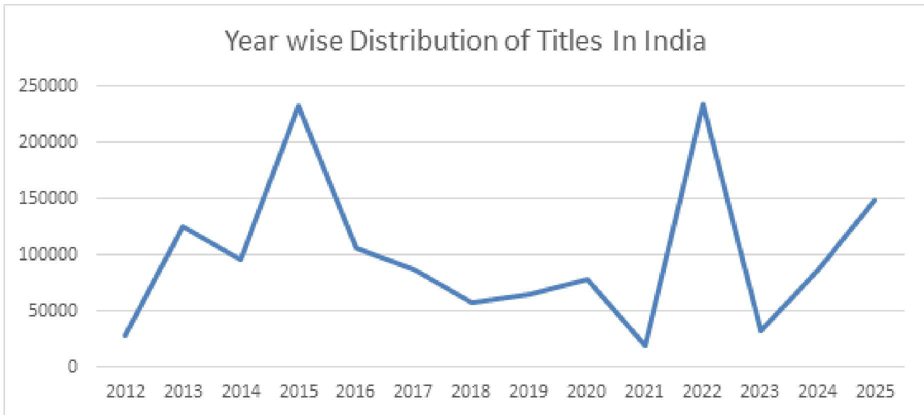
## 2. The Forest Rights Act, 2006

### 2.1 Implementation of FRA, 2006

The *Forest Rights Act (FRA), 2006* was envisioned as a transformative legislation to rectify the historical injustices faced by Scheduled Tribes and other traditional forest dwellers, by recognizing their rights over forest land and resources. The graph-1 titled *"Year-wise Distribution of Titles in India"* illustrates the annual progress made in granting these rights, specifically through the distribution of titles from the year 2012 to 2025. A closer look at the data reveals a highly inconsistent pattern of title distribution over the years, reflecting broader systemic issues in the implementation of the FRA. Beginning in 2012, the distribution of titles started at a relatively modest level—around 25,000—but saw a substantial rise in the year 2013, reaching approximately 120,000. This initial surge could be attributed to the momentum generated by early institutional efforts and awareness

campaigns following the 2008 enforcement of the Act. However, this progress could not be sustained, as seen in the dip in the year 2014. Despite this slight decline, the year 2015 marked a major breakthrough with the distribution of over 230,000 titles—the highest in the entire dataset. This sudden spike is indicative of an intensified administrative push, possibly catalyzed by political will, judicial intervention, or civil society mobilization. Yet, what follows this peak is a steady decline over the next three years (2016–2018), suggesting either a saturation in eligible claims, bureaucratic bottlenecks, or a weakening of institutional mechanisms supporting the recognition of rights.

The downward trend continued moderately until 2020, when a slight recovery was observed, potentially pointing toward renewed efforts to streamline the FRA's implementation. However, the year 2021 witnessed the most dramatic fall in title distribution, dropping to around 20,000. This sharp decline can plausibly be linked to the socio-political disruptions caused by the COVID-19 pandemic, which significantly hampered Gram Sabha meetings, field verifications, and public administrative functioning—all essential steps in the FRA recognition process. In stark contrast, year 2022 witnessed a near-restoration to the 2015 peak, again surpassing 230,000 title distributions. Such sharp fluctuations imply that the implementation of FRA has often been campaign-driven rather than institutionalised. This peak likely resulted from post-pandemic recovery efforts and government pressure to meet forest rights targets. However, the year 2023 saw another sudden plunge, reinforcing the cyclical and episodic nature of FRA implementation. Interestingly, the data for 2024 and 2025 indicates a promising upward trajectory, suggesting that there might be more sustained policy attention or structural improvements being undertaken. These trends reveal the need for a paradigm shift from episodic implementation to an integrated, continuous, and community-led approach. The FRA's success cannot be measured merely by aggregate numbers in isolated years; rather, it demands a framework that ensures constant community participation, bureaucratic accountability, and regular monitoring mechanisms. As the graph makes visually evident, the fluctuating pace of title distribution reflects the broader political, administrative, and socio-economic dynamics that govern the state's relationship with its forest-dwelling citizens. The Act, if implemented in letter and spirit, holds transformative potential—not just for forest rights, but for participatory forest governance and sustainable development. Hence, policymakers must learn from the uneven distribution patterns, institutionalise Gram Sabha capacities, minimize bureaucratic delays, and promote transparency in the title recognition process to ensure the enduring success of the Forest Rights Act.




*Graph 1: Distribution of land titles in India since 2012*
*(Source: Ministry of Tribal Affairs)*

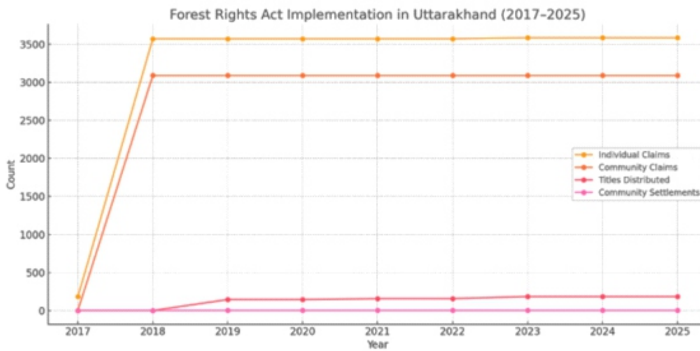
**2.2 Implementation of the Forest Rights Act (FRA) in the Uttarakhand State**

The implementation of the Forest Rights Act (FRA), 2006, in Uttarakhand presents a troubling picture when analysed through year-wise data from 2017 to 2025. The figures indicate persistent administrative inertia, systemic neglect, and a lack of political will in upholding the rights of forest-dwelling and tribal communities. The data tracks four key indicators: individual claims, community claims, title distribution, and community rights settlements. Taken together, they paint a grim picture of how far the state is from realizing the objectives of the FRA.

In 2017, only 182 individual claims were filed, and there were no community claims, title distributions, or community rights settlements. This reveals that either the FRA was yet to be meaningfully introduced in the state or that awareness among eligible beneficiaries was virtually non-existent. By 2018, however, there was a sudden increase in filings—individual claims jumped to 3,574, and 3,091 community claims were recorded. This may indicate the beginning of outreach or mobilisation efforts. Yet, no titles were distributed in 2018, which suggests that while applications were being collected, the processing machinery was non-functional or not ready.

In 2019, there was a slight improvement. Title distribution began with 144 individual titles being granted, and one community right was officially settled. However, this minimal progress remained largely unchanged over the next two years. The number of distributed titles stayed static at 144 until 2020, with no additional community settlements. In 2021, the number of titles distributed increased marginally to 156, but the number of community rights remained unchanged. This stagnant performance signals either bureaucratic resistance or a lack of urgency in operationalizing the Act.

From 2022 to 2025, some further, though minimal, progress was observed. By 2023, the number of individual claims slightly increased to 3,587. Titles distributed rose to 184 and remained static at that number through 2024 and 2025. Importantly, only one community right was settled throughout this entire period, a deeply concerning sign considering over 3,000 community claims were submitted. Despite the volume of claims and the passage of time, the state failed to scale up its capacity or streamline its processes to address the backlog. With more than 6,600 total claims (3,587 individual and 3,091 community) and only 184 titles distributed, the settlement rate is a mere 2.75%. For community rights, the recognition rate is just 0.03%.The consequences of this failure are severe and multifaceted. Denial of forest rights means that forest-dwelling communities continue to face insecurity over their land and livelihoods. These communities are unable to access or manage resources that are legally theirs, and women—who are often central to forest-based economies—are particularly affected. With rights unrecognized, tribal populations cannot claim access to benefits, support, or autonomy in forest governance, effectively excluding them from conservation and development frameworks.




*Graph 2: Distribution of land tenures among the claimants in Uttarakhand from 2017 to 2025 (Source, Ministry of Tribal Affairs)*

There are several factors responsible for this dismal record. One of the most critical is the *bureaucratic neglect* that characterizes the process. In Uttarakhand, the Social Welfare Department, which is already overburdened and understaffed, is the nodal agency for implementing the FRA. This choice of department demonstrates a misalignment, as it neither has the capacity nor the field network needed for effective implementation. Moreover, the Forest Department continues to dominate decision-making and forest governance, often resisting the empowerment of local communities. This bureaucratic conflict between the Forest Rights Act and the Forest Conservation Act further complicates matters, with the latter often being used to override the former.

Another significant issue is the lack of awareness among tribal communities about the provisions and procedures of the FRA. In many villages, especially in remote areas, people are unaware of their rights under the Act. There are no functional Van Samitis or FRA Committees, and those that were initially formed became defunct after the rejection of claims. The requirement of written documents proving land occupation for the last 75 years becomes an insurmountable hurdle for most forest dwellers. Due to low literacy levels, many tribal people cannot navigate the bureaucratic processes, and officials often use this as a reason to reject their claims outright.

Civil society organisations working in the region have consistently highlighted these shortcomings. They have pointed out that the FRA is not being implemented in its true spirit in Uttarakhand. Claims are often rejected at the block level without adequate verification or opportunities for applicants to provide oral evidence, which the Act permits. There is no regular training for officials on FRA procedures, nor are there independent monitoring mechanisms to ensure transparency. In many cases, the rights that forest dwellers historically held—such as *Haq-Hakook* (traditional rights), access to grazing lands, or the ability to collect timber and sand—have been restricted rather than restored, further alienating them from their traditional livelihoods.

To improve the situation, a set of targeted interventions is necessary. A dedicated department or FRA cell must be established with trained personnel who are exclusively responsible for awareness-building, verification of claims, and facilitation of settlements. Regular and systematic training programs for government officials, PRI members, and community leaders are essential. Satellite imagery, oral testimonies, and community maps should be accepted as valid evidence in line with the Act's provisions. Additionally, Gram Sabhas must be strengthened, empowered, and involved as primary decision-makers in the verification and approval of claims.

In conclusion, the analysis of FRA data in Uttarakhand from 2017 to 2025 reveals a systemic failure to implement the law in both letter and spirit. The slow pace of title distribution, the near-total neglect of community claims, and the lack of institutional accountability suggest a crisis of governance. Forest rights are not just legal entitlements; they are tools for justice, conservation, and community empowerment. If the government of Uttarakhand truly intends to respect the constitutional and ecological rights of its indigenous communities, urgent and corrective action is needed. Until then, the promise of the Forest Rights Act will remain a distant and unfulfilled ideal for the forest dwellers of the state.

## 3. Methodology and Study Area

The present study was carried out on the Tharu tribe of the village Biriya Majhola located in the Khatima Tehsil of Udham Singh Nagar district in Uttarakhand. Nestled within the administrative framework of Biriya Gram Panchayat, the village spans an area of approximately 174.14 hectares. It lies about 22 kilometres from the nearest town, Khatima, and functions under the Panchayati Raj system with a locally elected Sarpanch overseeing governance. According to the 2011 Census,[39] Majhola has a population of 1,567 residents living in 311 households. The gender distribution is fairly balanced, with 777 males and 790 females, reflecting a sex ratio of 1,017 females per 1,000 males—an impressive figure that surpasses the state average. The number of children aged 0–6 is 190, and the child sex ratio stands at 863, which is slightly below the Uttarakhand average.

Literacy in Majhola is relatively high, with an overall literacy rate of 77.20%. Male literacy is significantly higher at 86.22%, while female literacy stands at 68.52%, indicating a gender gap that still needs addressing. Socially, the village is home to a diverse population, including 83 individuals belonging to Scheduled Castes (SC) and 387 individuals from Scheduled Tribes (ST), the latter forming a significant 24.7% of the population. The economy of Majhola is largely agrarian. Out of the total population, 884 individuals are engaged in work-related activities. However, only 321 of them are main workers (employed for more than six months), while the remaining 563 are marginal workers with less consistent employment. Among the main workers, 146 are cultivators owning or co-owning land, and 114 individuals work as agricultural laborers, pointing to a strong dependence on agriculture for livelihoods.

The village makes use of most of its arable land, with around 151.66 hectares under cultivation and supported by irrigation from wells and tube-wells. A smaller portion, approximately 18.86 hectares, is used for non-agricultural purposes, and 3.62 hectares lie fallow. In terms of education infrastructure, Majhola hosts two government primary schools, but lacks middle, secondary, or higher secondary institutions, requiring students to travel to nearby villages such as Biriya and Shripur Bichwa for further education. There are no degree colleges within the village, which limits access to higher education. Health care facilities within the village are not explicitly documented, but nearby Beria Majhola host reputable hospitals such as Sparsh Hospital and Prayas Hospital, which serve the medical needs of the region.[40] In the absence of proper health infrastructure in the village, villagers rely on the traditional medicines to cure their health issues.

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[39] Majhola, 2011 Census Data, *available at:* https://myroots.euttaranchal.com/village-majhola-udham-singh-nagar-56219.html (last visited on June 16, 2025).

[40] *Supra* note 39.

The present study was carried out during 2022-23 and approximately heads of 50 households were randomly selected and interviewed. Gram Pradhan, Mukhiya, elder men and women were also interviewed to understand their traditional practices and dependency on the forest and its resources. An interaction with Samaj Kalyan Adhikari, SDM, Khatima, and Forest officers were also carried out to understand different perspectives on the forest rights.

## 4. Discussion and Analysis

The ethnographic study suggested that the tribals and OTFDs have heard about this, but they are not aware about the rights provided by the act. They have never informed through any medium about their rights and processes to claim these rights. Some of them who have heard about the Act in 'court-kutchehari' or in the SDM office, have submitted their claims but they were rejected due to inadequate information or evidences. Even their community rights were not accepted. Following points highlights the real picture of the implementation of the FRA in the studied Tharu Village.

