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EDITORIAL NOTE

It is with immense pleasure we announce the launch of the *NLIU Law Review* **Volume XV Issue I**, marking the completion of fifteen years of sustained contribution to legal scholarship. This *Crystal Jubilee Edition* is both a moment of reflection and an assertion of continuity of an institution that has matured alongside the evolving contours of legal thought in India and beyond.

What began as a student-run academic initiative has over the past decade and a half, grown into the flagship journal of the National Law Institute University, Bhopal. Volume XV, Issue I consciously reflects the editorial vision of the Journal in its fifteenth year. While not organised around a single unifying theme, this Edition represents a deliberate effort to expand the NLIU Law Review's engagement across diverse areas of law, both in depth and in breadth. The Journal has over the years, sought to respond meaningfully to shifts in legal method, institutional design and normative priorities. This issue continues that tradition.

A notable emphasis in this volume is on questions of constitutional law and international law, fields that have acquired renewed urgency in the context of ongoing global and domestic turmoil. The contributions in this issue engage with these developments with seriousness and nuance, reflecting the Journal's commitment to scholarship that is both theoretically grounded and contextually responsive.

The first article, "*Reciprocal Duties of USA: Is It Consistent with Domestic and International Law?*", examines President Trump's reciprocal tariffs imposed under Section 232 and International Emergency Economic Powers Act (IEEPA), analysing their compatibility with World Trade Organization (WTO) commitments and U.S. constitutional law. It concludes that these unilateral measures violate General Agreement on Tariffs and Trade (GATT) principles, including Most-Favoured-Nation (MFN) treatment, bound tariff commitments, and contradict the multilateral trading system framework.

The article, "*Unbridled Financial Freedom: A Prognosis on the Removal of Mandatory Conversion of OPCs and the Rise of Shell Companies*", analyses the 2021 removal of mandatory conversion requirements for One Person Companies in India. It examines whether this deregulation inadvertently facilitates shell company formation, comparing regulatory frameworks across jurisdictions and assessing implications for corporate governance and financial transparency.

The next article, "*The Decision in Khoday Distilleries and the Curious Case of SLP Dismissals*", critically examines the Supreme Court's approach to Special Leave Petition dismissals following the Khoday Distilleries decision. It analyses the precedential value of dismissal orders and explores their implications for legal certainty, judicial economy and the development of consistent jurisprudence.

In "*Means, Methods, and Machines: Classifying Tech-Enabled Terror Under IHL and ICL*", the author explores the classification of technology-enabled terrorism under International Humanitarian Law and International Criminal Law. It examines how emerging technologies challenge traditional legal frameworks for armed conflict, proposing analytical approaches for categorizing cyber warfare, autonomous weapons and digital terror tactics.

The next article, "*To Prey While They Pray- Black Collar Crimes and the Peril of Treating Religion as a Legal Exception*" investigates 'black collar crimes' and criminal offenses committed by religious leaders exploiting their positions. It critically examines how legal systems grant religious exemptions that shield perpetrators from accountability, arguing for balanced reforms that protect religious freedom while ensuring equal application of criminal law.

Next, "*Rejecting Lex Specialis, Affirming Systemic Integration: The ICJ's Advisory Opinion in Obligations of States in Respect of Climate Change*" analyses the ICJ's advisory opinion rejecting the lex specialis argument for climate treaties. It examines how the Court affirmed systemic integration, finding that climate obligations under United Nations Framework Convention on Climate Change (UNFCCC) complement rather than displace duties under international human rights law, United Nations Convention on the Law of the Sea (UNCLOS) and customary prevention principles.

The Issue concludes with the legislative comment titled "*A Step Backward for Arbitration Reform: A Legislative Comment on The Indian Stamp Act with Special Reference to the Maharashtra Stamp (Amendment) Act, 2024*", which critiques the Maharashtra Stamp

(Amendment) Act 2024, arguing it undermines arbitration reform in India. The article examines how stringent stamp duty requirements on arbitration agreements create procedural barriers, discussing implications for commercial dispute resolution and India's arbitration-friendly reputation.

This Crystal Jubilee Edition would not have been possible without the unwavering guidance and support of our Faculty Advisor, Sr. Prof. (Dr.) Ghayur Alam. His institutional wisdom and intellectual guidance throughout the preparation of this Issue have been nothing short of insurmountable. The Journal would not be where it is today without his steady mentorship and we remain deeply grateful for his faith in the editorial process and in the student editors who carry it forward.

We also extend our sincere gratitude to the members of the Editorial and Managerial Board, whose tireless work, often behind the scenes, ensured the timely and rigorous completion of this Issue. Their commitment to editorial excellence, attention to detail and willingness to engage critically with complex submissions form the backbone of the Journal's functioning. We are equally thankful to our peer reviewers for their careful evaluations and constructive feedback, and to our authors for entrusting the *NLIU Law Review* with their work. Scholarly publishing is a collaborative endeavour and this issue stands as a reflection of that shared commitment to advancing legal knowledge.

As the *NLIU Law Review* enters its sixteenth year, this milestone serves not merely as a celebration of longevity, but as a reaffirmation of purpose. The Journal remains committed to fostering rigorous, relevant and responsible legal scholarship, and to providing a platform for voices that contribute meaningfully to contemporary legal debates. It is in that spirit that we present Volume XV Issue I.

Aditi Shreya and Gauri Agarwal

Editor-in-Chief and Deputy Editor-in-Chief

RECIPROCAL DUTIES OF USA: IS IT CONSISTENT WITH DOMESTIC AND INTERNATIONAL LAW?

Dr. Rajan Sudesh Ratna[*] and Palkin Ratna[**]

ABSTRACT

The President of the USA, Mr. Donald J. Trump, in his second term, announced additional tariffs as 'reciprocal tariffs' to many countries starting April 2025. The reason cited was the growing trade imbalance for the USA. This paper examines international trade law, with particular emphasis on the binding commitments of the United States of America (USA) under the World Trade Organization (WTO) framework vis-à-vis the reciprocal duties. It focuses on three key actions undertaken by the United States: (a) the imposition of tariffs on steel and aluminium imports pursuant to Section 232 of the Trade

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Expansion Act of 1962, which authorises the U.S. executive to restrict imports considered a threat to national security; (b) reciprocal tariffs imposed under the International Emergency Economic Powers Act (IEEPA) and (c) additional duties on Canada and Mexico despite having a free trade agreement under the United States-Mexico-Canada Agreement (USMCA). The paper finds that the USA's actions are inconsistent with its international commitments in the WTO. This paper also evaluates if the US President has powers under IEEPA to impose reciprocal tariffs, an issue which is being discussed in the US Supreme Court now.

Keywords: *Reciprocal tariffs, Section 232, International Emergency Economic Powers Act (IEEPA), USMCA, GATT, WTO dispute settlement, national security exception, trade policy, multilateral trading system.*

I. INTRODUCTION

In his second term, which began in January 2025, President Donald Trump took several measures under the "America First Trade Policy".[1] He announced the use of reciprocal tariffs beginning in April 2025, citing national emergencies under the International Emergency Economic Powers Act (IEEPA).[2] This turn marked a significant escalation from the tariff actions undertaken during his first term, making a shift from product-specific and country-specific duties to a quasi-universal additional charge on imports, signalling a systemic reorientation of US trade policy away from multilateralism and toward managed bilateralism.[3] The policy introduced a 10% baseline tariff on nearly all imports, with additional country-specific tariffs based on bilateral trade deficits.[4] These measures aimed to counter what Trump described as unfair trade practices and persistent U.S. trade deficits. The tariffs excluded certain goods like pharmaceuticals and semiconductors, but covered a wide range of imports, significantly impacting global supply chains. Trump later modified the scope of

[1] The White House, 'America First Trade Policy' (Presidential Action, 20 January 2025) <https://www.whitehouse.gov/presidential-actions/2025/01/america-first-trade-policy/> accessed 10 December 2025; Chad P Bown, 'The US-China Trade War and the "America First" Trade Policy' (Peterson Institute for International Economics Policy Brief, 2025).

[2] Executive Order 14257, 'Regulating Imports with a Reciprocal Tariff to Rectify Trade Practices That Contribute to Large and Persistent Annual United States Goods Trade Deficits' (2 April 2025).

[3] Chad P Bown, 'The 2018 US-China Trade Conflict after Forty Years of Special Protection' (Peterson Institute for International Economics Working Paper 19-10, 2019).

[4] *Executive Order 14257* (n 2).

these tariffs through executive orders, adjusting exemptions and establishing frameworks for future trade deals.

From the perspective of WTO law, such a deficit-linked reciprocal tariff regime sits uneasily with the fundamental disciplines of bound tariffs and most-favoured-nation (MFN) treatment under the GATT 1994, because it conditions market access on a bilateral metric rather than on non-discriminatory product-based commitments scheduled in the US Schedule of Concessions.[5] At the same time, the use of IEEPA and national emergency declarations as the principal domestic legal basis raises questions about the separation of powers in US constitutional law, given that the Constitution allocates primary authority over foreign commerce to Congress and not to the President, an issue already noted in scholarship concerning Trump's earlier tariff initiatives under Section 232.[6]

These unilateral restrictive measures undertaken by the U.S. have initiated a global debate on whether the action taken by Trump is in accordance with the USA's binding commitments in the WTO and whether the President of the USA has the authority to issue such an Executive Order (EO) under IEEPA. Trading partners have criticised the measures as a form of unilateralism reminiscent of the pre-WTO

[5] General Agreement on Tariffs and Trade 1994 (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 187 arts I, II.
[6] Brendan McGarry and others, 'The International Emergency Economic Powers Act (IEEPA)' (Congressional Research Service Report R45618, 29 January 2024).

era, arguing that they undermine the rules-based dispute settlement system by substituting ad hoc bilateral pressure for multilateral adjudication.[7] The legality of these tariffs, both under Section 232 and IEEPA, has been challenged in the WTO; whereas the reciprocal tariffs imposed under IEEPA are challenged in the US courts. Currently, the U.S. Supreme Court is hearing arguments in November 2025 on whether Trump exceeded his authority under IEEPA. These domestic proceedings echo earlier litigation over national security tariffs, in which federal courts showed considerable deference to the political branches, but they now arise in a context where the scale and design of the reciprocal tariff regime make the alleged delegation of power even more constitutionally salient.[8] The imposition of reciprocal tariffs on Canada and Mexico, despite having an FTA under the United States-Mexico-Canada Agreement (USMCA), is also questionable as under Article XXIV of GATT (WTO), a free trade agreement needs to fulfil condition of duty-free trade on substantially all trade. By targeting USMCA partners, the United States not only risks violating its multilateral obligations but also tests the integrity of its own preferential trade architecture, since the core rationale of an FTA is to provide greater certainty and security of access than is available under the baseline WTO rules.[9] The USA has justified its actions by invoking the emergency and national security exceptions, positioning them as

[7] Julia Ya Qin, 'WTO Reform: Multilateral Control over Unilateral Retaliation – Lessons from the US–China Trade War' (2020) 12 Trade L & Dev 45.
[8] *Congressional Research Service* (n 6) 15–18.
[9] US–Mexico–Canada Agreement (signed 30 November 2018, entered into force 1 July 2020) art 2.4; GATT 1994 (n 5) art XXIV.

measures necessary for safeguarding its essential security interests. However, recent WTO jurisprudence on the security exception has narrowed the space for members to invoke national security in purely economic disputes, suggesting that a broad reliance on this clause to defend reciprocal tariffs may face significant legal obstacles.[10]

The paper analyses the following in this regard:

US MEASURE	**IMPACT**	**COUNTRIES AFFECTED**	**LEGAL PROVISIONS EXAMINED**
President Proclamation -Aluminium and Steel (Section 232)	Global tariffs on aluminium and steel	Globally (with some exceptions)	GATT 1994
Executive Order dated 2 April 2025- Reciprocal Duties under IEEPA	Imposition of reciprocal duties- different duties to different countries	Around 60-70 Countries	GATT 1994

[10] Tania Voon, 'The Security Exception in WTO Law: Entering a New Era' (2019) 113 AJIL Unbound 45.