### 4.1 Lack of Awareness and Access to Rights

Despite being one of the most significant legislative milestones for forest dwellers, the FRA remains a little-known legal provision among many Tharu communities in the Terai region of Uttarakhand. Most tribal members interviewed in this ethnographic study have never heard of the Act or are only vaguely familiar with it. Only a few politically active or literate individuals have some knowledge of the law, and even they are often unaware of the full range of rights the act promises—particularly the crucial *management rights* over forest resources. The focus among the few aware individuals remains limited to *individual* and *community rights*, with negligible understanding or claim over *governance and management rights*, which are central to participatory forest management. This is a crucial gap, because the transformative potential of FRA lies not merely in redistributing land titles, but in enabling forest-dependent communities to collectively manage, conserve, and govern forests through the Gram Sabha. Without this awareness, the Act's promise of participatory forest management risks being reduced to a symbolic recognition of land claims rather than a substantive shift in forest governance.

This lack of awareness is not unique to the Tharu community. Other study also suggests that many indigenous communities, particularly in remote areas, lack awareness about their rights under the FRA. This has hindered their ability to claim and utilize the provisions effectively.[41] Across India, research has consistently shown that tribal and other

[41] D. Chatterjee, "Forest Rights, Livelihood and Nature Conservation in Buxa Tiger Reserve, India: A Critical Appraisal" 27(4) *Contemporary Social Sciences* 50 (2018).

forest-dwelling communities remain poorly informed about their rights under FRA. For example, Sarin (2010) documents how communities in Chhattisgarh and Odisha often remain unaware of their entitlement to Community Forest Resource (CFR) rights, even when individual claims have been processed.[42] This ignorance is not accidental, but symptomatic of a systemic failure in state-led awareness campaigns and legal literacy initiatives. In practice, the dissemination of FRA provisions has been minimal, irregular, and often deliberately obscured by the forest bureaucracy, which views the Act as a threat to its control.

The promise of FRA—to democratize forest governance, correct historical injustices, and empower tribals as custodians of forests—cannot be fulfilled unless communities themselves understand and assert these rights. This call for urgent measures: legal literacy campaigns in local languages, capacity-building workshops for Gram Sabhas, and active involvement of civil society organizations in spreading awareness. Until such steps are institutionalized, FRA will remain what Amita Baviskar calls a form of "symbolic justice"—a law that exists in principle but fails in practice.[43] The Tharu case illustrates how the absence of knowledge sustains the very power asymmetries FRA sought to dismantle, leaving indigenous communities once again at the margins of forest governance.

### 4.2 Absence of Institutional Mechanisms

The interaction with the tribals suggests that the implementation of FRA requires robust grassroots institutions like *Van Samitis* (Forest Committees) or *FRA Committees*. While these were initially constituted in some regions, they were soon disbanded or became defunct—especially after widespread rejection of claims by district and block-level committees. Disillusioned by these rejections, many community members no longer see any merit in pursuing their claims or reviving these local bodies. This institutional vacuum severely hampers community engagement and implementation at the grassroots. Many Tharu respondents stated that they no longer see any merit in pursuing recognition under FRA or reviving defunct committees, as the process has come to symbolize frustration rather than empowerment. This institutional vacuum has severely hampered both community engagement and the grassroots implementation of FRA, undermining the Act's core philosophy of participatory governance. Moreover, *Other Traditional Forest Dwellers* (OTFDs)—usually Bhat who are residing with Tharus—often fail to provide the legally required proof of 75 years of continuous residence or resource use. While this provision was intended to prevent fraudulent claims, in practice it imposes an impossible evidentiary

[42] *Supra* note 18.

[43] Amita Baviskar, *In the Belly of the River: Tribal Conflicts over Development in the Narmada Valley* (Oxford University Press, Delhi, 2001).

burden on communities that rely on oral traditions rather than written records. Given the lack of formal documentation and reliance on oral traditions, their legitimate claims are often dismissed by authorities. This reflects a broader bureaucratic bias toward documentary rationality, privileging state archives over indigenous memory and tradition. The consequence of these dynamics is a double marginalization: Scheduled Tribes like the Tharus face rejection due to bureaucratic resistance, while OTFDs such as the Bhat are excluded due to structural evidentiary hurdles.

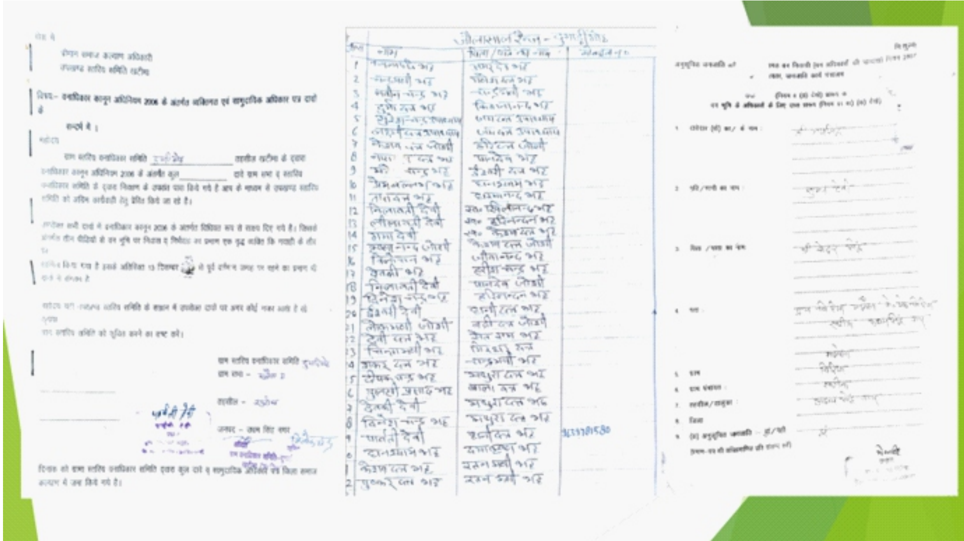

*Image 2: Claims made by the villagers, both Tribals and OTFDs which were not entertained so far.*

### 4.3 Dominance of Forest Bureaucracy and Legal Overlap

A core reason for FRA's poor implementation in Uttarakhand lies in the *continued dominance of the Forest Department*. In practice, the *Forest Conservation Act (FCA), 1980*, and the Indian Forest Act, 1927, often override the provisions of FRA. Forest officials, sometimes unaware and sometimes unwilling, continue to exercise unilateral control over forest lands, often treating FRA as a challenge to their authority. The process of recognizing and vesting forest rights has been slow and cumbersome in many regions. The FRA has often come into conflict with conservation efforts, particularly in tiger reserves and other protected areas. Indigenous communities have faced harassment and eviction by forest officials, undermining their rights.[44] Procedural dispossession, bureaucratic interpretations and lack of

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[44] R. Melissa, *"These Rights Have No Use? Forest Land Rights and the Economic and Subjective Wellbeing of Indigenous People in India"* (2017) (Unpublished Ph.D. thesis).

awareness among implementing agencies have limited the Act's effectiveness.[45] The legal recognition of rights exists on paper but the very procedures of implementation—claims verification, evidence submission, and committee functioning—become tools of denial.

The Tharu and OTDFs have reported being prohibited from making even semi-permanent structures within forests. Traditional activities such as grazing cattle, collecting firewood, building cattle shelters, or extracting minor forest produce like sand and timber have been systematically curtailed—despite being guaranteed under the FRA.Such restrictions have not only disrupted the socio-cultural and economic practices of the Tharus but also led to serious *livelihood losses*. Families have lost traditional agricultural tools and cattle due to lack of shelter, and financial pressures have increased as they now need to purchase what they once sustainably sourced from forests.

### 4.4 Bureaucratic Apathy and Administrative Failures

One of the biggest hurdles in FRA implementation in studied area is the absence of a *dedicated nodal department*. Unlike many other states where the Tribal Welfare Department oversees implementation, in Khatima block the *Social Welfare Department* has been assigned the role during the time of the study. Already overburdened and short-staffed, this department has failed to conduct regular training, awareness campaigns, or monitoring of the implementation process. Most claim applications are rejected at the *block level*, often citing lack of documentary evidence. Tribal applicants, many of whom are illiterate or semi-literate, are unable to fulfill the bureaucratic paperwork and procedural requirements. Officials frequently take this as an excuse to reject applications rather than offering support or suggesting alternative forms of evidence as permitted under the FRA.[46] There has been *no large-scale awareness campaign* about the FRA in Uttarakhand. Consequently, even community-level leaders remain unaware of procedures or the role they could play in mobilizing claims. A critical comparison with other states underscores how institutional strength shapes FRA outcomes. In states like Maharashtra, active Gram Sabhas and FRA Committees have enabled successful recognition of Community Forest Resource (CFR) rights. For example, Pachgaon village managed to secure collective rights over bamboo forests through well-organized local institutions, supported by civil society mobilization.[47] In contrast, Uttarakhand illustrates how the absence of functional grassroots bodies,

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[45] R. Kutty, A. Kodiveri, S. Lele and S. Setty, "India's Forest Rights Act, 2006: Stuck in a Maze of Bureaucratic Interpretations?" 80(4) *Social Work* (2019).

[46] *Supra* note 36.

[47] Roli Srivastava, "Bamboo Bonanza: How a Village in India Used its Forest to go from Poverty to Prosperity", *available at:* https://www.theguardian.com/global-development/2024/dec/17/india-adivasi-tribal-village-pachgaon-forest-law-traditional-rights(last visited on June 9, 2025).

combined with bureaucratic dominance, results in near-total failure of FRA implementation, with less than 3% of claims being recognized.[48] The contrast suggests that the law's success hinges not merely on legal provisions but on institutional vitality at the village level.

### 4.5 Voices from the Ground: Civil Society Concerns

Civil society organizations operating in the region—such as the Rural Litigation and Entitlement Kendra (RLEK), the Van Gujjar Tribal YuvaSangathan, and others—have repeatedly pointed out that the FRA is being *grossly neglected* in Uttarakhand. Reports submitted by these groups indicate that many FRA claims remain pending for years, and there is almost no effort to train block and district-level officials. A 2021 report by the *Ministry of Tribal Affairs (MoTA)* revealed that Uttarakhand had some of the lowest numbers of claims filed and approved under the FRA, compared to other states with significant forest-dwelling populations. Even where claims are accepted, the area of land allotted is far smaller than claimed, and community forest rights are rarely recognized. If the Act is to realize its transformative promise, urgent steps must be taken to revive and strengthen these institutions through capacity-building, legal literacy, and independent monitoring mechanisms. Civil Societies has very significant role to play. They facilitate the Gram Sabhas and FRA Committees in empowering and insulating from bureaucratic interference, to stop FRA to remain a hollow instrument, perpetuating rather than correcting the historical injustices it was meant to redress.

### 4.6 Way Forward: Structural and Policy Interventions Needed

The Forest Rights Act, 2006 was designed to remedy “historic injustice” suffered by tribal and traditional forest-dwelling communities. This situates the FRA, 2006, as part of a broader continuum of exploitation, state control, and eventual attempts at corrective justice, however it has been continued in the tribal areas in India. It sought to recognize both individual and community rights over forest land and resources, empower Gram Sabhas (village councils), and promote conservation through local management rather than centralized state authority. The paper explores various parameters such as lack of awareness, institutional mechanisms, bureaucratic resistance, and civil society interventions systematically and also links macro-level policies with micro-level failures, making the analysis both policy-relevant and community-specific. It is found that in the studied area FRA implementation appeared markedly underwhelming when compared to Odisha, Chhattisgarh and Maharashtra, where CFR recognition is tangible and enabled economic

[48] Ishan Kukreti, Uttarakhand District Violates Forest Rights Act for Pancheshwar Dam Project, *available at:* https://www.downtoearth.org.in/governance/uttarakhand-district-violates-forest-rights-act-for-pancheshwar-dam-project-59314 (last visited on June 11, 2025).

transformation in these states.[49] These examples underscore that strong Gram Sabha mobilization and gender-inclusive governance, combined with political will, can translate the FRA from paper to practice. Forest departments resist ceding control over forest resources, often enforcing working plans or bureaucratic conditions that contravene FRA's premise of community autonomy.[50] Implementation inertia is not accidental—it reflects a structural inertia rooted in forest departments' reluctance to relinquish authority and resources. Resistance manifests via procedural hurdles, refusal to recognize community management norms, and selective implementation. The result is a de facto conservation paradigm that prioritizes bureaucratic control over statutory justice and community welfare. The villagers have reiterated and alleged that claim rejections frequently violate procedural safeguards (e.g., ignoring Gram Sabha testimony), and the forest bureaucracy actively "sabotages" implementation in key regions. The historical dominance of the Indian Forest Act, 1927, and the Forest Conservation Act, 1980, underscores the urgent need for policy harmonization and reconciliation with the Forest Rights Act, 2006. These older laws, rooted in a colonial legacy, emphasize centralized control and often marginalize indigenous and forest-dependent communities by restricting their traditional rights. To ensure effective and equitable forest governance, it is critical to interpret and implement these laws in a complementary manner that simultaneously respects community rights and upholds conservation objectives. This requires dismantling the hierarchical and exclusionary forest management regime established during colonial times and transitioning towards a decentralized, participatory approach that acknowledges the essential role of indigenous knowledge and community stewardship in biodiversity conservation. Policy reforms should explicitly clarify that the community rights recognized under the Forest Rights Act override any conflicting provisions in the earlier statutes. Equally important is the capacity-building of forest officials and administrators to understand and embrace this integrated legal framework. Such reforms are indispensable to resolving the ongoing tensions that currently obstruct sustainable forest management, social justice for tribal and forest-dependent populations, and effective environmental protection, paving the way for a more inclusive and resilient forest governance system.

Most of the disposed cases of FRA Claims were not because of the shortcomings of the claimant form but improper implementation of the FRA in the region. To ensure effective implementation of the FRA in Uttarakhand—especially among communities like the Tharu—the state must establish a *dedicated FRA Implementation Cell* under a more

[49] Himanshu Nitnaware, "FRA Implementation: 16 Years after Its Inception, Just 3 States Recognise Community Forest Resource Rights" *Down to Earth* (February 12, 2025).

[50] Sarthak Kwatra, "Forest Rights Act: Implementation Across States" *Spontaneous Order* (June 29, 2002).

appropriate nodal department (preferably the Tribal Welfare Department). Regular *training workshops*, *awareness camps*, and *legal literacy drives* must be organized, particularly in tribal-dominated blocks of Udham Singh Nagar. Village-level institutions such as Gram Sabhas must be strengthened and educated about their role in claim verification and forest management. Local officials should be trained in the FRA's intent and procedures, with strict accountability for delays or wrongful rejections. Furthermore, oral testimonies, community knowledge, and traditional practices must be accepted as valid evidence—as per the provisions of the law itself.

## 5. Conclusion

The Forest Rights Act 2006 represents a significant step towards addressing the historical injustices faced by indigenous communities in India. Its socio-legal provisions have empowered these communities by recognizing their rights to forest land and resources. However, the implementation of the Act has been uneven, with challenges such as bureaucratic hurdles, limited awareness, and inter-community conflicts undermining its effectiveness. To fully realize the potential of the FRA, it is essential to address these challenges through improved awareness, capacity building, and stronger institutional mechanisms for implementation.

The present study of the Tharu tribe in Uttarakhand shows how the Forest Rights Act of 2006 (FRA)—a law meant to restore justice to forest-dwelling communities—has remained more a promise on paper than a reality on the ground. What was envisioned as a progressive step toward recognizing both individual and community rights over forests has, in practice, failed to protect the very people it was designed for the Tharu and other forest-dwelling groups, four core problems stand out: most villagers are unaware of what the Act guarantees; government institutions are indifferent or even openly resistant; the demand for strict documentary proof excludes many communities, especially those with oral traditions; and grassroots bodies like Van Samitis and FRA Committees, meant to act as vehicles of local governance, have either collapsed or never functioned properly. The result is a cruel paradox—tribes who have lived in these forests for generations are still treated as "encroachers," rather than their rightful custodians. A major roadblock remains the entrenched power of the Forest Department, which continues to operate under older colonial-style laws, such as the Forest Conservation Act of 1980 and the Wildlife Protection Act of 1972. By prioritizing conservation and state control over community rights, officials systematically weaken FRA's democratic spirit. This bias is worsened by the absence of legal awareness programs or administrative support, meaning most people don't even know how to claim their rights. For "Other Traditional Forest Dwellers" (OTFDs) like the Bhat, the

requirement to prove 75 years of continuous residence through documents is simply unrealistic. How can oral societies, whose histories are remembered through stories rather than paperwork, meet such exclusionary standards?

The situation in Uttarakhand also exposes a deeper weakness—the erosion of local democratic institutions. The FRA imagined Gram Sabhas as the heart of forest governance, but in practice, these bodies are often sidelined or dysfunctional. In contrast, states like Maharashtra present a more hopeful picture, where active Gram Sabhas have successfully claimed community forest rights and even managed resources sustainably, as seen in the bamboo forests of Pachgaon village. These examples show that where local institutions are strong, the Act can succeed; where they are weak, it falters. At its core, Uttarakhand's story reflects the ongoing clash between two ways of seeing forests: one that treats them as state-controlled zones for conservation and revenue, and another that sees them as shared commons where communities live, sustain themselves, and preserve culture. Unfortunately, the first vision still dominates, leaving the constitutional rights of marginalized groups pushed aside. The Tharu experience makes it clear that legal reforms alone are not enough to undo centuries of marginalization. What's needed is a genuine shift in priorities—from symbolic recognition to real devolution of power, from rigid evidentiary demands to inclusive processes, and from bureaucratic control to true grassroots democracy. Without such changes, the FRA risks going down in history not as a law that healed old wounds, but as one that repeated the same injustices under a new name.

# Sustainable Development and Social Justice: Perspective from India

*Dr. Suchit Kumar Yadav**

## ABSTRACT

*Sustainable development and social justice are intertwined goals that aim to create a society that is equitable, inclusive, and environmentally sustainable. While sustainable development emphasizes meeting the needs of the present without compromising future generations, social justice focuses on ensuring fairness, equity, and the protection of marginalized groups. This paper examines key theoretical debates, explores the interrelations between these concepts, and identifies the gaps that hinder their effective implementation. It addresses specific questions such as: How can sustainable development policies incorporate the principles of social justice? What role do marginalized groups, particularly women, play in sustainable development? What gaps exist in India's policy framework to align these goals effectively?*

***Keywords:*** *Sustainable Development, Social Justice, Intersectional Policies.*

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## 1. Introduction

Sustainable development is intricately linked to Amartya Sen's capabilities approach,[1] which emphasizes the enhancement of freedoms and opportunities for all individuals, and John Rawls' theory of justice,[2] which underscores the imperative of prioritizing the least advantaged members of society. However, tensions emerge when ecological economists contend that the pursuit of social justice may conflict with ecological limitations, highlighting the necessity of achieving a delicate balance between equitable resource distribution and environmental sustainability. Furthermore, feminist theories[3] contribute significantly to this discourse by stressing the importance of gender in sustainability, advocating for the incorporation of women's rights and contributions into development frameworks. In the context of India, several government initiatives seek to reconcile the objectives of sustainable development with those of social justice. The Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA)[4] is a pivotal program that not only promotes rural livelihoods but also supports environmental conservation efforts through initiatives such as afforestation and water resource management. The National Rural Health Mission (NRHM)[5] explicitly targets health disparities, focusing particularly on the needs of women and children. Additionally, initiatives like the Stand-Up India Scheme[6] foster entrepreneurship among women and marginalized communities, thereby promoting economic inclusion. The Pradhan Mantri Awas Yojana[7] further aims to provide affordable housing for underprivileged groups, contributing to the creation of sustainable urban environments. Despite these commendable initiatives, significant gaps remain. Structural inequalities, limited implementation capacity, and inadequate resource allocation hinder the effective integration of social justice within sustainability frameworks. Women and marginalized groups continue to encounter systemic barriers that restrict their access to these programs, while the absence of intersectional

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[1] Amartya Sen, *Development as Freedom* 3-4 (Oxford University Press, 1999).

[2] John Rawls, *A Theory of Justice* 60-65 (Harvard University Press, 1971).

[3] Simone and bell hooks de Beauvoir, *The Second Sex* (H. M. Parshley, Trans., Alfred A. Knopf, 1949) (Original work published in French) & *Feminist Theory: From Margin to Center* 18-21 (South End Press, 1984).

[4] Ministry of Law and Justice, *The Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (Act No. 42 of 2005)* (Government of India, 2005), *available at:* https://nrega.nic.in (last visited on May 15, 2025).

[5] Ministry of Health and Family Welfare, *National Rural Health Mission (2005–2012): Mission Document* (Government of India, 2005), *available at:* https://nhm.gov.in (last visited on May 15, 2025).

[6] Ministry of Finance, *Stand-Up India Scheme: Facilitating Bank Loans for SC/ST and Women Entrepreneurs* (Government of India, 2016), *available at:* https://www.standupmitra.in (last visited on May 15, 2025).

[7] Ministry of Housing and Urban Affairs, *Pradhan Mantri Awas Yojana – Housing for All (Urban)* (Government of India, 2015), *available at:* https://pmay-urban.gov.in (last visited on May 15, 2025).

policies exacerbates these challenges. To address these pressing issues, there is a critical need for inclusive governance, participatory planning, and a comprehensive re-evaluation of resource distribution mechanisms.In conclusion, this paper underscores the urgent need for policies that weave social justice into the fabric of sustainable development. It advocates for actionable strategies aimed at bridging existing gaps and ensuring that the voices of marginalized communities are at the forefront of decision-making processes, ultimately fostering a just and sustainable future for all.

## 2. Theoretical Debate: Interplay of Two Concepts

Sustainable development is an interdisciplinary construct that seeks to reconcile economic growth, social equity, and environmental sustainability. Its theoretical framework is enriched by a variety of perspectives, including Amartya Sen's capabilities approach, John Rawls' theory of justice, ecological economics, and feminist theories. The integration of these paradigms reveals complex tensions and synergies, necessitating a nuanced analysis of their foundational arguments and implications.Amartya Sen's capabilities approach offers a human-centered lens for evaluating development. In his influential work, "Development as Freedom" (1999),[8] Sen posits that the ultimate goal of development is to expand individuals' substantive freedoms—the capabilities necessary for leading lives they have reason to value. This perspective shifts the emphasis from traditional economic indicators, such as Gross Domestic Product (GDP),[9] to broader considerations of well-being, agency, and opportunity. Sen asserts that freedom is not only the primary objective of development but also a means to its achievement. This approach underscores the importance of recognizing the diverse values and aspirations inherent in various cultural and social contexts. Moreover, Sen's framework aligns the enhancement of individual capabilities with broader social justice objectives, aiming to mitigate inequalities and empower marginalized populations. However, the application of Sen's approach to environmental sustainability presents challenges, as critics contend that unbounded human freedoms may lead to ecological degradation unless moderated by constraints that prioritize intergenerational equity. In "A Theory of Justice" (1971), John Rawls[10] introduces a procedural framework for fairness that is grounded in his principles of justice. Through the thought experiment of the "original position" and the "veil of ignorance," Rawls seeks to establish impartial principles for social

[8] *Supra* note 1 at 74-75.

[9] See generally, N. Gregory Mankiw, *Principles of Economics* (9th ed., Cengage Learning, 2021).

[10] *Supra* note 2 at 11-17, 136-142.

cooperation. His two central principles are the equal basic liberties for all individuals and the difference principle, which permits social and economic inequalities only if they benefit the least advantaged members of society. This framework is congruent with sustainable development, as it emphasizes equity and prioritizes the needs of vulnerable populations. However, Rawls' focus primarily addresses justice within a single generation, giving less consideration to intergenerational justice.Scholars such as Brian Barry[11] and Simon Caney[12] extend Rawlsian justice to encompass obligations toward future generations, arguing that sustainable development necessitates the preservation of environmental resources for posterity. The tension between Rawlsian justice and ecological economics lies in the potential trade-offs between resource redistribution and environmental sustainability.[13] Ensuring equitable resource allocation for current disadvantaged groups may strain finite ecological limits, necessitating a balance between Rawlsian principles and ecological constraints. Ecological economics critiques mainstream economic models by emphasizing the Earth's biophysical limitations. Scholars like Herman Daly[14] advocate for a "steady-state economy," which seeks to maintain a stable level of economic activity within ecological boundaries. Daly argues that conventional growth-driven paradigms fail to account for environmental externalities and the finite nature of natural resources. He calls for strong sustainability, which requires the preservation of natural capital, as it cannot be substituted by human-made alternatives. This perspective stresses intergenerational equity, asserting that current consumption and emissions must be constrained to ensure that future generations inherit a livable planet. Furthermore, ecological economics advocates for decoupling economic growth from resource depletion and environmental degradation, thereby aligning economic activities with ecological realities. The interplay between ecological economics and social justice reveals the complexities of addressing resource inequalities while respecting ecological limits. Ecological constraints may restrict the capacity to redistribute resources equitably, as such actions could lead to environmental degradation or exceed sustainable thresholds. Scholars like Joan Martinez-Alier[15] champion the concept of "just sustainability," which seeks to integrate social equity with ecological

[11] Brian Barry, *Justice as Impartiality* 189-193 (Oxford University Press, 1995).

[12] Simon Caney, *Justice Beyond Borders: A Global Political Theory* 122-127 (Oxford University Press, 2005).

[13] See generally, Tim Hayward and Andrew Dobson, *Ecological Thought: An Introduction* (Polity Press, 2006) & *Justice and the Environment: Conceptions of Environmental Sustainability and Theories of Distributive Justice* 55-61 (Oxford University Press, 1998).

[14] Herman E. Daly, *Steady-State Economics: Second Edition with New Essays* 16-18 (Island Press, 1991).