Executive Order- Duties on Canada and Mexico (USMCA partners)	Duties on Canada and Mexico	Canada and Mexico	GATT 1994 and USMCA provisions

The paper first examines provisions of Section 232 and the IEEPA provisions and the powers of the U.S. President. The next section examines the domestic legal discussion being held on the President's power under IEEPA. The next section examines the compatibility of reciprocal tariffs under Section 232 and IEEPA under the lens of the USA's WTO obligations, especially to examine if these actions under reciprocal tariffs are consistent with the USA's obligations under the WTO or not.

II. IMPOSITION OF ADDITIONAL TARIFFS

SECTION 232 OF THE TRADE EXPANSION ACT, 1962

In February 2025, the US invoked Section 232 of the Trade Expansion Act, 1962, to impose additional tariffs on steel and aluminium imports. It allows the President to impose restrictions on imports of goods or enter into negotiations with trading partners if the U.S. Secretary of

Commerce determines, following an investigation, that the quantity or other circumstance of those imports "threaten to impair" U.S. national security.[11] Section 232 was originally conceived as a narrowly tailored instrument to protect critical defence-related industries, but in recent years it has been repurposed as a more general trade policy tool, prompting significant concern in the literature about its compatibility with both the US constitutional allocation of powers and multilateral trade rules.[12] On February 10, 2025, the Presidential Proclamation 10895 was issued, which imposed a 25% tariff on aluminium, citing national security concerns.[13] Further, Proclamation 10896 imposed a 25% tariff on iron and steel for similar reasons.[14] A few months later, on 3rd June 2025, through another proclamation, the tariffs on aluminium and iron and steel were increased to 50%, based on the continued threat posed due to the import surges to U.S. defence-related industrial capability.[15] The escalation to 50 per cent ad valorem is particularly striking when viewed against the United States' bound tariff commitments under its GATT 1994 Schedule, which for most steel and aluminium products are in the single-digit or low double-digit

[11] Trade Expansion Act, 1962 (19 USC of 1862) s 232.
[12] Gary Clyde Hufbauer and Euijin Jung, 'Steel and Aluminum Tariffs: Section 232 or Bust?' (2018) Peterson Institute for International Economics Policy Brief PB18-7.
[13] Proclamation 10895, 'Adjusting Imports of Aluminium into the United States' 90 Fed Reg 9807 (18 February 2025).
[14] Proclamation 10896, 'Adjusting Imports of Steel into the United States' 90 Fed Reg 9817 (18 February 2025).
[15] Proclamation 10947, 'Adjusting Imports of Aluminium and Steel into the United States' 90 Fed Reg 24199 (9 June 2025).

range, thereby raising a prima facie issue of violation of Article II.[16] It may be worthwhile to note that there was no new investigation

conducted before the issuance of Proclamation 10895 on February 10, 2025, rather the proclamation built on the original 2018 investigation by the Department of Commerce. The 2025 proclamation noted that the initial tariff of 10% ad valorem was not high enough to address the threatened impairment to the USA's national security posed by aluminium imports and U.S. primary aluminium production decreased by 30% from 2020 to 2024 and the smelter capacity utilization was only 52% in 2024, while the global capacity continued to increase. It also noted that the imports increased from countries that were excluded from the tariff regime of 2018. Yet, as commentators have pointed out, economic indicators such as excess global capacity and declining domestic output, while politically salient, do not automatically translate into a threat to "essential security interests" in the sense used in GATT Article XXI, especially where alternative policy instruments less disruptive to trade are available.[17]

More than ten cases were filed in the WTO dispute settlement mechanism by countries against US Proclamation 9704 of 2018 (steel-focused, though often bundled with aluminium), the most important of

[16] General Agreement on Tariffs and Trade 1994 (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 187 arts II:1(a)-(b).
[17] Tania Voon, 'The Security Exception in WTO Law: Entering a New Era' (2019) 113 AJIL Unbound 45, 49–50.

which was DS 544, where China was the complainant. The WTO panel found that the tariffs imposed by the USA were inconsistent with GATT I:1 and II:1. No "emergency in international relations" under GATT XXI(b)(iii), so the exception does not justify measures and also the safeguards rules are inapplicable. The US appealed on January 26, 2023 (issues of law on XXI review). The appeal is pending due to an Appellate Body vacancy and there has been no compliance or resolution. Because the appeal is effectively into the void in the absence of a functioning Appellate Body, the reports have not been adopted, but they nonetheless carry considerable persuasive authority and have already influenced academic and policy debates on the permissible scope of security-motivated tariffs.[18] China retaliated with duties on $3B US goods (e.g., soybeans). These retaliatory measures, though formally justified as rebalancing or countermeasures, further illustrate the systemic risks created when one member deploys Section 232 tariffs outside multilateral procedures, inviting others to respond unilaterally rather than through the WTO dispute settlement system.[19]

A. IEEPA: Power of the US President

By way of EO-14257 dated 2nd April 2025, President Trump announced across-the-board tariffs on imports into the US using the

[18] Dapo Akande and others, 'The National Security Exception in WTO Law after Russia – Traffic in Transit and US – Steel and Aluminium' (2023) 52(1) Geo J Int'l L 1.

[19] Julia Ya Qin, 'WTO Reform: Multilateral Control over Unilateral Retaliation – Lessons from the US–China Trade War' (2020) 12 Trade L & Dev 45.

powers given to him under Section 1701[20] of the International Emergency Economic Powers Act, 1977 ("IEEPA") and the National

Emergencies Act, 1976 ("NEA"). Unlike earlier uses of IEEPA, which predominantly targeted specific foreign persons or sectors through asset freezes and financial sanctions, EO-14257 deployed these emergency authorities to redesign the general tariff structure, thereby pushing IEEPA into the core domain of trade policy.[21] Section 1701 of IEEPA authorises the President to use the powers given to him under Section 1702 to deal with "an unusual and extraordinary threat to the national security, foreign policy or economy of the United States."[22] These powers can only be used for the specific threat declared and cannot be applied to new threats without a fresh declaration. The section ties directly to Section 1702, emphasizing that emergencies must be explicitly declared under IEEPA for its provisions to apply. Section 1702 prescribes the specific economic authorities granted to the President during a declared national emergency under 1701 and to be implemented via regulations, licenses, instructions or other means. These powers are broad but subject to exceptions.

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[20] Executive Order 14257 (n 2).

[21] International Emergency Economic Powers Act, 1977 50 USC §§ 1701–1702; Congressional Research Service, 'The International Emergency Economic Powers Act (IEEPA)' (CRS Report R45618, 29 January 2024).

[22] ibid.

BOX: SECTIONS 1701 AND 1702 OF IEEPA
1701: Unusual and extraordinary threat; declaration of national emergency; exercise of Presidential authorities *(a)Any authority granted to the President by section 1702 of this title may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.* *(b)The authorities granted to the President by section 1702 of this title may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this chapter and may not be exercised for any other purpose. Any exercise of such authorities to deal with any new threat shall be based on a new declaration of national emergency which must be with respect to such threat.* ***1702: Presidential authorities*** *(a) In general* *(1) At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—*

(A)investigate, regulate, or prohibit—

(i)any transactions in foreign exchange,

(ii)transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

(iii)the importing or exporting of currency or securities,

by any person, or with respect to any property, subject to the jurisdiction of the United States;

(B) investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States; and.

(C) when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such

hostilities or attacks against the United States; and all right, title, and interest in any property so confiscated shall vest, when, as, and upon the terms directed by the President, in such agency or person as the President may designate from time to time, and upon such terms and conditions as the President may prescribe, such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes.

(2)In exercising the authorities granted by paragraph (1), the President may require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in paragraph (1) either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of such paragraph. In any case in which a report by a person could be required under this paragraph, the President may require the production of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person.

(3) Compliance with any regulation, instruction, or direction issued under this chapter shall to the extent thereof be a full acquittance and

discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, this chapter, or any regulation, instruction, or direction issued under this chapter.

(b)Exceptions to grant of authority

The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly—

(1)any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value;

(2)donations, by persons subject to the jurisdiction of the United States, of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering, except to the extent that the President determines that such donations (A) would seriously impair his ability to deal with any national emergency declared under section 1701 of this title, (B) are in response to coercion against the proposed recipient or donor, or (C) would endanger Armed Forces of the United States which are engaged in hostilities or are in a situation where imminent involvement in hostilities is clearly indicated by the circumstances; or

(3)the importation from any country, or the exportation to any country, whether commercial or otherwise, regardless of format or medium of transmission, of any information or informational materials, including but not limited to, publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds. The exports exempted from regulation or prohibition by this paragraph do not include those which are otherwise controlled for export under section 4604 of this title, or under section 4605 of this title to the extent that such controls promote the non-proliferation or antiterrorism policies of the United States, or with respect to which acts are prohibited by chapter 37 of title 18; or

(4)any transactions ordinarily incident to travel to or from any country, including importation of accompanied baggage for personal use, maintenance within any country including payment of living expenses and acquisition of goods or services for personal use, and arrangement or facilitation of such travel including non-scheduled air, sea, or land voyages.

(c)Classified information

In any judicial review of a determination made under this section, if the determination was based on classified information (as defined in section 1(a) of the Classified Information Procedures Act) such information may be submitted to the reviewing court ex parte and in *camera. This subsection does not confer or imply any right to judicial review.*

Source: https://www.law.cornell.edu/uscode/text/50/1701; https://www.law.cornell.edu/uscode/text/50/1702

IEEPA was initially used to impose sanctions in response to terrorism, cybercrime and human rights abuses amongst others. IEEPA was used after the 9/11 attack (2011), for cyber threats (2010), Russia (after the 2014 invasion of Crimea), etc. However, it was for the first time that President Trump used IEEPA for imposing tariffs.

a) Domestic court cases

A group of small U.S. importers, along with twelve U.S. states, filed lawsuits challenging the legality of the reciprocal tariffs imposed by President Donald Trump through executive orders under the International Emergency Economic Powers Act (IEEPA). These tariffs were introduced after a national emergency was declared on the grounds of persistent trade deficits and applied to imports from nearly all major U.S. trading partners, with rates ranging from 10% to as high as 50%. The lead plaintiffs included V.O.S. Selections, Inc., a New York–based wine importer; Terry Precision Cycling LLC, which sells women's cycling apparel; FishUSA Inc., a sport-fishing equipment importer; Plastic Services and Products, LLC, an importer of ABS resins; and MicroKits LLC, which imports electronic components.

They were joined by twelve U.S. states, including Oregon, New York and Illinois.

The plaintiffs argued that while the IEEPA permits the President to regulate international economic transactions during a national emergency, it does not authorise the imposition of tariffs. Since tariffs are a form of taxation, they fall squarely within Congress's exclusive

powers under Article I of the U.S. Constitution. The lawsuits further maintained that long-standing trade imbalances cannot reasonably be characterised as the kind of "unusual and extraordinary threat" required to invoke emergency powers under the IEEPA.

Keeping in view such unilateral measures by the U.S., a three-judge panel of the Court of International Trade, in the case of *V.O.S. Selections, Inc. v. United States* has held that IEEPA does not authorise such tariff measures, emphasising that basing sweeping economic policy on emergency powers without congressional sanction runs contrary to the Act's intent.[23] In doctrinal terms, the judgment situates IEEPA within a tradition of "sanctions statutes" aimed at targeted coercive measures and rejects the view that it silently transfers Congress's core tariff-making power to the Executive.[24] Similarly, a District Court in *Learning Resources, Inc. v. Trump* found that IEEPA

[23] *V.O.S. Selections, Inc. v. United States*, (2025) 138 Ct. Intl. Trade.
[24] Congressional Research Service, 'The International Emergency Economic Powers Act (IEEPA)' (CRS Report R45618, 29 January 2024).

does not confer unilateral tariff-making authority, paving the way for broader constitutional debate.[25]

IEEPA further provides that these authorities "may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this chapter and may not be exercised for any other purpose".[26] The lower court concluded that IEEPA, which gives the President the authority to "*regulate.....importation*" was not meant to be a broad expansion of authority to set tariffs. Hence, the court declared those tariffs illegal and barred them from being implemented. Both lower courts read this language as a functional limit, holding that long-standing trade deficits do not qualify as the kind of sudden external peril that Congress had in mind when it enacted the statute.[27] The Trump administration further appealed to the U.S. Court of Appeals for the Federal Circuit. On August 29, 2025, the court ruled that the President had "no legal right to impose sweeping tariffs" or to invoke national emergencies as a justification. Following its ruling on August 29, 2025, the U.S. Court of Appeals for the Federal Circuit issued an order withholding the issuance of its mandate until October 14, 2025.[28] Until the issuance of the mandate, the United States Court of International Trade was directed to take no further action in the matter. In effect, while the

[25] *Learning Resources, Inc. v. Trump*, D.D.C. (2025).
[26] *International Emergency Economic Powers Act 1977*, 50 USC § 1701 (2018).
[27] CRS, 'The International Emergency Economic Powers Act (IEEPA)' (n 21).
[28] *V.O.S. Selections, Inc. v. Trump*, Case: 25-1812, Order at 3 (Fed. Cir. Aug. 29, 2025).

Federal Circuit affirmed that the President lacked authority under IEEPA to impose sweeping tariffs, the enforceability of that decision remains suspended, pending possible review by the Supreme Court. Following the decision, President Trump issued a statement on the social media platform *Truth Social*, declaring: *"ALL TARIFFS ARE STILL IN EFFECT! Today, a highly partisan Appeals Court incorrectly said that our Tariffs should be removed, but they know the United States of America will win in the end. If these Tariffs ever went away, it would be a total disaster for the Country. It would make us financially weak, and we have to be strong."*[29]

In sum, both the Court of International Trade and the Federal Circuit Court of Appeals rejected the United States' plea under IEEPA, stating that the executive cannot deploy emergency powers to bypass Congress in setting tariffs. The recent ruling of the U.S. Court of Appeals has declared the reciprocal tariffs imposed under the IEEPA unauthorised, emphasising the fact that the statute does not provide the President with rights to impose tariffs in this regard. The emerging line of cases therefore reinforces the broader separation-of-powers principle that major redistributions of regulatory authority in the trade field must rest on clear congressional authorization rather than on open-ended

[29] Donald J Trump, 'ALL TARIFFS ARE STILL IN EFFECT! Today a Highly Partisan Appeals Court incorrectly said that our Tariffs should be removed…' (Truth Social, 29 August 2025) https://truthsocial.com/@realDonaldTrump/posts/115114339832960282 accessed 10 December 2025.

emergency clauses.[30] It is to be noted that even if the ruling of the court challenges the measures currently, these tariffs do not seem to disappear soon, as the U.S. has several other provisions such as Sections 122, 201, 232, 301 and 338. Among these, Sections 232 (for national security reasons) and 301 (for unfair trade practices) are the strongest in favour of the U.S. For businesses operating internationally, this is a major challenge because such uncertainty makes it difficult for companies to plan their investments and trade plans in the long term, altogether making the U.S. trade policy extremely unpredictable.

The U.S. Supreme Court started hearing the case in November 2025. The arguments focus on the presidential authority under the IEEPA, discussing whether the Act permits the imposition of tariffs. The case originates from the imposition of "reciprocal tariffs" on trading partners, citing national emergencies related to drug trafficking and trade imbalances. The administration argued that tariffs are regulatory tools within the President's discretion under IEEPA's mandate to "regulate importation," while challengers, including states and small businesses, contended that tariffs are a form of taxation, constitutionally reserved for Congress. They emphasized that IEEPA does not mention tariffs and that its historical use has been limited to sanctions, not duties. During the hearing, several justices expressed scepticism about the administration's interpretation. Chief Justice

[30] CRS, 'The International Emergency Economic Powers Act (IEEPA)' (CRS Report R45618, 29 January 2024); *West Virginia v Environmental Protection Agency* (2022) 597 US 5.

Roberts and Justice Kagan highlighted the constitutional requirement for Congressional authorization of taxes, while Justice Barrett questioned the historical basis for equating "regulate importation" with tariff authority. Justice Jackson noted that IEEPA was designed to constrain, not expand, executive power. The case also invoked the Major Questions Doctrine and the Non-delegation Doctrine, raising concerns about the breadth of authority delegated to the President. Economically, the tariffs have generated $88 billion in revenue but are estimated to cost households $1,000–$1,300 annually. A ruling is expected by the end of 2025 and could significantly reshape the balance of power between Congress and the Executive in trade and emergency economic policy.

B. Reciprocal tariffs under USMCA

The North American Free Trade Agreement (NAFTA), which came into force in 1994, was a landmark trade pact between the United States, Canada and Mexico aimed at eliminating tariffs and fostering economic integration across North America. Over time, however, concerns emerged regarding labour standards, environmental protections and the shifting dynamics of global trade. In response, the three countries renegotiated the agreement, resulting in the United States-Mexico-Canada Agreement (USMCA), which replaced NAFTA on July 1, 2020. USMCA modernized provisions on digital trade, intellectual property and automotive rules of origin, while introducing stronger labour and environmental commitments. Though it retained the core principles of tariff-free trade for qualifying goods, USMCA introduced mechanisms to ensure fairer competition and more balanced trade relationships among the member countries. The primary objective of the USMCA was to enhance tariff-free trade between these three countries and to strengthen the strong economic cooperation.[31]

USMCA faced a challenge due to the imposition of additional tariffs on Canada and Mexico by the US under Section 232 of the Trade Expansion Act of 1962 and the International Emergency Economic Powers Act (IEEPA), thereby stating national security reasons as the key aspect of such tariff imposition. These measures revived debates from the NAFTA era about whether security-based trade restrictions between close economic partners undermine the very rationale of deep regional integration.[32] The imposition of reciprocal tariffs by the United States on imports from Canada and Mexico under IEEPA has raised questions about their compatibility with the USMCA. The initial imposition of additional tariffs applied broadly and the duties were charged even on originating goods, but were quickly adjusted through executive order to exclude all USMCA-compliant goods, thereby maintaining compliance with Article 2.4 and preserving the integrity of the agreement's tariff commitments.[33] Under Article 2.4 of the United States-Mexico-Canada Agreement (USMCA), the three member

[31] Agreement between the United States of America, the United Mexican States and Canada (signed 30 November 2018, entered into force 1 July 2020) (USMCA).
[32] Simon Lester and Inu Manak, *'Security Exceptions and Regional Trade Agreements'* (2020) 21 Journal of International Economic Law 123.
[33] Executive Order 14257 (n 2).

countries i.e., the United States, Canada, and Mexico are prohibited from adopting new customs duties or increasing existing ones on goods that qualify as originating under the agreement. Originating goods are those that meet the specific rules of origin outlined in Chapter 4, which typically require a minimum level of regional value content or substantial transformation within North America. This provision ensures that qualifying goods continue to benefit from preferential tariff treatment and are shielded from unilateral tariff increases. In conclusion, the U.S. reciprocal tariffs under IEEPA are procedurally not inconsistent with USMCA obligations, as they do not affect goods that meet the agreement's origin requirements. This distinction ensures that the integrity of the trade agreement remains intact.