[15] Joan Martinez-Alier, *The Environmentalism of the Poor: A Study of Ecological Conflicts and Valuation* 11-15, 63-68 (Edward Elgar Publishing, 2002).

boundaries. This approach emphasizes participatory decision-making, ensuring that marginalized communities have a voice in the allocation and management of resources. Balancing fairness in resource distribution with the imperative to preserve ecological integrity for both current and future generations is essential. Feminist theories critically engage with sustainable development by examining the intersections of gender, environmental issues, and social justice. Advocated by scholars such as Vandana Shiva[16] and Bina Agarwal,[17] these perspectives highlight that women, particularly in developing regions, face disproportionate challenges due to environmental degradation. Given their roles in food production, water collection, and caregiving, women are especially vulnerable to ecological crises. Feminist theories advocate for the recognition and integration of women's traditional ecological knowledge into development strategies, underscoring the significance of their expertise in sustainable resource management. Additionally, these theories underscore the necessity of women's empowerment and active participation in decision-making processes to foster inclusive and equitable development approaches. Feminist critiques also address the patriarchal biases present in mainstream development models, which often neglect systemic gender inequalities. By advocating for the incorporation of gender equity into sustainability frameworks, feminist perspectives broaden the discourse to emphasize justice, inclusivity, and the centrality of women's rights in formulating sustainable solutions.The theoretical tensions among the frameworks of Sen, Rawls, ecological economics, and feminist theories reflect the complex, multidimensional challenges inherent in achieving sustainable development. Addressing these challenges necessitates a deliberate and integrative approach that balances human freedoms, social equity, and ecological constraints. Development strategies must draw from insights across these paradigms, ensuring alignment with both local contexts and global environmental imperatives. Tailoring policies to specific cultural, social, and environmental circumstances is critical to their efficacy. Sustainability solutions must account for the unique challenges and opportunities presented by diverse regions, recognizing the interplay of local traditions, resources, and societal needs. Additionally, fostering interdisciplinary collaboration among scholars, policymakers, and stakeholders is essential for bridging divides between theoretical perspectives, thereby enabling more comprehensive and effective approaches to sustainable development.Inclusive governance is fundamental to reconciling these tensions. Decision-making processes must prioritize the participation of marginalized

[16] Vandana Shiva, *Staying Alive: Women, Ecology and Development* 41-45 (Zed Books, 1988).
[17] Bina Agarwal, *A Field of One's Own: Gender and Land Rights in South Asia* 7-10, 155-160 (Cambridge University Press, 1994).

groups, including women and indigenous communities, whose perspectives are often overlooked in mainstream initiatives. Their involvement ensures that solutions are equitable, culturally sensitive, and grounded in lived experiences. The synthesis of these theoretical insights, alongside the acknowledgment of their inherent tensions, paves the way for the development of more just, inclusive, and resilient strategies for sustainable development. By integrating diverse perspectives and addressing their contradictions, scholars and policymakers can work collaboratively toward solutions that harmonize human well-being, social justice, and ecological sustainability.

## 3. Social Justice Discourse In India

The discourse surrounding social justice in India is complex and multifaceted, deeply embedded in the nation's historical context of caste-based discrimination, economic disparity, and entrenched social hierarchies.[18] Pioneering figures such as Dr. B.R. Ambedkar,[19] the principal architect of the Indian Constitution, alongside other prominent social reformers including Jyotirao Phule, Periyar E.V. Ramasamy, and Dalit leaders like Kanshi Ram, have significantly shaped the theoretical foundations and advocacy for social justice in the country.[20] Their contributions have catalyzed critical discussions regarding equality, affirmative action, and the dismantling of caste-based oppression. Dr. B.R. Ambedkar stands out as a seminal thinker in conceptualizing social justice. His insights were profoundly influenced by his own experiences as a Dalit and his academic pursuits in law, economics, and social theory. A cornerstone of Ambedkar's vision was the eradication of the caste system, which he articulated in his pivotal work, Annihilation of Caste (1936). Ambedkar posited that caste serves as the fundamental source of inequality in India, advocating for its complete dismantlement due to its perpetuation of economic exploitation, social discrimination, and political disenfranchisement. Additionally, Ambedkar underscored the principle of equality before the law as integral to social justice. As the chief architect of the Indian Constitution, he embedded provisions for equality in Articles 14 to 18,[21] which prohibit caste-based discrimination and endorse affirmative action for Scheduled Castes (SC), Scheduled Tribes (ST), and Other Backward Classes (OBC). Furthermore,

[18] Gopal Guru (ed.), *Humiliation: Claims and Contexts* 1-8 (Oxford University Press, 2009) & Satish Deshpande, *Contemporary India: A Sociological View* 104-112 (Viking/Penguin India, 2003).

[19] B.R. Ambedkar, *Annihilation of Caste* 37-45 (Bheem Patrika Publications, Bombay, 1936).

[20] Anand Teltumbde, *Republic of Caste: Thinking Equality in the Time of Neoliberal Hindutva* 87-95 (Navayana, 2020) & Omvedt, Gail, *Ambedkar: Towards an Enlightened India* (Penguin Books, 2004).

[21] Government of India, *The Constitution of India* (Ministry of Law and Justice, 1950), *available at:* https://legislative.gov.in/constitution-of-india (last visited on May 15, 2025).

Ambedkar emphasized economic justice, as discussed in his work The Problem of the Rupee: Its Origin and Its Solution, highlighting that true social justice remains unattainable without the economic empowerment of marginalized communities.The exploration of social justice has been furthered by various thinkers in India, with Jyotirao Phule emerging as a pivotal figure. A trailblazer in social reform, Phule critiqued the caste system and the dominance of Brahmanical ideology in his book Gulamgiri (1873).[22] He asserted that the oppression of Shudras and Dalits is central to India's social fabric, advocating for education as a transformative tool to dismantle entrenched social hierarchies, particularly for women and marginalized groups. E.V. Ramasamy Periyar,[23] through his Self-Respect Movement, contested caste hierarchies and patriarchal norms. His writings, notably Why Women Were Enslaved, explored the intersectionality of caste and gender oppression, promoting rationalism and atheism as instruments for liberation from oppressive structures.Kanshi Ram, founder of the Bahujan Samaj Party (BSP), expanded upon Ambedkar's vision by emphasizing political empowerment for marginalised groups. In his work The Chamcha Age (1982),[24] he critiqued the appropriation of Dalit leaders by dominant political entities and popularized the term "Bahujan," encompassing SC, ST, OBC, and religious minorities to forge a coalition against upper-caste dominance. Savitribai Phule,[25] recognized as India's first female teacher, collaborated with Jyotirao Phule to champion education for marginalized populations, highlighting the critical role of schooling for women and the oppressed. Contemporary activists, such as Chandrashekhar Azad Ravan,[26] persist in addressing caste-based oppression and advocating for social justice through grassroots movements.The implementation of these theories in political practice has sparked significant debates in India, particularly concerning affirmative action, reservation policies, and the intricate relationship between caste and class. A contentious issue has arisen around the criteria for affirmative action, with some advocating for a shift from caste-based to class-based considerations. This perspective suggests that caste is no longer a primary barrier to

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[22] See generally, Jotirao Phule, *Gulamgiri [Slavery]* (Original work published in Marathi, 1873), trans. G. P. Deshpande, in *Selected Writings of Jyotirao Phule* (LeftWord Books, 2002).

[23] E. V. Ramasamy, *Why I Am Not a Hindu: A Sudra Critique of Hindutva, Philosophy, Culture and Political Economy* 35-42 (M. S. S. Pandian, ed., Samya, 1991).

[24] Kanshi Ram, *The Chamcha Age: An Era of the Stooges* 5-12 (Dalit Shoshit Samaj Sangharsh Samiti (DS4), 1982).

[25] Savitribai Phule, *Selected Writings of Savitribai Phule* 14-20 (M. S. Wankhade, ed. & trans., Mountain Peak Publishers, 2008).

[26] See generally, Anurag Yadav, *The Dalit Uprising: Bhim Army and the Struggle for Caste Equality in India* (Juggernaut Books, 2021) & Scroll.in, "Chandrashekhar Azad Launches Political Party Named Azad Samaj Party" (15 March 2020), *available at:* https://scroll.in/latest/955929 (last visited on May 15, 2025).

social mobility. However, scholars, including Ambedkar, maintain that caste remains a deeply rooted source of social inequality, with thinkers like Phule and Periyar echoing similar sentiments regarding the enduring impact of caste on India's social and economic frameworks.Another critical discourse revolves around the perceived tension between meritocracy and social justice. Critics of reservation policies argue that such measures undermine meritocratic ideals, while Dalit leaders and scholars contend that systemic barriers inherently faced by marginalized communities preclude a fair assessment of merit, which cannot be disentangled from access and opportunity. Moreover, the intersectionality of caste, gender, and religion complicates any uniform approach to social justice; for example, Dalit women confront multifaceted oppression requiring nuanced, context-specific responses. In the contemporary landscape, economic liberalization and the rise of neoliberal ideologies have prompted a reevaluation of traditional social justice frameworks. Nevertheless, Dalit voices continue to assert the ongoing reality of caste-based discrimination, emphasizing the necessity for targeted policies that address these persistent structural inequalities.

## 4. Affirmative Actions and Public Policies: Bridging Social Justice and Sustainable Development In India

In India, affirmative action[27] and public policies targeting marginalised and disadvantaged groups have been instrumental in addressing historical inequalities and fostering social justice. These initiatives are not only pivotal in their own right but also align with the broader objectives of sustainable development by integrating social, economic, and environmental dimensions. The theoretical frameworks proposed by prominent scholars such as B.R. Ambedkar, Amartya Sen, and Vandana Shiva provide valuable insights into how these policies serve as a conduit between social justice and sustainability.

### 4.1 Affirmative Action and the Concept of Social Justice

Affirmative action in India, which is deeply rooted in the equality and justice principles enshrined in the Constitution, aims to uplift historically marginalized groups, including Scheduled Castes (SC), Scheduled Tribes (ST), and Other Backward Classes (OBC). Dr. B.R. Ambedkar, a principal architect of India's affirmative action policies, contended that historical injustices, particularly caste-based discrimination, necessitate

[27] Government of India, *The Constitution of India* (Ministry of Law and Justice, 1950), *available at:* https://legislative.gov.in/constitution-of-india (last visited on May 15, 2025) & Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (Oxford University Press, 1999).

proactive measures to ensure equal opportunities and full participation for these marginalized groups. His philosophy underscores that social justice transcends mere formal equality; it requires dismantling structural inequalities that impede substantive equality.From a broader perspective, Amartya Sen's capabilities approach bolsters the rationale for affirmative action as a means to enhance the freedoms and capabilities of disadvantaged populations. By addressing structural barriers, affirmative measures empower individuals to engage fully in economic, social, and political life, thereby fostering inclusive development. In the Indian context, policies such as reservations in education and employment operationalize these theoretical insights, facilitating access to vital resources and opportunities for marginalized communities. Importantly, achieving sustainable development in India is contingent upon addressing social justice, as issues of inequality and poverty are intricately linked to environmental degradation. Consequently, affirmative actions and protective policies for weaker sections serve as essential mechanisms to bridge these gaps, promoting equity while also aligning with sustainability goals through a focus on resource conservation, health, education, and livelihood security.

### 4.2 Policy Initiatives Bridging Social Justice and Sustainable Development

*i) Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA[28])*

MGNREGA embodies the principle of the right to work while integrating sustainability through environmental conservation. This act guarantees 100 days of wage employment to rural households, focusing on creating durable assets such as water conservation structures, afforestation, and soil preservation. Scholars like Jean Drèze argue that MGNREGA promotes social justice by empowering rural workers, particularly women and marginalized communities, through dignified work and financial security. Simultaneously, its emphasis on ecological projects aligns with sustainable development by restoring degraded ecosystems and enhancing natural resource management.

*ii) National Rural Health Mission (NRHM[29])*

NRHM addresses health disparities by targeting maternal and child health, with a particular emphasis on marginalized communities. By improving healthcare access for women, children, and tribal populations, NRHM directly contributes to social justice by

[28] Government of India, *The Mahatma Gandhi National Rural Employment Guarantee Act, 2005* (Ministry of Law and Justice, 2005), *available at:* https://nrega.nic.in (last visited on May 15, 2025).

[29] Ministry of Health and Family Welfare, *National Rural Health Mission (2005–2012): Mission Document* (Government of India, 2005), *available at:* https://nhm.gov.in (last visited on May 15, 2025).

[30] *Supra* note 6.

rectifying systemic inequities in health outcomes. Enhanced health outcomes also serve to bolster human capital, facilitating sustainable economic growth and resilience to environmental and social shocks. Amartya Sen highlights the significance of health as a critical capability, arguing that improved healthcare access empowers individuals to lead lives they value.

*iii) Stand-Up India Scheme*[30]

This initiative encourages entrepreneurship among women and marginalized communities, thereby promoting economic inclusion and self-reliance. By facilitating access to credit for small businesses, the scheme addresses structural barriers that have historically excluded disadvantaged groups from economic opportunities. Vandana Shiva emphasizes that empowering marginalized communities economically not only fosters social equity but also encourages sustainable practices, as localized and community-driven enterprises tend to be more environmentally conscious and resource-efficient.

*iv) Pradhan Mantri Awas Yojana (PMAY)*[31]

The provision of affordable housing under PMAY aims to guarantee shelter for economically vulnerable sections, including SCs, STs, and OBCs, while promoting sustainable urban development. The integration of eco-friendly construction practices and energy-efficient technologies within these housing projects illustrates how social justice and environmental sustainability can converge. This program reflects what urban sociologist Henri Lefebvre described as the "right to the city," advocating for inclusive urban policies that prioritize the needs of marginalized populations.

The interconnection between social justice and sustainable development in India aligns with broader theoretical frameworks. B.R. Ambedkar's emphasis on substantive equality resonates with the necessity for targeted policies that empower historically marginalized groups, ensuring that no one is left behind. Amartya Sen's capabilities approach underscores the importance of expanding freedoms and opportunities for all, asserting that development must be evaluated based on its impact on individuals' real capabilities.Furthermore, the principles of sustainability espoused by ecological economist Herman Daly reinforce the imperative of integrating social justice with ecological conservation. Daly posits that sustainable development must guarantee a fair distribution of resources while respecting ecological limits, aligning seamlessly with India's commitment

[31] Ministry of Housing and Urban Affairs, *Pradhan Mantri Awas Yojana – Housing for All (Urban)* (Government of India, 2015), *available at:* https://pmay-urban.gov.in (last visited on May 15, 2025).

to integrating livelihoods, health, and environmental conservation within its policy landscape.