III. RECIPROCAL DUTIES UNDER SECTION 232 AND IEEPA AND THE USA'S OBLIGATIONS UNDER WTO

WTO and its predecessor, the General Agreement on Tariffs and Trade (GATT) have consistently aimed to promote a stable, transparent, predictable and non-discriminatory global trading system. The United States was previously a key player in formulating this framework, but recent actions, particularly the imposition of reciprocal tariffs under Executive Order 14257, dated 9 April 2025, has raised questions about its commitments to the WTO/GATT rules. These concerns are sharpened by the fact that the United States has also blocked appointments to the WTO Appellate Body, thereby weakening the very enforcement mechanism that was designed to police departures from core disciplines such as bound tariffs and most-favoured-nation treatment.[34] Article XXI of GATT introduces a Security Exception clause (invoked by the United States), permitting members to invoke national security concerns to justify measures that would otherwise contravene WTO obligations. Critics suggest that the reciprocal tariffs were aimed at shielding U.S. industry from market pressures, not addressing a real emergency in international relations, and thus fall outside the intended scope of GATT Article XXI. Various provisions of the GATT, which are stated to be violated in this case, are examined below:

ARTICLE 1-MOST-FAVOURED NATION TREATMENT

Article I of the GATT establishes the MFN principle requiring that any trade advantage, such as reduced tariffs granted by one WTO member to another, must be extended immediately and unconditionally to all other WTO members.[35] Under this provision, members must accord "*any advantage, favour, privilege or immunity*" granted to imports from one country "*immediately and unconditionally*" to like products originating in all other WTO Members.[36] This foundational rule is designed to prevent discriminatory treatment among trading partners. The imposition of reciprocal tariffs, however, involves applying higher

[34] Tania Voon, 'The Security Exception in WTO Law: Entering a New Era' (2019) 113 AJIL Unbound 45.
[35] General Agreement on Tariffs and Trade (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 194, art I (GATT 1994).
[36] World Trade Organization (WTO). 1994. *General Agreement on Tariffs and Trade 1994 (GATT 1994)*.

duties to imports from selected countries while maintaining lower rates for others, which directly contravenes the MFN principle. For instance, when the United States imposed a 44% tariff on goods from Sri Lanka while charging only 26% on similar goods from India, it breached its WTO obligations under GATT.[37] Such selective tariff measures undermine the non-discrimination principle. This issue has been at the heart of many disputes brought before the WTO dispute settlement system, including those challenging earlier U.S. tariffs on steel and aluminium, where panels found that the selective imposition of duties was inconsistent with MFN treatment.[38] China has already responded by initiating proceedings at the WTO dispute settlement body and imposing counter-tariffs on U.S. goods. Similarly, India has notified the WTO of its intent to seek authorization for retaliatory tariffs against the United States.[39]

In a United States–Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil (GD/233), Brazil complained that the U.S. applied different countervailing duty laws to imports from Brazil compared to other countries, allegedly violating the MFN

[37] Executive Order 14257 (n 2).
[38] *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R.
[39] Government of India, WTO Notification G/SG/N/12/IND/28 (4 July 2025); Ahmed, Aftab and Aditi Shah, 'India Proposes Retaliatory Duties at WTO Against U.S. Tariffs on Autos' Reuters (New Delhi, 4 July 2025) https://www.reuters.com/world/india/india-proposes-retaliatory-duties-wto-against-us-tariffs-autos-2025-07-04/ accessed 10 December 2025.

obligation under GATT Article I:1.[40] The panel found that the U.S. treatment of Brazilian footwear was inconsistent with Article I, as it failed to extend the same favourable treatment accorded to other countries.[41] In another case, Spain – Tariff Treatment of Unroasted Coffee (BISD 28S/102), Brazil complained that Spain applied different tariff rates to various types of unroasted coffee beans depending on their origin, which Brazil argued violated the MFN principle under GATT Article I.[42] The panel concluded that the coffee varieties were "like products" and that Spain's discriminatory tariff treatment violated Article I:1 by not extending equal treatment to all WTO members.[43] Spain was found to be in breach of its MFN obligations.[44]

ARTICLE II - SCHEDULES OF CONCESSIONS

The U.S., like any other member of the WTO, has committed to certain tariff levels in its GATT schedule, these reciprocal tariffs, as additional tariff constitute a breach of its GATT Article II commitments.[45] For example, the U.S. had initially committed to keep a 5% tariff on steel, but it later raised it to 25% on its own without renegotiating its

[40] Panel Report, *United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil* (19 June 1992) GATT Doc BISD 39S/128, para 6.1.
[41] ibid para 6.10.
[42] Panel Report, *Spain – Tariff Treatment of Unroasted Coffee* (11 June 1981) GATT Doc BISD 28S/102, para 3.1.
[43] ibid para 4.9.
[44] ibid para 5.1.
[45] GATT 1994 (n 5) art II.

agreements.[46] Instead of arising through multilateral negotiation, such tariffs are often imposed unilaterally, weakening the system of tariff commitments and predictability that GATT Article II was originally designed to safeguard. Past WTO panel rulings, including those involving U.S. steel tariffs, have affirmed that going beyond agreed tariff commitments on a unilateral basis constitutes a breach of a country's WTO obligations.[47]

WTO disputes have dealt with Article II of GATT. In one case, where China imposed additional charges on imported auto parts if they were not assembled into complete vehicles in China, treated them as complete vehicles for import duties. In DS 339, 340 and 342, the WTO panel found that this practice violated GATT Article II:1(b) as the duties exceeded China's bound tariff rates for auto parts.[48] In another case, the U.S. provided that importers of shrimp from Thailand and India need to post enhanced bonds, which were challenged as an additional charge not listed in the U.S. Schedule of Concessions. The Appellate Body (DS 345) ruled that the enhanced bond requirement constituted an "other duty or charge" under GATT Article II:1(b) and violated WTO rules because it was not properly recorded in the U.S.

[46] Panel Report, *United States – Certain Measures on Steel and Aluminium Products* (9 December 2022) WT/DS544/R, para 7.112.

[47] World Trade Organization (WTO). 2022. *United States-Certain Measures on Steel and Aluminium Products: Report of the Panel.* WT/DS544/R, adopted 9 December 2022.

[48] Panel Report, *China – Measures Affecting Imports of Automobile Parts* (18 July 2008) WT/DS339/R, WT/DS340/R, WT/DS342/R, para 7.217.

Schedule.[49] The U.S. was found in violation and asked to revise its bond directive.[50]

ARTICLE III - NATIONAL TREATMENT ON INTERNAL TAXATION AND REGULATION

By invoking Section 232, the United States imposed new tariffs on steel and aluminium in 2025 and sought to defend them under GATT Article XXI. These measures, however, have also been questioned for their compatibility with the National Treatment requirement contained in Article III of the GATT 1994.[51] By subjecting imported steel and aluminium to tariffs of 25% to 50% while domestic "like" products remained unaffected, the United States altered the competitive conditions in favour of its own industry. WTO jurisprudence has repeatedly confirmed that even if measures are formally applied at the border, their economic effect can breach national treatment where imported products are treated less favourably than domestic ones.[52] In *Japan-Alcoholic Beverages II*, the Appellate Body emphasised that the key question is whether imported goods are given "less favourable treatment" in terms of competitive opportunities.[53] Similarly, in *Korea-*

[49] Appellate Body Report, *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties* (1 August 2008) WT/DS345/AB/R, para 173.
[50] ibid para 181.
[51] GATT 1994 (n 5) art III.
[52] Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (10 January 2001) WT/DS161/AB/R, WT/DS169/AB/R, para 135.
[53] World Trade Organization (WTO). 1996. *Japan-Taxes on Alcoholic Beverages: Report of the Appellate Body.* WT/DS8/AB/R, adopted 1 November 1996.

Alcoholic Beverages case, the Appellate Body underscored that any measure which modifies conditions of competition to the detriment of imports violates Article III:4.[54] The U.S. appeal to Article XXI cannot hide the fact that Section 232 tariffs are intended to protect domestic producers rather than to address actual security concerns when viewed in the context of WTO jurisprudence. The United States is using Article XXI in a way that goes beyond what it was meant to do. It considers global overcapacity and surplus trade security threats, which goes against the national treatment discipline that is nevertheless essential to the GATT framework. This makes it challenging to articulate the difference between standard economic management and serious international emergencies.

ARTICLE XI - GENERAL ELIMINATION OF QUANTITATIVE RESTRICTIONS

The implementation of Section 232 measures depicts attributes that are similar to quantitative restrictions prohibited by Article XI:1 of the GATT 1994,[55] even though they were announced as additional duties on steel and aluminium products. The sharp increase in tariffs effectively closed off significant portions of the U.S. market, leading

[54] World Trade Organization (WTO). 1999. *Korea-Taxes on Alcoholic Beverages: Report of the Appellate Body.* WT/DS75/AB/R, adopted 17 February 1999.
[55] World Trade Organization (WTO). 1994. *General Agreement on Tariffs and Trade 1994 (GATT 1994).*

to sharp volume declines in targeted imports.[56] This restrictive effect was reinforced by the United States' reliance on negotiated "arrangements" with certain trading partners such as Brazil, Argentina and Korea, where exemptions from tariffs were conditioned upon strict quantitative limits on exports.[57] In this way, Section 232 blurred the line between tariffs and quotas, replacing scheduled tariff concessions with discretionary, country-specific import ceilings. By structuring the measure in this manner, the United States not only departed from its bound tariff commitments under Article II of the GATT 1994 but also reintroduced quantitative restrictions in a manner inconsistent with the core market-access disciplines of the multilateral trading system.[58]

ARTICLE XXI - SECURITY EXCEPTIONS

Article XXI of GATT deals with security exceptions to trading obligations, mainly consisting of measures imposing disclosure requirements, security interests of a WTO Member country, etc. This article prescribes that national security will prevail upon the trade policies. This article thus provides the flexibility to WTO members to violate their binding commitments in cases of national security.

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[56] World Trade Organization (WTO). 2022. *United States-Certain Measures on Steel and Aluminium Products: Report of the Panel (China).* WT/DS544/R, circulated 9 December 2022.

[57] U.S. Trade Representative (USTR). 2018. *Proclamation 9740: Adjusting Imports of Steel into the United States; and Proclamation 9759: Adjusting Imports of Steel into the United States.*

[58] World Trade Organization (WTO). 1994. *General Agreement on Tariffs and Trade 1994* (GATT 1994).

Article XXI of the GATT states that:

Nothing in this Agreement shall be construed,

a. *to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or*
b. *to prevent any contracting party from taking any action, which it considers necessary for the protection of its essential security interests*
   (i) *relating to fissionable materials or the materials from which they are derived;*
   (ii) *relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;*
   (iii) *taken in time of war or other emergency in international relations; or*
c. *to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.*[59]

A legal debate has been raised time and again over the issue of whether this clause is *self-judging* in nature, i.e., whether a country can unilaterally determine what measures qualify as a security interest for its nation. In early WTO practice, Article XXI, GATT was seen as

[59] World Trade Organization (WTO). 1994. *General Agreement on Tariffs and Trade 1994* (GATT 1994).

largely non-justiciable; however, this thought has changed over time, with key rulings in 2019 and 2022, where WTO panels examined whether such measures could be reviewed under the dispute settlement system.

The first WTO Jurisprudence on Article XXI came in the case of Russia – *Measures Concerning Traffic in Transit case* in 2016*(WT/DS512)*, where Russia imposed restrictions on the transit of goods from Ukraine through Russian territory to third countries (Kazakhstan, Kyrgyz Republic) after the 2014 Crimea crisis. Ukraine claimed these measures violated GATT Articles V and X (freedom of transit and transparency obligations). Russia invoked Article XXI(b)(iii) (national security exception), arguing the measures were necessary to protect its essential security interests during an "emergency in international relations" (Crimea crisis). Russia claimed Article XXI is self-judging, meaning WTO panels cannot review such measures. The panel ruled that Article XXI is not totally self-judging and that the WTO panels have jurisdiction to review whether conditions for invoking Article XXI are met[60]. The phrase "emergency in international relations" refers to armed conflict or heightened tension between states, not economic disputes. The panel found Russia acted during such an emergency and in good faith, so its measures were justified under Article XXI. This case set a precedent for later disputes, including U.S.–steel/aluminium

[60] World Trade Organization (WTO). 2019. *Russia-Measures Concerning Traffic in Transit: Report of the Panel*. WT/DS512/R, adopted 26 April 2019; see also Tania Voon, *Can International Trade Law Recover? The Security Exception in WTO Law: Entering a New Era*, 113 AJIL Unbound 45, 45–50 (2019).

tariffs and the Saudi Arabia–IPR case. The panel held that any such invocation of national security or emergency concerns by a member must meet certain objective conditions, including the existence of a genuine emergency in international relations.[61]

In 2018, the United States imposed additional tariffs on steel (25%) and aluminium (10%) under Section 232 of the Trade Expansion Act, citing national security concerns. China challenged these measures at the WTO (DS544), arguing they violated U.S. obligations under the General Agreement on Tariffs and Trade (GATT) 1994.[62] The WTO panel examined the U.S.–China disputes over steel and aluminium tariffs, WTO panel clarified the interpretation of Article XXI of GATT, which provides a national security exception.[63] The WTO panel in its finding in December 2022, observed that the U.S. tariffs breached core GATT provisions and that Article XXI is not entirely self-judging. While members may define their essential security interests, the invocation of this exception is subject to objective review. The panel emphasized that an "emergency in international relations" refers to situations such as armed conflict or severe international crises, not general economic or trade concerns. Consequently, the U.S. failed to demonstrate that its tariffs were imposed during such an emergency.

[61] Bown, C. P. (2020). *US-China Trade War and the Limits of WTO Law.* Peterson Institute for International Economics.

[62] Request for Consultations by China, *United States – Certain Measures on Steel and Aluminium Products* (5 April 2018) WT/DS544/1.

[63] Panel Report, *United States – Certain Measures on Steel and Aluminium Products* (n 46).

These rulings have significant legal and policy implications. Legally, they establish that Article XXI is reviewable and limit the scope for invoking national security exceptions, reinforcing that economic concerns alone do not qualify. Policy-wise, the decisions strengthen the rules-based trading system but raise enforcement challenges, given the U.S. rejection of the findings and the current paralysis of the Appellate Body. For WTO members, including India, the rulings underscore the need for careful justification of security-related trade measures and adherence to dispute settlement procedures. They also signal potential pressure for WTO reform to address security exceptions and restore the dispute settlement mechanism. These developments will likely influence future trade disputes, particularly in sectors such as technology and critical minerals, where national security arguments are increasingly invoked.

IV. CONCLUSION

This paper demonstrates that the United States' recent reciprocal tariffs raise serious legal concerns, especially under the international trade rules. While Section 232 acts as a domestic tool, its use goes far beyond what the WTO permits. The tariffs imposed under Section 232 clearly breach key GATT rules on MFN treatment, bound tariff commitments and the prohibition on quantitative restrictions and they do not meet the strict conditions for using the national-security exception in Article XXI. The tariffs imposed under IEEPA face even deeper issues. U.S. courts have ruled that IEEPA does not give the President the power to impose tariffs and these measures also violate the United States' WTO obligations. The reciprocal tariffs, therefore, lack a lawful basis both domestically and internationally. Though the Supreme Court hearing is going on, the authors feel that the action of the USA's President on reciprocal duties under IEEPA will be declared illegal and likely to be quashed. Overall, the United States' unilateral actions under Section 232 and IEEPA show a growing gap between U.S. trade policy and the rules of the WTO system. Together, these measures reflect a sharp departure from the rules-based multilateral trading system. It is a saddening situation to note that it was the USA which pushed for a rule based transparent and predictable multilateral trading system a few decades ago and the same rules are being demolished by the USA.

UNBRIDLED FINANCIAL FREEDOM: A PROGNOSIS ON THE REMOVAL OF MANDATORY CONVERSION OF OPCS AND THE RISE OF SHELL COMPANIES

Sharan Sai Venkata Subhash Pokuru[*]

ABSTRACT

This paper explores the evolution, challenges and regulatory implications of the One Person Company (OPC) structure in India, particularly in light of the 2021 amendment that removed the mandatory conversion requirement upon crossing specific financial thresholds. Introduced under the Companies Act, 2013, OPCs aimed to offer individual entrepreneurs the benefits of limited liability and corporatization, bridging the gap between sole proprietorships and private companies. However, the subsequent deregulation, though intended to support post-pandemic economic

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recovery and entrepreneurial freedom, has given rise to significant concerns regarding regulatory oversight and corporate transparency.

The paper critically examines how the current legal framework enables regulatory arbitrage by allowing OPCs to operate at large financial scales while enjoying relaxed compliance obligations. It identifies three primary compromises: gaps in fiscal reporting (e.g., exemption from cash flow statements), absence of internal accountability (due to single-member structure) and regulatory loopholes enabling the misuse of dormant companies, which collectively increase the risk of OPCs being used as shell companies for fraudulent activities.

Drawing from real-world cases like Rotomac and Malvika Steels, the paper demonstrates how these gaps hinder early detection of financial misconduct. While reinstating the pre-2021 fiscal caps is seen as impractical and counterproductive to business growth, the paper proposes a hybrid regulatory model. Inspired by OPC frameworks in Bangladesh and Germany, the solution advocates for a two-

fold approach: introducing a revised fiscal threshold for mandatory conversion and limiting borrowing beyond paid-up capital unless personally collateralized.

This framework balances economic growth with financial integrity, ensuring that OPCs can scale responsibly without compromising transparency and accountability. By doing so, the paper offers a pragmatic roadmap for reforming India's OPC regime while protecting its corporate ecosystem from misuse.

Keywords: *One Person Company (OPC), Companies Act, 2013, Deregulation, Regulatory Arbitrage, Shell Companies.*

I. INTRODUCTION

Personal liability is one of the most significant challenges faced by entrepreneurs in the business sector. It amplifies the pressures on an individual, often restricting their ability to operate freely and confidently. To alleviate this burden, the concept of a 'company' was introduced as a business vehicle, providing the protection of a separate

legal entity. This legal distinction acts as a shield, safeguarding entrepreneurs from personal liability.[1]
By definition, a 'company' traditionally requires the participation of multiple individuals.[2] Consequently, a solo entrepreneur is typically confined to operating through a sole proprietorship, which lacks the benefit of a separate legal entity and leaves them personally exposed to liabilities. This limitation underscores the need for innovative business models that bridge the gap between a sole proprietorship's simplicity and a company's protective framework.

With the rise of information technology and the expansion of business opportunities in the service sector, bridging the gap between sole proprietorship and the corporate framework became imperative. This necessity, among others, prompted the formation of the J.J. Irani Committee, tasked with advising the government on reforms to the Companies Act, 1956. The Committee's report highlighted the importance of empowering entrepreneurs to leverage their capabilities as drivers of economic activity. It stressed that requiring entrepreneurs to form an association of persons to establish a company was unreasonable and restrictive. Recognizing the need to foster individual

[1] Ireland P, 'Finance and the Origins of Modern Company Law', *Cambridge University Press eBooks* (2017) https://doi.org/10.1017/9781139681025.013 .
[2] Namrata Gupta, 'One Person Company - A Critical Analysis' (2016) 1 International Journal of Legal Insight 1.

entrepreneurship, the report advocated for reforms that would provide a pathway for solo entrepreneurs to access the corporate framework.[3]

In line with this vision, the Companies Act, 2013, introduced the concept of the One Person Company (OPC). This innovation aimed to broaden the scope of entrepreneurship and create new opportunities for individuals to participate in the corporate world, blending flexibility with legal protection.[4] According to the statute, an OPC is a company that only has one person as a member.[5] For legal purposes, it is deemed to be a private company with a relevantly similar form of working.[6] It requires and consists of a single member and/or one director.[7] In essence, an OPC is regarded as a hybrid of a sole proprietorship and a company,[8] wherein the law provides a sole proprietor with the protection of a separate legal entity,[9] thus benefiting the entrepreneur

[3] J.J. Irani Committee, *Report of the Expert Committee on Company Law*, (Ministry of Company Affairs, Gov't of India 2005).
[4] T. V. Narayanaswamy, 'One Person Company - A Legal Fiction' (2014) 8 Chartered Secretary Journal 37.
[5] The Companies Act, 2013 (18 of 2013) s 2(62).
[6] The Companies Act, 2013 (18 of 2013) s 3(1)(c).
[7] Kanvi Gupta, 'Analysis of One-Person Company Laws in India' (2023) 5 Indian Journal of Law & Legal Research 1.
[8] Mayashree Acharya, 'One person company (OPC) vs sole proprietorship India' (cleartax, 20 June 2024) https://cleartax.in/s/one-person-company-vs-sole-proprietorship accessed 13 July 2025.
[9] Vinay Haswani & Krati Rajoria, 'One Person Company: An Analytical Study' (2015) 5 An International Multidisciplinary Research Journal, https://dx.doi.org/10.2139/ssrn.3806325 accessed 13 July 2025.

through highly sought limited liability and corporatization.[10] Although deemed to be a private company, an OPC was suggested with the idea of subjecting it to lesser regulations than a normal company to enable wealth creation,[11] thereby encouraging sole proprietors of the country.[12]

Until 2021, this economic freedom was restricted, requiring an OPC to convert into a private or public company once it reached a specific financial threshold. However, in 2021, the Union lifted this requirement.[13] This paper offers a prognosis of the law by examining the theoretical impact of removing the mandatory conversion requirement for One Person Companies (OPCs) in the context of the government's post-pandemic economic revival efforts. The analysis is divided into five parts. The first part introduces the concept of OPCs. The second part examines the current legal position governing OPCs and the rationale underlying it. The third part demonstrates that, while the removal of the mandatory conversion requirement aligns with the Union's economic objectives, it weakens key company law safeguards, reducing transparency and increasing the risk of corporate fraud

[10] Shrishti Verma, 'A Critique on the Concept of One Person Companies, and Its Relevance in Indian Entrepreneurship' (2022) 5 International Journal of Law Management & Humanities 771.