## 4. Challenges and Pathways Forward

Despite the notable strides made through affirmative actions and protective policies aimed at bridging the gap between social justice and sustainability, several challenges persist. Issues such as inadequate implementation, corruption, and resource constraints can significantly undermine the effectiveness of these initiatives. Furthermore, the intersectionality of caste, class, and gender necessitates more nuanced and targeted approaches to ensure that the most marginalized communities genuinely benefit from these policies. To enhance the impact of these measures, it is essential for policymakers to emphasize participatory governance, ensuring that marginalized groups have a meaningful voice in the decision-making processes that affect their lives. Additionally, integrating climate resilience and adaptive strategies into social justice frameworks will be critical for addressing the escalating challenges posed by climate change.In the Indian context, affirmative actions and protective policies have played a pivotal role in promoting social justice while simultaneously advancing sustainable development goals. Programs such as the Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA), the National Rural Health Mission (NRHM), Stand-Up India, and the Pradhan Mantri Awas Yojana (PMAY) exemplify how targeted measures can effectively address both historical inequalities and ecological concerns. Grounded in the theoretical insights of prominent scholars such as B.R. Ambedkar, Amartya Sen, and Vandana Shiva, these initiatives showcase the potential of inclusive policies to foster a more equitable and sustainable society. By continuing to refine and expand these efforts, India can establish a pathway that reconciles social equity with economic growth and environmental conservation.

## 5. Current Inclusive Government Policies: Steps Towards Sustainability

The social and economic landscape of India has been significantly influenced by a

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[32] Ministry of Finance, *Pradhan Mantri Jan Dhan Yojana (PMJDY)* (Government of India, 2014), *available at:* https://pmjdy.gov.in (last visited on May 10, 2025).

[33] Pension Fund Regulatory and Development Authority (PFRDA), *Atal Pension Yojana* (Government of India, 2015), *available at:* https://www.npscra.nsdl.co.in (last visited on May 10, 2025).

[34] Ministry of Finance, *Pradhan Mantri Jeevan Jyoti Bima Yojana (PMJJBY)* (Government of India, 2015), *available at:* https://jansuraksha.gov.in (last visited on May 10, 2025).

[35] Ministry of Finance, *Pradhan Mantri Suraksha Bima Yojana (PMSBY)* (Government of India, 2015), *available at:* https://jansuraksha.gov.in (last visited on May 10, 2025).

series of affirmative actions and protective policies designed to empower marginalized and underprivileged sections of society. The current Indian Government has launched several initiatives, including the Pradhan Mantri Jan Dhan Yojana (PMJDY),[32] the Atal Pension Yojana (APY),[33] the Pradhan Mantri Jeevan Jyoti Bima Yojana (PMJJBY),[34] the Pradhan Mantri Suraksha Bima Yojana (PMSBY),[35] and the Pradhan Mantri Mudra Yojana (PMMY). These programs reflect targeted efforts to promote financial inclusion, social protection, and economic empowerment, aligning with broader sustainable development objectives by addressing poverty, inequality, and vulnerability. The PMJJBY and PMSBY are two insurance schemes specifically designed to provide affordable life and accident insurance to low-income groups. PMJJBY offers life insurance coverage, while PMSBY focuses on accidental death and disability coverage. By safeguarding vulnerable households against catastrophic financial losses, these schemes enhance resilience and mitigate poverty traps. Theoretical perspectives on social safety nets, as proposed by economist Joseph Stiglitz, emphasize the crucial role of such measures in fostering economic stability and reducing inequality. Stiglitz posits that social protection policies create a safety net that enables individuals to take entrepreneurial risks, thereby contributing to broader economic growth.The integration of technology and e-governance has further amplified the reach and effectiveness of PMJJBY and PMSBY. The implementation of digital payment systems, mobile applications, and Aadhaar-enabled verification has streamlined the enrollment and claims processes, ensuring that benefits are efficiently delivered to intended beneficiaries. This technological advancement aligns with the principles of good governance, promoting accountability, transparency, and inclusivity.

## 6. Economic Empowerment Through Credit Access

Launched in 2015, the PMMY aims to provide collateral-free loans to small and micro-entrepreneurs, with a particular focus on women, Scheduled Castes (SC), Scheduled Tribes (ST), and Other Backwards Classes (OBC) entrepreneurs. By addressing the structural barriers to credit access, PMMY fosters economic inclusion and self-reliance, contributing to social justice by empowering marginalised groups to actively participate in economic activities and reducing their dependence on exploitative systems. The arguments presented by Vandana Shiva regarding localised and sustainable economic practices resonate with the objectives of PMMY, as she emphasizes that empowering marginalized communities economically not only promotes social justice but also encourages environmentally sustainable practices. Small-scale enterprises often rely on local resources and traditional knowledge, which aligns with Shiva's advocacy for sustainable

development.Moreover, the integration of PMMY with digital platforms has facilitated the disbursement and monitoring of loans, thereby reducing bureaucratic delays and enhancing transparency. The effective use of technology ensures that resources are allocated efficiently, minimizing the risk of misuse while maximizing the social impact of these initiatives. Through such strategic advancements, India can continue to pave the way towards a more inclusive and sustainable future.

## 7. Bridging Social Justice And Sustainable Development: The Role of E-Governance In India

The convergence of social justice and sustainable development is increasingly recognized as critical for fostering inclusive growth. Affirmative actions and protective policies that ensure access to financial resources, social protection, and economic opportunities empower marginalised communities, enabling them to break free from the constraints of poverty and actively contribute to societal progress. This empowerment is closely aligned with several United Nations Sustainable Development Goals (SDGs), specifically Goal -01(No Poverty),[36] Goal-08 (Decent Work and Economic Growth),[37] and Goal -10 (Reduced Inequalities).[38] The integration of technology and e-governance plays a pivotal role in enhancing the effectiveness of these policies. By leveraging digital platforms, biometric authentication, and mobile connectivity, e-governance initiatives address traditional barriers to service delivery, including geographic isolation and bureaucratic inefficiencies. Furthermore, e-governance promotes accountability and transparency, ensuring that resources effectively reach their intended beneficiaries. This is particularly relevant in light of critiques from scholars such as Jean Drèze,[39] who have highlighted the inefficiencies of welfare programs.However, despite the substantial progress made, challenges remain. Issues such as a lack of awareness, digital literacy gaps, and

[36] United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development* (United Nations, 2015), *available at:* https://sdgs.un.org/goals/goal1 (last visited on May 15, 2025).

[37] United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development* (United Nations, 2015), *available at:* https://sdgs.un.org/goals/goal8 (last visited on May 15, 2025).

[38] United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development* (United Nations, 2015), *available at:* https://sdgs.un.org/goals/goal10 (last visited on May 15, 2025).

[39] See generally, Jean Drèze and Amartya Sen, *An Uncertain Glory: India and Its Contradictions* (Princeton University Press, 2013).

[40] National Informatics Centre, *NICNET and DISNIC: Initiatives in E-Governance Infrastructure* (Government of India, 1987), *available at:* https://www.nic.in (last visited on May 15, 2025).

[41] Department of Electronics and Information Technology, *National E-Governance Plan (NeGP): Approach and Key Components* (Ministry of Communications and Information Technology, Government of India, 2006), *available at:* https://www.meity.gov.in (last visited on May 15, 2025).

infrastructural limitations in remote areas hinder the full realization of these initiatives. Addressing these challenges necessitates targeted efforts to enhance digital inclusion, strengthen infrastructure, and improve financial literacy. Additionally, fostering greater community participation and establishing feedback mechanisms can ensure that these programs remain responsive to local needs.In the context of India, e-governance—defined as the use of Information and Communication Technology (ICT) by government entities to deliver services and facilitate communication—has transformed traditional governance systems. The evolution of e-governance in India can be traced back to foundational initiatives like the National Satellite-Based Computer Network (NICENET)[40] in 1987 and the District Information System of the National Informatics Centre (DISNIC). These initiatives laid the groundwork for a comprehensive e-governance framework, culminating in the National e-Governance Plan (NeGP)[41] introduced in 2006. The NeGP aimed to enhance the accessibility, efficiency, and transparency of government services.Among the notable initiatives stemming from the NeGP is the Digital India initiative, launched in 2015, which seeks to empower citizens through a robust digital infrastructure and the digital delivery of government services. Key components of this initiative include the Aadhaar biometric identification system, which facilitates identity verification and direct benefit transfers, and the myGov platform, which engages citizens in policymaking processes.Other significant tools include the Unified Mobile Application for New-age Governance (UMANG),[42] which centralises access to government services, and the Digital Locker, which allows citizens to securely store important documents. The implementation of the PayGov payment gateway and the Mobile Seva platform further exemplifies the commitment to making government services more accessible and user-friendly.In summary, India's e-governance framework is not merely a technological advancement; it catalyses promoting inclusive growth, environmental sustainability, and social equity. As these initiatives continue to evolve, they hold the potential to further integrate sustainable practices and amplify the voices of marginalized communities, ultimately creating a governance model that embodies the principles of equity, justice, and sustainability.

## 8. Conclusion

In conclusion, the intricate relationship between sustainable development and social justice in India underscores the necessity for a comprehensive and inclusive approach that addresses the multifaceted challenges faced by marginalized communities. This paper has

[42] Ministry of Electronics and Information Technology, *UMANG: Unified Mobile Application for New-age Governance* (Government of India, 2017), *available at:* https://www.umang.gov.in (last visited on May 15, 2025).

elucidated how theoretical frameworks, particularly those articulated by thinkers such as Amartya Sen, John Rawls, and B.R. Ambedkar, provide valuable insights into the need for policies that not only promote economic growth but also prioritize equity and environmental sustainability. The examination of various initiatives, including MGNREGA, NRHM, the Stand-Up India Scheme, and PMAY, reveals that while significant strides have been made, persistent gaps in implementation and systemic barriers remain.The integration of e-governance within these frameworks has demonstrated potential in enhancing transparency, accountability, and access to resources, thereby empowering marginalized groups. However, for these policies to achieve their intended impact, it is crucial to emphasize participatory governance that incorporates the voices of those directly affected. Moreover, addressing the intersectionality of caste, class, and gender is essential for crafting nuanced strategies that ensure no community is left behind.As India navigates the complexities of development in an era marked by rapid environmental changes and socio-economic disparities, a concerted effort to weave social justice into the fabric of sustainable development policies is imperative. By fostering interdisciplinary collaborations and embracing inclusive practices, India can pave the way toward a more equitable future that harmonizes the principles of justice and sustainability, ultimately contributing to the global discourse on achieving the United Nations Sustainable Development Goals. The path forward lies in recognizing the intrinsic value of every individual and ensuring that development policies reflect a commitment to dignity, empowerment, and ecological stewardship for generations to come.

# Constitutionalism and the Rule of Law: In a Theatre of Democracy (2023)

*by* A.K. Sikri. Eastern Book Company, 34, Lalbagh, Lucknow-226001
Pp. LXXX+608. Price Rs. 1526/-

*Priti Saxena*[1]

The Book under review, fittingly titled *Constitutionalism and Rule of Law: In a Theatre of Democracy* a significant contribution to the intricate tapestry of democratic thought emerges from the pen of the esteemed former Supreme Court Justice A.K. Sikri. Drawing upon the insights gleaned from the book that embarks upon a profound exploration of the foundational ideals and doctrines that serve as the very bedrock upholding democratic societies. Justice Sikri, drawing deeply from the wellspring of his extensive and rich judicial experience, delves into an intricate analysis, meticulously examining the symbiotic and nuanced interplay that exists between constitutionalism and the rule of law. Within the discerning gaze of this work, constitutionalism is presented not merely as an abstract concept but as the formidable force embodying the supremacy and the essential framework of a constitution, that is a thoughtful construct designed to limit the reach of governmental power. This is aligned with the rule of law, depicted as a principle demanding that all individuals and entities, crucially including the state itself, stand equally subject to the just and fair principles that underpin the legal system.

The book thoughtfully navigates the delicate and often precarious balance required between the inherent authority of the state and the fundamental dignity of the individual. It illuminates, with compelling clarity, how these two vital principles, one the constitutionalism and other, the rule of law do not function in isolation but collectively coalesce to safeguard the delicate edifice of democracy. This collective strength manifests through the mechanisms they provide, ensuring accountability from the government, affording robust protection to fundamental rights, and diligently fostering the pursuit of social justice. Graced by a foreword from the Chief Justice of India, D.Y. Chandrachud, (as he was then) introduced by the esteemed legal scholar Professor Upendra Baxi, and concluded with an afterword by the erudite former Supreme Court judge, Justice Rohinton Fali Nariman, this Book under review is well-organized with 22 essays in four Parts, (Fifth Part contains few leading cases) and insightful speeches. This book, as a rich tapestry of

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essays and orations, shines a light upon the ever-evolving landscape of jurisprudence. This dynamic legal philosophy, as presented in the sources, actively shapes not only the practicalities of democratic governance but also the critical function of judicial review, and the ongoing, vital endeavour for equality before the law. Ultimately, the Book is more than a scholarly text; it serves as a potent invitation, compelling readers to critically engage with the enduring challenges and the persistent aspirations that define constitutional democracy.

The first part consisting of six essays starts with the 'Role of the Judge in a Democracy'. This essay is based on the lecture delivered by the author in the Justice H.R. Khanna Memorial Lecture which emphasised on the critical responsibilities of judges within a constitutional framework. The author honours Justice H.R. Khanna as an audacious personality for his dissenting opinion in the landmark *ADM Jabalpur*[2] and portrays him as a model of judicial courage and integrity. Drawing inspiration from Justice Aharon Barak, the author emphasizes that a judge in a democracy must primarily uphold the Constitution and the rule of law. This perspective emphasizes the judiciary's indispensable role as a guardian of democratic values, particularly in moments of institutional upheaval or political turmoil. By quoting Justice Aharon Barak, the author affirms that judges do not function in a vacuum; rather, each judge brings to the bench a distinct worldview shaped by their experiences, values, and understanding of justice. This diversity of thought fosters ideological pluralism—an essential strength within the judiciary that ensures decisions are not monolithic but reflect a rich interplay of perspectives. Such pluralism not only enhances judicial independence but also fortifies the rule of law in a democracy by allowing the law to adapt and respond to evolving societal needs. Despite varied perspectives, all judges share a fundamental duty to uphold the Constitution and democratic values, extending beyond resolving disputes. This essay reflects on the evolving role of judges and constitutionalism in bridging the gap between law and society. The author writes how the constitutionality of statutes is affected by changes in society and cites cases like- *Uphaar* case,[3] *Nirbhaya*, *Talwar* case,[4] *Jessica Lal*,[5] *Triple Talaq*,[6] *Vishaka* case, [7]*Aruna Shanbaug*,[8] *NALSA*[9] and *Jeeja Ghosh*[10] to reflect. However, the author puts a note of caution for the future by touching upon

[2] *A.D.M. Jabalpur* v. *Shivakant Shukla*, (1976)2 SCC 521.