[11] J.J. Irani Committee, *Report of the Expert Committee on Company Law*, (Ministry of Company Affairs, Gov't of India 2005).

[12] Aditi Vinzanekar, 'A Critique on the Concept of One Person Companies, and Its Relevance in Indian Entrepreneurship' (2018) 3 Pen Acclaims 1.

[13]Ministry of Corporate Affairs, *The Gazette of India, Extraordinary*, G.S.R. 91(E), Rule 6, 1 February 2021, Part II, Section 3(i).

particularly through the proliferation of shell companies thereby posing a serious threat to the economy. The fourth part explains why reinstating the original mandatory conversion requirement is neither viable nor desirable, given its economic impracticality and its restrictive impact on entrepreneurial freedom. Finally, the fifth part proposes, as an ex-ante measure, the adoption of a hybrid regulatory framework drawing from the OPC models of Bangladesh and Germany, aimed at balancing economic growth with effective regulatory oversight.

II. MANDATORY CONVERSION PROCESS – THE CURRENT LEGAL POSITION AND THE RATIONALE BEHIND

An OPC enhances an entrepreneur's creditworthiness by granting it a company status.[14] Financial institutions and investors often prefer lending to companies rather than sole proprietorships due to the greater transparency and accountability ensured under the Company Act.[15] Furthermore, an OPC structure enables entrepreneurs to access diverse funding sources such as venture capital, angel investors and financial institutions, thereby significantly broadening the financial base beyond

[14] M. Bina Celine Dorathy, 'One Person Company (OPC) - The New Business Format for Small Retailers in India' (2015) 20(1) Management 173.

[15] Zarana Mehta, 'A complete guide on What is OPC?, Characteristics of One Person Company, and OPC Advantages and Disadvantages' (*EbizFiling*, 17 March 2022) https://ebizfiling.com/blog/opc-advantages-and-disadvantages/ accessed 13 July 2025.

personal contributions and increasing opportunities for raising capital.[16] While an OPC is classified as a private company, it is subject to relatively fewer regulations, making it a streamlined and flexible business model.[17] Thus, an OPC uniquely combines the benefits of a sole proprietorship with the advantages of an enhanced financial base and reduced regulatory burden, making it an appealing choice for entrepreneurs.

This mode of business with economic freedom in the form of fewer regulations was originally limited to an extent. In case an OPC's paid-up share capital had been increased beyond Fifty Lakh rupees or its average annual turnover during the relevant period had exceeded Two crore rupees, it was obligated to convert either into a private or a public company.[18] The fiscal cap imposed by the mandatory conversion rule restricts the revenue potential of the OPC, as its ability to borrow credit is limited by this threshold. In India, a loan is granted to an OPC based on its performance. However, this loan is limited to Micro and small-scale industry loans,[19] given the imposed statutory limitation.

[16] Sakshi Srivastava, 'Benefits of OPC (One Person Company)' (*Corpbiz*, 12 September 2020) https://corpbiz.io/learning/benefits-of-opc-online/ accessed 13 July 2025.

[17] Vinay Haswani & Krati Rajoria, 'One Person Company: An Analytical Study' (2015) 5 An International Multidisciplinary Research Journal, https://dx.doi.org/10.2139/ssrn.3806325 accessed 13 July 2025.

[18] Companies (Incorporation) Rules 2014, r 6(2), prior to amendment by Companies (Incorporation) Second Amendment Rules, 2021.

[19] M. Bina Celine Dorathy, 'One Person Company (OPC) - The New Business Format for Small Retailers in India' (2015) 20(1) Management 173.

This stance changed after 2021, as COVID-19 heavily affected the economy.[20] In light of the economic impact of the pandemic,[21] the union removed this mandate by virtue of the Companies (Incorporation) Second Amendment Rules, 2021.[22] A company is no longer mandated to convert into a private or public company upon surpassing the specified financial threshold. The removal of the fiscal cap was expected to enhance economic freedom by expanding the entrepreneurs' financial opportunities, thereby directly contributing to stabilizing the distressed economy.[23] However, the anticipated benefits of this framework also lay the groundwork for the potential misuse through the formation of shell companies.

III. REGULATORY COMPROMISES AND THEIR ROLE IN FACILITATING THE CREATION OF SHELL COMPANIES

Theoretically speaking, an OPC is no longer limited to small-scale or microloans. However, such a liberty comes at a cost. Edmund Burke

[20] United Nations, 'Data Tells the Story: How COVID-19 is Changing the World' (United Nations) https://www.un.org/hi/desa/data-tells-story-how-covid-19-changing-world accessed 13 July 2025.

[21] India, Budget Speech 2021-2022, Nirmala Sitharaman, Minister of Finance, (February 1, 2021). Available in: https://www.indiabudget.gov.in/budget2021-22/doc/Budget_Speech.pdf accessed 13 July 2025.

[22] G.S.R. 91(E), Gazette of India, Ministry of Corporate Affairs, Feb. 16, 2021.

[23] India, Budget Speech 2021-2022, Nirmala Sitharaman, Minister of Finance, para 81 (February 1, 2021). Available in: https://www.indiabudget.gov.in/budget2021-22/doc/Budget_Speech.pdf accessed 13 July 2025.

once said about liberty, "*when men act in bodies, it is power. When they act by themselves, it is will; and will, unrestrained by any authority, is anarchy*."[24] As noted earlier, an OPC may be deemed to be a private company,[25] it is subjected to relevantly lesser regulations.[26] Regulations imposed on a company lead to the disclosure of information by companies which enhances transparency between the company and regulatory enforcement authorities such as SFIO (Serious Fraud Investigation Office), CBI (Central Bureau of Investigation), SEBI (Securities and Exchange Board of India), ED (Enforcement Directorate), etc, the wings of the MCA (Ministry of Corporate Affairs).[27] Therefore, under the latest amendment, an OPC is now subject to relatively fewer regulations, with its financial base no longer restricted by law, thereby compromising transparency at the highest economic level. This relaxation of oversight reduces regulatory scrutiny and increases the risk of opaque financial practices.

[24] Pepperdine School of Public Policy, 'Reflections on the French Revolution' (Pepperdine University, 1996) https://publicpolicy.pepperdine.edu/academics/research/faculty-research/french-revolution/reflections.htm accessed 13 July 2025.

[25] The Companies Act, 2013 (18 of 2013) s 3(1)(c).

[26] Vinay Haswani & Krati Rajoria, 'One Person Company: An Analytical Study' (2015) 5 An International Multidisciplinary Research Journal, https://dx.doi.org/10.2139/ssrn.3806325 accessed 13 July 2025.

[27] T.P. Morgan, 'The Misuse of Corporate Vehicles' (2002) 10 Journal of Financial Crime 133.

Mandated Information disclosed to regulatory authorities assists them in carrying out investigations of corporate misconduct.[28] One of the biggest corporate misconducts is the formation of Shell Company. A 'Shell Company' is defined as a corporate entity established with the intent of using it as a veil to obscure non-existent business transactions. This veil is often employed to facilitate illicit activities such as tax evasion, fraud or money laundering, by disguising the true nature of financial operations and the identities of those involved.[29] The latest amendment enables an OPC to function as a shell company with a reduced likelihood of detection, owing to the relaxed regulations that compromise transparency. This regulatory compromise weakens oversight by authorities, as reflected in three specific regulatory gaps that allow such shell companies to evade scrutiny. They are:

C. Compromise in Financial Regime: Gaps in Fiscal Oversight Regulations

The Companies Act prescribes several regulations to maintain the fiscal integrity of a company. In accordance with Sections 128(3) and 133 of the Act, it is mandated that every company maintains a record

[28] Dharmvir Singh, 'Incorporating with Fraudulent Intentions: A Study of Various Differentiating Attributes of Shell Companies in India' (2010) 17(4) Journal of Financial Crime 459.

[29] Financial Crimes Enforcement Network (FinCEN), *The Role of Limited Liability Companies in Money Laundering* (2006) https://www.fincen.gov/sites/default/files/shared/LLCAssessment_FINAL.pdf accessed 13 July 2025.

of its financial operations and is open for inspection,[30] while adhering to the accounting standards.[31] Additionally, in accordance with Section 128(1) of the Act, each corporation is required to prepare financial statements for every fiscal year.[32] Furthermore, in accordance with Section 137 of the Act, a copy of financial statements and other relevant attachments are required to be filed with the Registrar of Companies, within 30 days of its preparation.[33] However, an OPC's Financial stewardship is deemed to be the same as every other company although not being subjected to the same level of regulations.

One key aspect of the relaxed regulatory framework is the reduced scrutiny of financial statements. While a financial statement typically consists of multiple components, such as the cash flow statement for that fiscal year,[34] the proviso of Section 2(40) of the Companies Act exempts OPCs from including cash flow statements in their financial disclosures.[35] A cash flow statement provides a summary of the company's cash inflows and outflows.[36]

Economic transparency facilitated by such regulations enables authorities to identify potential shell companies. An important attribute

[30] The Companies Act, 2013 (18 of 2013) s 128(3).
[31] The Companies Act, 2013 (18 of 2013) s 133.
[32] The Companies Act, 2013 (18 of 2013) s 128(1).
[33] The Companies Act, 2013 (18 of 2013) s 137.
[34] The Companies Act, 2013 (18 of 2013) s 2(40).
[35] ibid.
[36] Ion Hirghiduș, 'Ethical Implications in the Socioeconomical Life' (2009) 9 Annals U. Petroşani Econ. 5.

associated with such shell companies is the flow of funds in their bank accounts relative to the booking of business transactions. When there is a corollary between anomalies in the flow of funds such as a company receiving income in cash but conducting expenses via bank transactions and irregularities in transaction bookings, authorities place these companies under heightened scrutiny.[37] This correlation suggests a higher likelihood of false reporting, one of the illicit activities, including money laundering, commonly conducted through shell companies.[38]

However, as mentioned, an OPC is not required to disclose cash flow statements—the documents that help authorities detect corporate fraud. As a result, the likelihood of an OPC being flagged as a shell company is diminished due to the absence of cash flow transparency. This issue is exemplified by the case of Rotomac Pen.