[3] *MCD* v. *Uphaar Tragedy Victims Assn.*,(2013)14 SCC 481.

[4] *Rajesh Talwar* v. *CBI*, (2012)4 SCC 245.

[5] *Manu Sharma* v. *State (NCT of Delhi)*, (2010)6 SCC 1.

[6] *Shayara Bano* v. *Union of India*, (2017)9 SCC 1.

[7] *Vishaka* v. *State of Rajasthan*, (1997)6 SCC 241.

[8] *Aruna Ramchandra Shanbaug* v. *Union of India*, (2011)4 SCC 454.

[9] *National Legal Services Authority* v. *Union o f India*. (2014)5 SCC 438.

[10] *Jeeja Ghosh* v. *Union of India*, (2016)7 SCC 761.

the aspect of judicial activism and to balance the same with judicial restraint to continue to treat the Courts as the 'Temple of Justice'.

The second essay 'Constitutional Democracy: India's Moments' explores India's journey with constitutional democracy, emphasizing the Constitution as the supreme legal authority—or Grundnorm—designed to guide the nation through clearly defined objectives and institutions. The author connects this to Hobbes' theory of social contract and liberal democratic principles like limited government, rule of law, and sovereign citizenry, 'We the People'. A central argument is that these ideals are only achievable through a truly independent judiciary, free from interference by the executive or legislature. The author puts forth his idea that the Constitution as an instrument of governance, and constitutionalism as attributes of better governance and a welfare state, works for 'we the people' as the focal point of democracy. The author highlights the longevity of the Constitution and its acceptance and endurance by recalling Justice Krishna Iyer when he labels the Constitution of India as 'The Nation's Safety Valve'.

Essay 3, 'Judicial Review: The Indian Experience', discusses the Indian perspective on judicial review. It traces its philosophical roots to the maxim *ubi jus ibi remedium*, which means that where there is a right, there must be a remedy. While this principle has historically been upheld as fundamental by the Indian Supreme Court, the author notes that the contemporary interpretation of judicial review has evolved, diverging significantly from its traditional definition of superior courts revising inferior court decisions. Further, the author cites Henry J. Abraham's view on judicial review, reinforcing that courts have the essential power to invalidate laws, or government actions that conflict with constitutional principles. This essay continues the exploration of core constitutional principles in India, focusing on judicial review, rule of law, and the separation of powers.

Essay 4, 'Rule of Law: Protecting the Constitution and Democracy in India', shifts focus to the rule of law as a foundational concept in protecting democracy and the Constitution in India. It underscores the distinction between formal democracies, based on electoral representation, and substantive democracies, grounded in rule of law. The idea that "law is above all" is emphasized, highlighting that no individual or institution is beyond its reach. The essay concludes by demonstrating the deep interconnection between constitutionalism, liberal democracy, and the rule of law. These elements are not merely complementary but inseparable, with an ideal constitution ensuring democratic vibrancy, accountability, human rights, and protection from arbitrary power.

Essay 5, 'Judicial Review and the Principle of Proportionality', discusses how the concept of proportionality, which is of global jurisprudential significance, is used as a tool

for judicial review in India. It describes how this principle contributes to a rational and balanced decision-making process, particularly in three key areas: punishment for offences, administrative decisions, and legislative actions. Through detailed analysis, the essay explores how the Indian Supreme Court has interpreted and applied proportionality to ensure reasonableness and fairness in governance. The author cited many writings and case laws on the principles of proportionality like Aharon Barak, Kai Möller, Moshe Cohen-Eliyan, and Iddo Porat, to name a few.

Essay 6, 'Proportionality: A Balancing Act for Achieving Constitutional Rights', expands on proportionality as a critical method for balancing constitutional rights, portraying it as an essential for upholding the rule of law. The essay incorporates a poignant quotation from Raymond Chandler to underscore the moral strength required of individuals directing a just legal order. The essay also invokes Lon Fuller's concept of the "Inner Morality of Law," emphasizing that legal systems must meet certain minimum standards to be legitimate and differentiated from authoritarian regimes. The essay underscores the pivotal role of the doctrine of proportionality in achieving the principles of the rule of law as an essential tenet of modern constitutional theory.

Proportionality supports democratic values and reinforces the constitutional mandate of balancing power with reasonableness. Basically, this essay presents proportionality as a cornerstone of constitutional adjudication and ethical governance.

Essay 7, in the second Part of the book, is a lecture given by the author in a program among Rotarians, particularly emphasized on 'Fundamental Duties'. This essay highlights that in a democracy striving for equality and inclusive growth, it is essential that all citizens actively participate, understanding not only their rights but also their duties. Further, it critiques the citizen's tendency to focus solely on rights, neglecting the corresponding responsibilities. The narrative calls for a shift from an individualistic 'I versus You' mindset to a collective "We" approach. Drawing on Cicero and Plato, the author affirms that we are social beings, born for one another. The author has beautifully highlighted the 'Corona untouchability' in this essay and reminded what Confucius said: "Destruction has noise, but creation is quiet" in reference to fundamental duties.

Essay 8, 'Judiciary's Relevance in a Democracy: The Role of Law Schools', explores an essay originally presented in memory of Late Shri G.L. Sanghi. This reflects the enduring impact of those who contribute to the growth of legal scholarship and civic awareness. This essay focuses on the evolving responsibility of law schools in shaping future change-makers, and the mission of law schools extends beyond merely producing lawyers. Fundamentally, it

is about cultivating great legal minds. The author also discusses the role of a judge and the role of lawyers to act as social engineers, and the responsibility of law schools to ensure the quality of thought.

Essay 9, 'Social Transformation Through Judicial Process in India', is a deep dive into how judicial interventions have driven societal change. This involves redefining national identity, revitalizing foundational values, and pushing for a just society. The author critiques the Indian legal and political system's current state, describing it as fragmented and spiritually adrift, suffering from a collective amnesia of its constitutional promises. The judiciary is called upon to counteract this condition through a radical, justice-oriented legal movement that prioritizes eradicating poverty and social inequality over elite comfort. The essay draws on Justice V.R. Krishna Iyer's insights, what he observed in *State of Karnataka vs Shri Ranganatha Reddy*, that 'the social philosophy of the constitution shapes creative judicial vision and orientation...[11] Basically this essay also underscores the judiciary's potential and responsibility in steering India toward meaningful, inclusive progress, guided by constitutional principles and social justice and to adjudicate in social context.[12]

Essay 10, 'Growing Significance of Dignity Jurisprudence in the World of Ascending Human Rights', explores the philosophical and legal foundations of human dignity, focusing primarily on the influence of Immanuel Kant, and the judicial legacy of Justice MRA Ansari, in whose memory this lecture was delivered. The essay begins by observing how Kant's philosophy profoundly influenced the modern understanding of human dignity, primarily through his ethical doctrine rather than legal theory. This essay reflects on the profound influence of World War II in reshaping the global understanding of human dignity. It begins by outlining three conceptual models of dignity that existed prior to the rise of written constitutions in democratic nations. The horrors of the war served as a stark awakening for governments, underscoring the urgent need to affirm and safeguard human dignity. This recognition found formal expression in foundational international instruments such as the United Nations Charter and the Universal Declaration of Human Rights (1948), both of which enshrined dignity as a core value. On the national front, too, despite the relatively recent development of written constitutions, there has been a marked emphasis on the protection of human rights rooted in the idea of dignity. Even in nations like the United Kingdom and Israel, where constitutions are not codified, the municipal laws ensure protection.

[11] (1977)4 SCC 471.

[12] See Prof. N.R. Madhav Menon, "Social Context Education for Social Justice Adjudication" 1 *Journal of National Judicial Academy* 241 (2005).

The author cites Professor Upendra Baxi,[13] who presents dignity as a "meta-ethical" concept. He emphasizes that dignity pertains to the complex relationships between individuals and society, hinging on the idea of "respect." In Baxi's view, dignity involves honouring individual autonomy and the ability to make free, and informed choices. A just society is one that ensures the necessary contexts and conditions for such autonomy. Importantly, this respect for dignity acts as a safeguard, placing limits on the actions of the state, legal frameworks, and regulations, thereby empowering individuals in a meaningful and structural way.

In essay 11, 'Human Rights of the Disabled: World in a Slow Motion', the author highlights how these ideals extend into the domain of disability rights. Inspired by Joseph P. Shapiro's 'No Pity',[14] the essay challenges societal ignorance and misunderstanding of persons with disabilities, as reflected in Shapiro's provocative subtitle, "You Just Don't Understand", and the stark observation that "Nondisabled Americans do not understand the disabled ones". It further examines the slow progress in recognizing the dignity of differently-abled individuals. It critiques international human rights frameworks for their insufficiently responsive implementation regarding equality, which should be based on non-discrimination and reasonable differentiation. True equality, it argues, must ensure that all individuals can equally enjoy rights and freedoms, which requires eliminating barriers to participation. The author gives the example that public facilities not accommodating the needs of disabled persons, results in exclusion and a denial of rights. Therefore, the commitment to equality must go beyond mere non-discrimination, to actively preventing systemic injustices through protective laws and inclusive practices.

In practical terms, this involves adopting positive rights, affirmative action, reasonable accommodation, and a broader social justice approach to uphold the dignity of all, particularly marginalized or disabled groups. The author eloquently delineates the legal status of persons with disabilities within both international and national frameworks, while also advocating for the recognition and realization of their rights. In doing so, the essay seeks not only to inform but to awaken public conscience and foster greater awareness of the challenges faced by the disabled. It emphasizes the need to rethink rights categorically to improve disability policies and societal attitudes.

[13] Upendra Baxi, "First Justice H.R. Khanna Memorial Lecture: Protection of Dignity of Individual Under the Constitution of India", Lecture delivered at Indian Law Institute, New Delhi.

[14] Joseph P. Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* (Universal Book Traders, Delhi, 1993).

Essay 12, 'Negotiating Spaces: Gender Justice', continues the discourse on human rights by expanding on gender justice and explores the judiciary's role in achieving gender justice. The author questions the nature of judicial responsibility, initially presenting the conventional view that a judge merely applies existing law to resolve disputes. However, this simplistic view is challenged by acknowledging the reality that judges often interpret the same law differently and may evaluate facts and evidence through divergent lenses. The existence of terms like "liberal judge" and "conservative judge" underlines that judicial decisions are not purely mechanical but are influenced by interpretation, context, and personal judgment.

The third part of the Book opens with Essay 13, 'Mediation: New Dimension of Access to Justice', and Essay 14, 'The Power of Mediation'. These essays, centered on mediation and its role in expanding access to justice, affirm that justice must extend beyond procedure and legality. It must be grounded in humanity, compassion, and inclusiveness. At the heart of this discourse is Justice V.R. Krishna lyer's assertion that "access to justice is basic to human rights." Justice is thus portrayed not merely as a legal construct, but as a profound philosophical and ethical value that intersects with theology, politics, and economics. The essays recognize that justice has long been debated by jurists and philosophers, each offering diverse perspectives. Within this framework, these essays underscore the contemporary shift toward viewing mediation as a practical and inclusive means of achieving justice. The author asserts that mediation is not an empty "promise," but a means capable of producing real, tangible miraculous outcomes, even when effectively employed.

Essay 15, 'Exploring the Relationship Between Conflict and Law', addresses the philosophical and practical implications of conflict as a natural component of human society. The author emphasizes that while conflict can be disruptive, it also presents opportunities for constructive transformation, if these are properly resolved through legal mechanisms. The essay is structured under distinct sub-headings to explore different dimensions of this relationship: "Conflict and Law", highlights the legal system's role in managing disputes, particularly through mediation; "Conflict of Law" deals with jurisdictional clashes in international contexts; and "Conflict in Law" considers the internal tensions within legal systems caused by evolving social contexts, necessitating reform.

Essay 16 is 'The Inexplicable Yet Unavoidable Relationship Between Law and Literature. Here, the author argues that while law and literature are distinct disciplines, they are intricately interwoven. Each can exist independently but often complements or

completes the other, creating a mutual enrichment. Literature gives emotional and narrative depth to legal principles, while law provides structure and formality to abstract ideas. This reflection on their symbiotic relationship underscores the broader theme of the text: justice is not merely procedural but deeply connected to human expression, morality, and understanding. The author focuses the thematic exploration of the deep and multifaceted relationship between law, literature, and the broader socio-cultural framework.

The discussion begins with a reflection on the interpretative power of words, which are central to both legal practice and literary expression. The author contrasts the functional role of law, that relates to defining rights, punishing wrongs, and awarding compensation with the imaginative nature of literature, which creates worlds, characters, and experiences that allow readers to engage emotionally and intellectually. Both fields, despite their apparent divergence, rely on narrative structures, persuasive language, and the power of interpretation. The author illustrates this point by highlighting how foundational legal texts (like the Constitution or judicial orders) and legal performances (such as courtroom arguments) share literary qualities that resonate with audiences. Conversely, literature often embeds legal themes, as seen in 'Pride and Prejudice', where the plot hinges on the legal principle of primogeniture. The text then moves to a contemplation of law's dynamic nature. It presents judgments as evolving constructs influenced by time, context, and societal change, emphasizing their susceptibility to reinterpretation. Despite these fluctuations, law maintains a structured continuity through the reliance on precedent, which adds credibility and consistency to legal outcomes. The globalized legal landscape is depicted as a forum where numerous legal perspectives and judgments compete, reinforcing the idea that law is a living, adaptive discipline.