Rotomac Global Private Limited, incorporated as a private company in 1992, initially focused on providing high-quality ballpoint pens at affordable prices. The brand quickly gained recognition in the domestic market and set its sights on the international stage.[39] However, when

[37] Income-Tax Department New Delhi, *Techniques of Investigation for Assessment*, vol 4 (Excel India Publishers 2019) 31.

[38] Dharmvir Singh, 'Incorporating with Fraudulent Intentions: A Study of Various Differentiating Attributes of Shell Companies in India' (2010) 17(4) Journal of Financial Crime 459.

[39] Insolvency and Bankruptcy Board of India, *E-Auction Process Document: Rotomac* (2023) https://insolvencyandbankruptcy.in/wp-content/uploads/2023/02/E-Auction-Process-Document-Rotomac.pdf accessed 13 July 2025.

the company sought loans from multiple banks, including the Bank of India, discrepancies in its financial reports raised concerns. Specifically, the export packing credit it received was not reflected in corresponding export orders from the remitting party, signalling inconsistencies between the cash flow statement and the account books.[40]

These discrepancies prompted the banks to conduct investigative audits, eventually leading to the company being reported to enforcement agencies.[41] The primary factor in uncovering this fraudulent activity was the mismatch between the cash flow statement and the accounts. Against this background, if Rotomac had hypothetically been registered as an OPC, where cash flow statements are not mandatory to be disclosed, such suspicions might never have been raised. This precisely highlights the regulatory gap hindering the early detection of fraud in OPCs.

D. Compromise in Accountability: Absence of Internal Oversight

[40] Express News Service, 'CBI Books Rotomac, Its Directors in Rs 750-Crore Bank Fraud Case' *The Indian Express* (New Delhi, 16 November 2022) https://indianexpress.com/article/india/cbi-books-rotomac-global-in-rs-750-crore-bank-fraud-case-8272194/ accessed 13 July 2025.

[41] Press Trust of India, 'Pen-Maker Rotomac Global Charged in 750 Crores Bank Fraud Case' *NDTV* (New Delhi, 16 November 2022) https://www.ndtv.com/india-news/pen-maker-rotomac-global-charged-in-750-crores-bank-fraud-case-3526317 accessed 13 July 2025.

A company, by definition, comprises multiple members. Once incorporated, the board of directors is responsible for managing the company's daily operations.[42] The law imposes a fiduciary duty on directors,[43] making them legally obligated to act in the best interests of the company's owners, i.e., its members.[44] The statute thereby ensures the accountability of the board of directors, which in turn guarantees the overall accountability of the company, as the board manages its day-to-day operations. This accountability is maintained by requiring the board to fulfill specific statutory obligations. It includes conducting an annual general meeting,[45] during which the board must report the company's performance to the shareholders while disclosing the financial statements, books of accounts[46] and the audit report.[47] Further, the board is also restrained from undertaking activities that can substantially affect the company's operations without the approval of the members.[48] Therefore, the actions of the board that directly impact the company are subject to significant scrutiny, ensuring the accountability of the company itself from the outset.

However, such accountability is absent for an OPC. Unlike a typical company, which has multiple members, an OPC has only one member. This absence of multiple stakeholders results in a lack of oversight, as

[42] The Companies Act, 2013 (18 of 2013) s 179.
[43] The Companies Act, 2013 (18 of 2013) s 166(i).
[44] The Companies Act, 2013 (18 of 2013) s 2(55)(iii).
[45] The Companies Act, 2013 (18 of 2013) s 173.
[46] The Companies Act, 2013 (18 of 2013) s 134.
[47] The Companies Act, 2013 (18 of 2013) s 177.
[48] The Companies Act, 2013 (18 of 2013) s 190.

the director's actions are not subject to scrutiny by anyone else. The will of a single individual essentially drives the company. The board of an OPC is not required to conduct an annual general meeting or seek approval for significant transactions.[49]

Internal accountability within a company plays a crucial role in assisting regulatory authorities in identifying or initiating investigations into potential shell companies. As Niccolò Machiavelli wisely observed, "*involving too many people increases the likelihood of exposure, as it's harder to maintain secrecy and trust among a larger group*."[50] This principle applies to companies as well: when multiple members are involved in corporate governance, the chance of fraudulent activities diminishes, as the members can monitor and intervene if the board attempts misconduct. The members of a company can exercise a number of rights, such as removing the board[51] or approaching the NCLT (National Company Law Tribunal),[52] to monitor the board's actions and to protect their self-interests by filing a class action.[53]

However, this internal check is absent in an OPC, which may operate on a large financial scale akin to a private company but lacks the

[49] The Companies Act, 2013 (18 of 2013) s 96(1).

[50] Niccolò Machiavelli, *Discourses on Livy* (Identity Hunters, 2017) <https://identityhunters.org/wp-content/uploads/2017/07/niccolo-machiavelli-discourses-of-livy.pdf> accessed 13 July 2025.

[51] The Companies Act, 2013 (18 of 2013) s 169.

[52] The Companies Act, 2013 (18 of 2013) s 241.

[53] The Companies Act, 2013 (18 of 2013) s 245.

oversight provided by multiple members. Without the safeguard of internal accountability, the risk of such entities being used as shell companies increases, as there is no collective body to resist or expose fraudulent activities. Consequently, this absence of regulation hinders authorities in detecting and addressing the misuse of OPCs as shell companies.

This can be exemplified by the case of M/s Malvika Steels Limited, a subsidiary of M/s Usha (India) Limited (UIL), which began as an ISP project in 1993. The initial project estimates were set at *One Thousand, Three Hundred Sixty-Four* crores, with nearly half of the amount raised through equity shares. However, the board reported several issues, including changes in the project scope, inordinate delays and alleged fraud by the promoters, which resulted in significant delays. Consequently, the project cost escalated to *Three Thousand, Five Hundred Thirty-Seven* crores, far exceeding the original estimates.[54]
These discrepancies raised suspicions among the members of the company, particularly Industrial Financial Corporation of India (IFCI), one of the lead financiers and equity holders. As a result, IFCI, which had become a member of the company, suspended the board and took over the management. Eventually, it had been discovered that the board, largely consisting of family members, had been siphoning off

[54] *Ifci Ltd. v Usha (India) Ltd. and Ors., Shri Vinay* (2005) 63 SCL 602 (CLB).

project funds. This resulted in cases of fraud being filed against the Usha Group family.[55]

The uncovering of this fraudulent activity was primarily due to the scrutiny the board faced and the power that the members possessed to ensure accountability within the company. Against this background, if the concerned company had been structured as an OPC, such an overthrowing of the board would not have been possible owing to the absence of internal accountability regulations for OPCs. Accordingly, this would have left the creditors with little recourse and they would have been forced to compromise on their debt recovery, gaining whatever they could during the winding-up stage.

E. Compromise in Bonified Corporate Conversion: Regulatory Gaps for Dormant Company to OPC

The corporate legal framework provides entrepreneurs the flexibility to transition between various company structures, facilitating conversions from a private company to a public company or from an OPC to a private company,[56] in accordance with the prescribed procedures outlined under company law.[57] This flexibility is particularly beneficial for shelf companies. Shelf companies refer to dormant entities that are

[55] Centre for Monitoring Indian Economy, *Databank of Company Records: Financials of Over 2,45,000 Indian Companies* (First Source 2002).
[56] The Companies Act, 2013 (18 of 2013) s 18.
[57] Companies (Incorporation) Rules 2014, r 6.

established but inactive in nature, or to companies incorporated by professional consultants for immediate use when urgent business needs arise.

Shelf companies, often left dormant, can be revived due to their pre-existing financial standing, which may help in raising credit or securing financial instruments. These companies, though created for legitimate purposes, may remain unused for a certain period yet retain value due to their established credit history and legal framework, making them suitable for future business activities or transactions. Reviving a dormant company, as opposed to starting a new one, presents a significant advantage for individuals intending to engage in illicit activities. This is because dormant companies often carry the appearance of legitimacy, having been previously registered and possibly maintaining an established financial profile. By leveraging this pre-existing reputation, such individuals can more easily raise funds, secure financial backing, and enter into transactions with reduced suspicion from external parties, including lenders and business partners.[58]

The dormant company's history and creditworthiness can provide a facade of trustworthiness, making it an attractive vehicle for fraud or money laundering. Unlike a newly incorporated company, which may

[58] Dharmvir Singh, 'Incorporating with Fraudulent Intentions: A Study of Various Differentiating Attributes of Shell Companies in India' (2010) 17(4) Journal of Financial Crime 459.

attract scrutiny due to its lack of operating history or established credibility, a revived dormant company can sidestep such concerns, as its previous standing can mask the intent to commit fraudulent activities. The removal of the previous financial caps on OPCs under the Companies (Incorporation) Rules, 2014,[59] the financial base of an OPC is no longer limited, allows a dormant company to be converted into an OPC,[60] taking advantage of the least regulated company structure under the Companies Act, 2013. This regulatory relaxation makes it easier for individuals with malicious intent to revive dormant companies and use them for illicit purposes, such as money laundering or tax evasion, all while hiding under the minimal reporting and scrutiny required of an OPC.

This risk translates into observable statistical trends reported by the authorities. Following the 2021 amendment, MCA data shows that nearly *eleven thousand* additional OPCs were incorporated between 2021[61] and the end of 2022,[62] compared to approximately *six thousand* incorporations between 2018[63] and the end of 2019[64] (excluding 2020

[59] ibid (n 57).
[60] The Companies Act, 2013 (18 of 2013) s 252; The Companies Act, 2013 (18 of 2013) s 18; Companies (Incorporation) Rules 2014, r 7.
[61] Ministry of Corporate Affairs Government of India, 'Monthly Information Bulletin on Corporate Sector December 2021' (MCA 2021).
[62] Ministry of Corporate Affairs Government of India, 'Monthly Information Bulletin on Corporate Sector December 2022' (MCA 2022).
[63] Ministry of Corporate Affairs Government of India, 'Monthly Information Bulletin on Corporate Sector December 2018' (MCA 2018).
[64] Ministry of Corporate Affairs Government of India, 'Monthly Information Bulletin on Corporate Sector December 2019' (MCA 2019).

due to pandemic-related distortions). Notably, this surge in OPC incorporations in 2022 is accompanied by an 18% increase in reported financial fraud in the same year.[65] Read together, the concurrent rise in OPC formations and financial fraud suggests that the 2021 amendment may have contributed to heightened financial risk, for the reasons discussed above.

In conclusion, companies are subject to regulations designed to disclose critical information to regulatory authorities, enabling them to detect potential threats, such as shell companies. However, OPCs are subject to relatively fewer regulations, creating gaps in the financial regime, accountability and the integrity of corporate conversions. These compromises allow for greater risks of misuse, contributing to the rise of shell companies, as illustrated by multiple cases. Therefore, strengthening oversight and closing these regulatory gaps is essential to prevent further exploitation of OPCs.