Essay 17, 'Globalisation of Judging', delves into the paradox of how national courts now function on a global stage. It raises the intriguing question of why domestic judicial systems seem prepared to engage in global discourse, despite the complex challenges that globalization brings. This transition is portrayed as both remarkable and revealing. It suggests a transformation in the judiciary's role and its increasing relevance in the international order. The essay extends the evolving narrative of the judiciary's transformation in a globalised context, emphasizing how courts now operate beyond the bounds of national jurisdiction. This interconnectedness illustrates how legal systems are increasingly integrated, with foreign judgments serving as valuable reference points in shaping domestic legal outcomes.

Essay 18, 'Law and Economics' builds on Posner's foundational work.[15] This essay explores the interaction between law and economics, particularly in a transnational context, and investigates the Indian judiciary's role in advancing economic analyses within legal frameworks. The analysis centers on two core questions: when and how these distinct yet increasingly intertwined disciplines converge, and what implications this has for legal practice and policy-making. The essay underscores the growing relevance of interdisciplinary approaches in understanding law's role in a globalised, economically driven world. The author cites the works of scholars like Amartya Sen, Martha Nussbaum, Noam Chomsky and many more while dealing with human rights and economic analysis of law.

Essay 19, 'Spirituality and Legal Profession', explores a vital perspective on the essence of spirituality, the principle of being true to oneself. The author draws a profound connection between justice and spirituality, presenting the latter as a core value within the legal process. While the law seeks to resolve disputes and deliver judgments, spirituality, the author suggests, delves into the deeper roots of conflict. Both, however, share a common purpose: the pursuit of truth and justice, and the minimization of wrongdoing and crime in society. The fourth part of the book is devoted to a profoundly meaningful theme 'A tribute to my teachers'. This reflects the deep respect and reverence the author holds for his mentors. It comprises two essays: 'Professor Upendra Baxi: A Remarkable Intellectual Journey and Works', and 'Professor M.P. Singh: An Appreciation'. These essays serve not only as heartfelt homages but also as meditative reflections on the author's own professional journey that is shaped and enriched by the enduring influence of his distinguished teachers.

In particular, Essay 20, acknowledges Professor Baxi's profound impact on India's legal education and jurisprudence, highlighting how his ideas have influenced not just legal professionals but also the broader society. Professor Baxi is praised for his social philosophy and his refusal to be constrained by conventional academic boundaries. His work is presented as both intellectually liberal and deeply rooted in public service, leaving a lasting imprint on India's legal landscape. Essay 21, commemorates the remarkable academic and professional accomplishments of Professor M.P. Singh. The essay outlines his trajectory from a law lecturer to a vice- chancellor, traversing academic milestones and geographical boundaries. His prolific output of scholarly work is acknowledged as a vital contribution to both Indian and global legal education. His efforts are portrayed as instrumental in shaping generations of students and educators alike, signifying his lasting impact on the legal landscape.

[15] Richard A. Posner, *Economic Analysis of Law* (Aspen Casebook Series, 2014).

The final essay 22, "Bidding Adieu: My Farewell Speech', serves as the author's personal reflection on retiring from a long and distinguished career spanning 42 years as a lawyer and judge. Through this essay, he revisits the core teachings and values discussed throughout the book.

The final part of the book highlights several important and landmark cases which the author adjudicated as a judge of the Supreme Court of India. These cases have played a pivotal role in safeguarding justice and upholding the rights of the common man. Whether addressing the right to privacy,[16] the rights of persons with disabilities,[17] performers' rights to carry business etc,[18] the rights of LGBTQ[19] individuals, the right of those in a vegetative state,[20] or the protection of witnesses,[21] each judgment reflects a steadfast commitment to constitutional values and human dignity.

Overall, the author succeeds in addressing a wide range of themes with clarity and depth, doing full justice to each subject explored. Readers are encouraged to engage with this book for its profound insights, drawn from Justice A.K. Sikri's extensive judicial experience. Written in lucid prose and systematically structured, the book offers a panoramic view of the foundational principles of constitutional democracy. Through a compelling collection of essays, it thoughtfully examines the interplay of law, justice, and governance in upholding individual dignity and protecting democratic ideals.

[16] *K.S.Puttaswamy* v. *Union of India,* (2019)1 SCC 1.
[17] *Jeeja Ghosh* v. *Union of India*, (2016)7 SCC 761.
[18] *Indian Hotel and Restaurant Association & An* v *State of Maharashtra*, (2019)3 SCC 429.
[19] *National Legal Services Authority* v *Union of India*, (2014)5 SCC 438.
[20] *Common Cause* v *Union of India* (2018)5 SCC 1.
[21] *Mahender Chawla* v *Union of India*, (2019)14 SCC 615.

# Artificial Intelligence and National Security

*by* Vijay S. Khare and Amit Sinha, (Pentagon Press LLP, 2024).

*Atul Kumar Pandey*[1]

The two words that perhaps are driving the engine of growth for the contemporary world are Information Technology and Artificial Intelligence (AI). Present society being knowledge society the technology that regulates production and dissemination of this knowledge has become vital for diverse organizations and countries across the globe. AI these days stands as the lone factor of contributing to rapid change of any country's economy and military power. All of us in some or the other ways are an indispensable part of this driver of change. The history of any national security can be now be divided into two eras, the time before AI and after it. While widespread use of AI in all domains of life is a fact the most important question is how it can be deployed in most beneficial manner for the national security.

Demystification undoubtedly is one of the most important contributions of any scholarship. The book on *Artificial Intelligence and National Security* serves the above purpose successfully and adequately justifies it title, as it actually demystifies the world of AI for a common reader. It leads reader into an enigmatic world and allows him or her to be at home there. Written in an extremely lucid manner it takes reader to a highly interesting journey into the world AI, the concept and a contemporary reality. Explanations on some fundamental terms and concepts will offer a good starting point for informed and rational debates on emerging challenges related to AI, with greater chances for proper solutions to deal with same. The book performs an extremely difficult task of explaining a highly technical world of AI in such a simple manner. Dotted with examples the book has converted what could be an otherwise dry subject matter into a highly interesting read. Possibility to learn difficult concepts 'Artificial Narrow Intelligence', 'Artificial General Intelligence', 'Artificial Super Intelligence' creates a desire to read further and know more.

It is almost trite to say that no innovation, especially technological innovation, ever comes alone. It comes accompanied by threats, potential of turning into a Frankenstein monster.

Ensuring deployment of technological innovations into growth of humanity is possible only when it is understood properly with its strengthens and weakness. This book

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serves that purpose as it makes readers aware that AI is an unavoidable reality and at the same time cautions on what aspects of AI have potential of misuse.

A near perfect example of interdisciplinary scholarship the book would be a great help for non-technical persons, AI Strategist and policy makers. As claimed by the authors it avoids jargon, but at the same time ensures that concepts are explained in proper depth despite simplification. Chapter 1 Introduction contains several lengthy and overly elaborate statements which, at times, obscure the intended message and may lead to unnecessary confusion for the reader. For instance, the sentence: “These instruments of power that form the concept of National Security, exist along the entire Spectrum, wherein military power is about control whereas diplomacy is about influencing and persuading others to achieve an objective,” appears in the opening paragraph and exemplifies this issue. Such complex constructions could be more effectively communicated by dividing them into shorter, clearer sentences, thereby enhancing reader comprehension. Figure 1 contains better insights of AI technologies like Computer Vision, Natural Language Processing, Machine Learning, etc. However, a brief description of these technologies is not included in the text referring to the figure for the better understanding of the readers. The chapter traces the origin of the AI.

The book gives readers a clear message- AI is the future of national security and warfare, it is here to stay howsoever it may be apprehended or disliked. However, on a very positive note, it highlights meaningful impact of AI on our lives. It in its own way aims to prepare the world to understand and find ways to deal with its challenges rather closing our eyes to them or looking at them as threats both for civilian and national security strategist. The book carries an interesting discussion on inherent biases in the AI system and how even AI can reflect mind-set prevalent in society at a given point of time for civilian and armed forces.

It was expected that the introductory chapter should have introduced the topic and its significance. Role of Regulatory, Scientific and Mathematical Tools in Determination of AI role in national security should have been clearly introduced. In the Section 1.1.2 many definitions by the National Defence Authorization Act (NDAA) (2019), have been quoted, however, rationale for AI is not clearly delineated. A reading the chapter 1 does give an impression that the focus of study is on artificial intelligence as discussion on artificial intelligence and national security is not present which takes one's eye off the ball.

Chapter 2 demonstrates a comprehensive understanding of the AI and national security, with sources ranging from foundational studies to recent advancements. Although the content is rich, some sources could benefit from clearer thematic grouping to enhance

readability. Inclusion of studies from David J Lonsdale (2004) covering Information Warfare and AI Commander, Ambuj Saha (2019) for AI in Defence, and Manish Kumar Jha and Amit Das (2021) for inevitability of AI in military is appreciated. The study of Kenneth Payne (2018) mentioning AI still favours the offence as compared to the nuclear weapons which favour defence needs to be backed with a good reasoning. How AI can be used for such purpose given its speed, precision, acquisition and analysis need to be more explained in detail. The mention of Association for the Advancement of AI (AAAI) in Section 2.5 should have been expanded by covering the AAAI conference which is a top-level Computer Science conference in today's world. It is a flagship AI conference recognised globally. This will provide more support to the description in this section. Studies from Kim R Holmes (2015), Air Vice Marshal Arjun Subramanian (Retd) (2022) and Pranay Kotasthane (2021) have not covered any direct or indirect inference of AI. It is therefore suggested to connect them relatively to the overall theme of the book. The book brought together contributions of different scholars that addressed a wide range of topics relating to AI and National Security.

The chapter 3 of the book reports on the various aspect of AI and national security. The chapter offers a clear explanation of 'niche technology', 'emerging technology' and 'disruptive technology' and brings out the fact that that AI is no longer a niche technology today. Authors argue that AI qualifies as emerging technology, and is differentiator for business in industry as it has resurged over the last decade. It has all the traits of an emerging technology with endless scope and applications yet to be unearthed. Finally, authors opine that it is AI is one of the technologies which tend to cloud 'emerging technology' versus 'disruptive technology' narrative. It discusses in detail the changing character of war in the era of AI and disruptive technologies. The book critically examines a range of global challenges and addresses concerns related to national security within the context of Fifth-Generation Warfare (5GW), Hybrid Warfare, Grey-Zone Tactics, and Algorithmic Warfare. These issues are explored in relation to the emergence and impact of disruptive technologies. This chapter also discusses national security strategy and AI strategy by examining Defence Acquisition Procedure,2000, modernisation and restructuring of the armed forces and way forward. In my opinion, authors have succeeded in developing a plausible argument.

The book under review contains a comprehensive chapter in the form chapter 4 on the key initiatives by the Government of India. It discusses NITI Aayog's initiative in AI, AI accelerators and enablers and leveraging AI in defence applications. With its comprehensive coverage of legal and policy-oriented efforts at the global level, it will also prove to be an

important starting point for approaches in different jurisdictions and philosophical underpinnings of legal efforts. Authors also taps different ethical issues and how India deals with AI.

A notable aspect of the book is chapter 5, which presents a comparative analysis between India and the P5 nations. This analysis provides readers with a comprehensive understanding of India's position concerning AI strategy and preparedness. The chapter further highlights India's current status and progress in leveraging AI for military applications, emphasizing its role in strengthening the core dimension of national security. However, link between AI and 5GW is missing.

Chapter 6 of the book deals with the roadmap outlining the strategic integration of AI into national security and presents a forward thinking and comprehensive vision. A critical examination existing framework reveals several areas that warrant deeper consideration and caution. Authors argue that roadmap for AI in national security is necessary strategic effort, but it must be approached with due care and attention. Mere technological advancement is insufficient without simultaneous development of ethical safeguards, legal frameworks, transparency standards, and public trust mechanisms. Authors fails to discuss the role of private actors in the way forward of AI deployments in in national security.

This book falls short of the expected standards which includes discussions on the core issues relating to the uses of AI in national security. In this, it seems that the emphasis of the author is more on providing information rather than deciphering the key issues in view of the global context of AI. One can not appreciate and practice AI if the technological and its practical aspects are not explained clearly. The book does not endeavor to explain clearly and comprehensively even the core legal issues. This book is a useful resource for any professional and student who wants to take a plunge in the world of AI and national security with clarity about basic concepts, regulatory and ethical issues.

## Legends in Law: Our Great Forebears (2024)

*by* V. Sudhish Pai. Law and Justice Publishing Company.
Pp 735. Price: Rs. 1395/-.

*Narender Kumar Bishnoi*[1] *and Vanaj Vidyan*[2]

In *Legends in Law: Our Great Forebears* (2nd ed. 2024),[3] Senior Advocate V. Sudhish Pai offers a remarkable and deeply evocative tribute to some of the most influential figures in Indian legal history. This newly expanded edition, comprising 48 carefully selected profiles, stands as both a monumental archive and a passionate homage. It explores the intellectual, moral, and personal landscapes of eminent judges, lawyers, and scholars who left indelible marks on the Indian legal system. Combining legal history, moral philosophy, cultural memory, and literary narrative, Pai crafts a book that transcends genre: it is at once a chronicle, a meditation, a gallery of portraits, and a cultural artifact. Indeed, Pai openly borrows George Santayana's dictum that "progress depends on retentiveness"[4] in the idea that contemporary lawyers must remember and learn from their forerunners. To this end, each chapter unfolds a procession of the greats before the reader, recounting both their professional legacies and personal stories.

The tone throughout is celebratory and anecdotal. Pai punctuates the narratives with rich gems of entertaining incidents and humorous anecdotes drawn from both correspondence and personal memory. The sketches emphasize human qualities alongside professional prowess; readers learn not only of each person's legal achievements but also of peculiarities and personal character. Pai does not merely summarise judicial contributions but goes a step further to animate these figures. He humanises them through personal quirks, intellectual convictions and public contributions. The format is essentially literary rather than academic: Pai writes in accessible, affectionate prose, often quoting letters or sayings of the legends. For example, the author includes mottoes and epigrams, often invoking Justice Oliver Wendell Holmes's aphorisms[5] to enliven the portraits. The narrative does not linger on dates or dry chronology; instead, it flows like a series of character studies.

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[3] V. Sudhish Pai, *Legends In Law: Our Great Forebears* (Law & Justice Publishing Co., 2nd ed., 2024).

[4] George Santayana, *The Life of Reason: Reason in Common Sense* (1906).

[5] Oliver Wendell Holmes, *The Common Law* 1 (Little, Brown & Co. 1881).

The foreword, contributed by Justice M. N. Venkatachaliah, former Chief Justice of India, observes that biographers inevitably feel "an emotion of hero-worship" toward their subjects, and he judges Pai's effort to be "worthy" in informing "the present generation of lawyers of what distinguished some of our great forebears in the law."[6] He praises Pai's intent to preserve "for posterity something heroic" in these lives. It also underscores the thematic unity of the work: although each life is unique, they all share devotion to "the advancement of the cause of justice".

Pai's method is distinctly literary rather than academic. He eschews exhaustive timelines in favour of moral parables and character studies. Each chapter reads like a contemplative monologue, shaped by narrative flair and punctuated by philosophical insight.

He divides the book into four major sections: "Law - Philosophy - Values - Development," "History of the Courts," "Men of Law," and "Letters." Each of these segments provides a different lens through which to view the evolution of Indian law and its architects.

The first section is philosophical and ethical in tone, where Pai introduces his moral universe. Here, he draws on both classical Indian jurisprudence and Western legal thought. The Upanishads meet Cardozo and Holmes; Krishna Iyer echoes dharma.[7] This segment highlights law not merely as an instrument of governance but as a vehicle for justice, conscience, and virtue. It sets the stage for the personalities who embodied those ideals.

The second section is historical, detailing the development of India's legal institutions. From the colonial roots of the Supreme Court and the Privy Council to the Federal Court and the emergence of India's modern Supreme Court, Pai provides a compelling overview of the judiciary's structural evolution. He situates figures like Sir Barnes Peacock[8] and Sir Rashbehary Ghose[9] within the shifting sands of imperial power, institutional experimentation, and gradual indigenization of the legal system.

The third and largest section, "Men of Law," is the book's living heart. Pai breathes life into legal giants—Justice Vivian Bose,[10] who combined civic service with legal acumen; Nani Palkhivala,[11] whose mathematical mind shaped jurisprudence; and Justice V.R. Krishna

[6] V. Sudhish Pai, *Supra* note 3, Foreword by Justice Venkatachaliah.

[7] *Id.* at 2.

[8] *Id.* at 47.

[9] *Id.* at 91.

[10] *Id.* at 301.

[11] *Id.* at 457.

Iyer,[12] who composed poetry while transforming the social reach of constitutional law. Pai's portrayals of M.C. Setalvad, H.M. Seervai, P.N. Bhagwati and Soli Sorabjee, move beyond dry summaries, offering rich, character-driven sketches. These figures are seen as philosophers, reformers, visionaries, and in some cases (such as those of Justice H.R. Khanna), lonely warriors of principle.[13]

The final section, "Letters," adds a deeply personal dimension stitching past to present. Private correspondence between Pai and the family or associates of these legends reveals the warmth, affection, and mentorship that underpinned their greatness.

Despite the book's scope and elegance, from a critical scholarly standpoint there are notable gaps. The book's approach is very much of an older-school, celebratory biography genre, and it rarely ventures into critical analysis or context beyond the narrative. There is little discussion of the broader social or political challenges these figures faced, nor any sustained engagement with controversies in their careers Controversies, ideological critiques, and institutional biases are mostly sidestepped. Justice Bhagwati's reversal during the Emergency,[14] for instance, is only lightly addressed. The socio-economic and caste backgrounds of the featured figures are rarely discussed. The portraits are unapologetically laudatory; true to the theme of “hero-worship” the author steers clear of any serious criticism or nuance. This is a stylistic choice, but it means the book is more devotional than dialectical. In an academic sense, *Legends in Law* reads as hagiography rather than historiography.

Closely related is the point that the selection of personalities is noticeably traditional. Pai's foreword and descriptions repeatedly call them “men of law”, and indeed virtually every profile in the volume is male. There are no chapters on India's early women lawyers or jurists, such as Cornelia Sorabji (India's first woman barrister) or Justice Leila Seth (first female High Court Chief Justice). This omission is glaring when seen in the context of India's legal history. Cornelia Sorabji (1866–1954), for example, is widely recognized as India's first female lawyer – she studied law at Oxford in the 1890s and worked for the welfare of women under purdah.[15] Leila Seth (1930–2017), another pioneer, broke multiple barriers: she was the first woman judge of the Delhi High Court and later the first woman Chief Justice of a state High Court.[16] Neither figure is mentioned by Pai, and that is a missed opportunity. Even by the late 20th century women were still a tiny minority on Indian

[12] *Id.* at 443.
[13] *Id.* at 431.
[14] Anuj Bhuwania, “P.N. Bhagwati's Legacy: A Controversial Inheritance” *The Hindu* (June 27, 2017), *available at:* https://www.thehindu.com/opinion/lead/a-controversial-inheritance/article62113007.ece (last visited on May 15, 2025).

benches (only about 11.7% of High Court judges were women as of 2021).[17] Including the stories of these women would have added much-needed diversity to Pai's pantheon and better reflected the progress (and remaining gaps) in legal inclusion.

Another significant omission is any discussion of contemporary transformations in legal practice and education. *Legends in Law* is almost entirely historical in focus: it does not grapple with modern trends in technology, pedagogy, or legal aid. In today's digital age, technology has revolutionized the law, from online legal research to virtual hearings, yet Pai makes no attempt to connect his subjects' legacies to these developments. There is no speculative reflection on how past legends might respond to these changes or how their principles could guide new lawyers navigating this digital terrain. Including such reflections would not dilute the book's historicity but enrich it with relevance.

The book also overlooks systemic access issues in the legal system. The narrative does not address how socioeconomic factors, gender, or infrastructure influence who becomes a lawyer or who gets justice. For example, scholars emphasize the crucial role of law schools in promoting access to justice for the poor. Law students volunteering in legal aid clinics or pro bono programs are today seen as vital in 'closing the gap' for those who cannot afford counsel. However, in Pai's biographies, the only hint of outreach is occasional mention of eminent lawyers' work in famous cases or commissions, not their community engagement.

Further, as the publisher's description candidly admits, Pai's style is decidedly non-technical: it is "story-telling" rather than scholarly analysis. Readers seeking data, charts, or comparative tables of jurisprudence will find none. There are no reference notes, and sources are mostly allusions (quoting books and letters without formal citation). This is appropriate for a general readership, but it means the work may disappoint academics looking for in-depth research. While *Legends in Law* will be an excellent addition to every library of both lawyer and layman, its user-friendliness comes at the expense of rigor and completeness.

*While Legends in Law* adopts a predominantly literary, anecdote-rich mode, eschewing extensive footnotes or doctrinal analysis in favour of character sketches and moral parables,

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[15] Nikita Mohta, "The Trailblazing Journey of Cornelia Sorabji" *Indian Express*, Mar. 19, 2025, *available at:* https://indianexpress.com/article/lifestyle/books/cornelia-sorabji-first-indian-female-lawyer-9197231/ (last visited on May 15,2025).

[16] Gauri Kashyap, "Women in the Judiciary - Have We Come Far From the 30s" *Supreme Court Observer*, July 23, 2021, *available at:* https://www.scobserver.in/journal/women-in-the-judiciary-have-we-come-far-from-the-30s/ (last visited on May 15,2025).

[17] *Ibid.*

other recent works in Indian legal biography have taken differing tacks. For example, Indu Bhan's *Legal Eagles*[18] blends narrative vignettes with succinct case-study analyses, integrating data on landmark judgments and practice-tips for aspiring lawyers. By contrast, *The Courtroom Genius: Nani Palkhivala*[19] situates its subject within detailed socio-political contexts, examining Palkhivala's tax jurisprudence through archival speeches, budget-speech transcripts, and contemporaneous press reports, thereby offering both anecdote and institutional critique. Where Pai privileges moral exemplarity and philosophical resonance, Bhan and Sorabjee & Datar interweave narrative with empirical frameworks. This contrast underscores Pai's role as cultural historian and storyteller, rather than a conventional legal historian.

Readers will appreciate that Pai often includes witty stories or personal recollections – the kind of material lawyers hear in courtside gossip but seldom see in print. By emphasizing judicial wisdom and wit, *Legends in Law* casts the law as a culture and profession, not just an abstract system of rules. The work thus succeeds in its primary goal: inspiring reverence for India's juristic heritage. As the foreword suggests, the book cultivates “awe and respect” for these forebears while subtly reminding us that their common bond was justice. Those wanting role models of public-spirited advocacy or judicial courage will find much to admire here.

Law students and young lawyers, in particular, can benefit from knowing that they stand on the shoulders of giants. In Pai's portraits, one sees examples of courage, integrity, and intellectual curiosity. For instance, the volume's subjects include trailblazers who risked their careers for justice, or who went beyond the courtroom in public service. Though Pai does not explicitly extract lessons, readers can infer them: that dedication to principle can change society, that legal skill coupled with conscience is a powerful force, and that even small acts of wit or kindness define a lawyer's reputation.

Pedagogically, exposure to such exemplars is widely recognized as formative. Legal educators have found that students of law are hungry for direct contact with people who are living the lives they are trying to envision for themselves.[20] A law student who meets ambitious, public-minded figures in these pages may see a blueprint for a fulfilling career. By literally introducing a new generation to the personalities behind landmark judgments, Pai helps inculcate a sense of belonging to the “arc of the legal profession”.

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[18] Indu Bhan, *Legal Eagles: Stories of The Top Seven Indian Lawyers* (Random House India, 2015).

[19] Soli J. Sorabjee & Arvind P. Datar, *Nani Palkhivala: The Courtroom Genius* (LexisNexis, 2012).

[20] Patrick Longan, Timothy Floyd & Justin L. Driver, “A Virtue Ethics Approach to Teaching Professional Identity” *St. Thomas Univ. Sch. of Law* (May 3, 2020), *available at:* https://blogs.stthomas.edu/professional-identity/virtue-ethics-approach/ (last visited on May 15, 2025).

Moreover, the book encourages reflection on the continuity of legal principles. When modern lawyers see, for example, how an earlier advocate argued for fundamental rights, or how a former judge approached constitutional interpretation, they can draw lines from past to present. Justice Venkatachaliah's writes that although each legend was “exceptionally great,” what truly matters is that “the advancement of the cause of justice [was] their dedication”.[21]

Engaging with this work also sharpens the mind to narrative reasoning, an underrated legal skill. Courts often phrase their judgments with carefully chosen historical analogies and personal anecdotes. Pai's collection can serve as a mini-library of such literary devices. Indeed, the presence of many quotations and stories in *Legends in Law* reminds us that law and literature go hand in hand. Balram Gupta's comment about “the best of legal literature” indicates that connecting law to writing and storytelling is part of the book's appeal.[22]

Finally, the book is simply inspiring on a human level. Many coming generations have grown up hearing only abstract talk of jurisprudence or news about scandals. *Legends in Law* offers a different diet replete with rare heroism, humour, and humanity. It shows that lawyers can be not only thinkers of abstract law but also vibrant characters. The pleasure it affords makes the learning stick – a rare compliment for a legal text.

*Legends in Law: Our Great Forebears* is, above all, an affectionate tour of India's legal heritage. In a time when graduate programs emphasize theory and case methods, Pai's book returns us to personalities and narrative. It implicitly argues that remembering past jurists is as crucial as any doctrinal lesson. The work succeeds handsomely in this aim: its engaging prose and rich anecdotes bring history to life for the reader. For these reasons, the volume is heartily recommended.

Future editions of this book must be bolder. They should include pioneering women, spotlight voices from marginalized communities, and extend the analysis to the changing contours of law in the digital age. Critical questions around caste, gender, technology, and access to justice must not be ignored. Only then can this narrative become as inclusive as it is inspiring. Still, in its present form, Pai's book remains essential reading. It reminds readers that law, at its finest, is a moral enterprise powered by individuals of character. For students beginning their journey, it offers direction. For seasoned advocates, it offers reflection. For the profession, it offers both legacy and hope.

[21] *Supra* note 6.

[22] Balram K. Gupta, “How Literature and Law Are Twins” *Indian Express*, Mar. 12, 2023, *available at:* https://indianexpress.com/article/opinion/columns/how-literature-and-law-are-twins-8494455/ (last visited on May 15, 2025).

In a world of flux, *Legends in Law* serves as a compass pointing toward enduring values. Ultimately, it underscores an evergreen truth: 'Law is not only made by statutes and judges' pens, but by the personalities who wield them.' This volume ensures that those personalities are not forgotten.

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