IV. THE COST OF COMPROMISED REGULATIONS AND THE UNSUITABILITY OF REINSTATING THE PREVIOUS LEGAL STANCE

[65] ET LegalWorld and www.ETLegalWorld.com, "59% of Indian Companies Report Financial Fraud; Procurement Fraud Tops Concerns: PwC Survey" *ETLegalWorld.com* (December 18, 2024) https://legal.economictimes.indiatimes.com/news/corporate-business/59-of-indian-companies-report-financial-fraud-procurement-fraud-tops-concerns-pwc-survey/116435735#:~:text=This%20marks%20an%2018%20per,it%20as%20a%20major%20issue. accessed 01 January 2026.

As demonstrated above, the lack of transparency in OPCs, combined with their uncapped financial base, significantly increases the likelihood of corporate misconduct, particularly through the formation of shell companies.

However, this amendment does not amount to a complete failure. Its stated objective was to enhance economic liberty and increase overall revenue, goals that have largely been achieved following the relaxation of regulatory constraints. Corporate sales turnover witnessed a substantial increase of 32.5% in FY 2021–22, while aggregate corporate profitability rose sharply from approximately *Two Lakh Fifty Thousand Crore Rupees* in 2020–21 to nearly *Seven Lakh Ten Thousand Crore Rupees* by 2024–25,[66] indicating a structural shift in value generation to which the removal of the economic cap has been a contributing factor. In parallel, OPCs have benefited from significantly reduced compliance costs, as they are exempt from holding Annual or Extraordinary General Meetings[67] and, where there is a sole director, from conducting formal Board Meetings[68] or complying with associated notice and secretarial requirements.[69]

[66] Sarkar S, '"17-Year High": Corporates' Net Profit Rose by 115.6% since Pandemic. Is There Reason to Celebrate?' (*The Wire*, 23 October 2025) <https://thewire.in/business/corporate-indias-net-profit-rose-by-115-6-since-the-pandemic> accessed 1 January 2026.

[67] The Companies Act, 2013 (18 of 2013) s 122.

[68] The Companies Act, 2013 (18 of 2013) s 173.

[69] The Companies Act, 2013 (18 of 2013) s 118.

Nevertheless, this expansion of economic liberty has come at the cost of weakened regulatory standards, as demonstrated earlier. While the short-term economic gains of removing the mandatory conversion requirement are evident, this perspective overlooks potential long-term risks. Notably, in 2017 alone, over *One Billion Dollars* in untaxed and fraudulent income was uncovered through shell companies.[70] If left inadequately regulated, India risks similar systemic instability, as seen in Albania's transition to a market economy, where weak financial oversight precipitated economic collapse and civil unrest.[71]

In 2017 alone, over *One Billion dollars* in untaxed and fraudulent income was uncovered from shell companies. This starkly illustrates how the anticipated economic benefits are undermined by the damage caused to the financial system, rendering the amendment's purpose counterproductive.

This does not necessitate a repeal of the newly implemented amendment, nor does it support a return to the prior legal framework, under which an OPC was mandated to convert into a public or private company if its paid-up capital exceeded Fifty lakh rupees or its

[70] Bloomberg, 'Crackdown on Indian Shell Companies Unearths $1 Billion Cash' *The Economic Times* (New Delhi, 24 October 2017) <https://economictimes.indiatimes.com/markets/stocks/news/crackdown-on-india-shell-companies-unearths-1-billion-cash/articleshow/61198230.cms> accessed 13 July 2025.

[71] Jarvis, Christopher (March 2000), *The Rise and Fall of Albania's Pyramid Schemes*, Vol. 37 (Finance & Development: A Quarterly Magazine of the IMF 2000).

turnover surpassed Two crore rupees.[72] While this earlier position was introduced to ensure that larger business entities were subjected to stricter regulatory scrutiny, it brought with it a range of practical and economic challenges that disproportionately affected small and emerging entrepreneurs:

> *Firstly*, the previous fiscal threshold was too low and failed to account for the financial realities of starting and growing a business in India. Entrepreneurs making capital-intensive investments such as purchasing land, acquiring machinery or developing infrastructure often required a higher capital base. Imposing a conversion requirement at such an early stage not only disrupted their growth trajectory but also made the OPC structure impractical for any enterprise with medium-term scaling ambitions.[73]
>
> *Secondly*, once these financial thresholds were crossed, the mandatory conversion triggered considerable financial costs,[74] including fees payable to the Registrar of Companies[75] and substantial legal expenses for amending the Articles of

[72] Companies (Incorporation) Rules 2014, r 6(2) prior to amendment by Companies (Incorporation) Second Amendment Rules, 2021.
[73] Ishita Chelawat, *One Person Company — A Critical Analysis*, Prof. Ranbir Singh Legal Research Center, India (2015).
[74] IndiaFilings, 'Conversion of One Person Company to Private Limited Company' (18 October 2023) https://www.indiafilings.com/learn/conversion-one-person-company/ accessed 13 July 2025.
[75] Companies (Registration of Offices and Fees) Rules, 2014, r 12.

Association and Memorandum of Association.[76] These added financial burdens strained businesses unnecessarily.

Lastly, the earlier regime fundamentally conflicted with the principles of ease of doing business and entrepreneurial autonomy.[77] Regulatory frameworks should enable and encourage innovation, not restrict it through premature and rigid thresholds.[78] By placing artificial caps on growth, the previous law constrained the very spirit of entrepreneurship it aimed to support.

As a result, reinstating the earlier legal stance would be counterproductive and ill-suited to the current economic environment.

V. WAY FORWARD: ADDRESSING THE ROOT ISSUE WITH A MODIFIED HYBRID MODEL OF FOREIGN JURISPRUDENCE

The root issue with the removal of the mandatory conversion requirement lies in how the legislation continues to treat OPCs as small companies. Various sections and provisos that grant exemptions often

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[76] The Companies Act, 2013 (18 of 2013) s 18.

[77] Jeffery S McMullen, D Ray Bagby and Leslie E Palich, 'Economic Freedom and the Motivation to Engage in Entrepreneurial Action' (2008) 32 *Entrepreneurship Theory and Practice* 875 <https://doi.org/10.1111/j.1540-6520.2008.00260.x> accessed 13 July 2025.

[78] J.C. Heckelman, 'Economic Freedom and Economic Growth: A Short-Run Causal Investigation' (2000) 3 Journal of Applied Economics 71.

phrase it as "*…with respect to One Person Company, Small company…*"[79] or similar, indicating that OPCs are being regulated under the assumption that they operate within fiscal limits traditionally applied to small enterprises. However, with the recent amendment removing mandatory conversion, OPCs are no longer economically restricted and can still benefit from the lenient regulatory framework designed for small-scale entities.

This creates an inequitable situation where a company operating at a much larger financial scale is enjoying regulatory exemptions intended for truly small enterprises. It's akin to an individual taking advantage of caste-based reservations when they no longer need them, similar to the issue addressed by the 'Creamy Layer' rule,[80] which prevents unfair beneficiaries from exploiting affirmative action policies. In the same way, an OPC, once it exceeds certain economic thresholds, should not be permitted to continue enjoying the leniency designed for genuinely small businesses.

A potential solution to address the regulatory gaps in India's OPC framework could be derived from a hybrid approach based on the legal frameworks of Bangladesh and Germany for OPCs. The Bangladeshi law imposes a fiscal cap, but with much higher limits. It mandates a conversion if the paid-up share capital exceeds Ten crore rupees or if

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[79] The Companies Act, 2013 (18 of 2013) s 2(40).
[80] *Indra Sawhney v Union of India* AIR 1993 SC 477.

the turnover surpasses Hundred crore rupees.[81] This allows smaller companies to grow without being immediately burdened by excessive regulations while ensuring that larger companies are regulated appropriately. In addition, the German framework imposes a mandate where the capital borrowed from creditors must not exceed the paid-up capital of the company.[82] This ensures that companies do not engage in excessive borrowing beyond their actual capital base, reducing the risk to creditors and ensuring financial discipline.

Taking these frameworks into account, an ideal solution to address the regulatory gap in India's OPC framework would be to legislate an amendment that introduces both a fiscal cap and a borrowing cap. In this respect, given the difference in the economic conditions between both the countries, the fiscal limits for mandatory conversion in India should be determined after a thorough analysis of what entrepreneurs are willing and capable of maintaining. Simply adopting the Bangladeshi limits may not be feasible, as those caps are set according to Bangladesh's specific economic needs. Moreover, in modifying the German framework, OPCs in India should not be allowed to borrow beyond their paid-up capital unless the shareholder's assets are also used as collateral. This would increase accountability and reduce the

[81] Avtar Singh, *Company Law* (16th edn, Eastern Book Company 2015).
[82] Salah Mohammed N Almasabi, Hasani Mohd Ali and Hazlina Shaik Md Noor Alam, 'One Person Company in Asia and Europe: A Comparative Study' (2023) 14 *UUM Journal of Legal Studies* 607 <https://doi.org/10.32890/uumjls2023.14.2> accessed 13 July 2025.

risk of financial misconduct, ensuring creditors are protected while maintaining transparency.

To operationalise this hybrid framework, fiscal thresholds must move beyond arbitrary limits and adopt a dynamic benchmark aligned with the Micro, Small and Medium Enterprises Development (MSMED) Act, 2006. The mandatory conversion threshold should correspond to the definition of a 'small enterprise'—currently capped at a turnover of ₹50 crore (prior amendment)[83]—as this marks the point at which a firm's scale and complexity exceed the managerial capacity of a single individual.[84] Additionally, introducing a borrowing cap is particularly suited to the Indian context to address the persistent risk of thin capitalisation, where entities are excessively debt-financed, shifting insolvency risk onto creditors.[85] Limiting an OPC's borrowing to its paid-up capital, unless supported by personal collateral, would embed the principle of 'skin in the game' and curb the common practice of promoters insulating personal wealth while leveraging corporate entities into failure.[86] This approach finds doctrinal support in Section

[83]Micro, Small and Medium Enterprises Development (MSMED) Act, 2006 (27 of 2006) s 7.

[84]Reserve Bank of India, *Report of the Expert Committee on Micro, Small and Medium Enterprises*, (Reserve Bank of India 2019) 32-35.

[85]OECD, "Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 - 2015 Final Report" (OECD Publishing, Paris 2015) https://www.oecd.org/content/dam/oecd/en/publications/reports/2015/10/limiting-base-erosion-involving-interest-deductions-and-other-financial-payments-action-4-2015-final-report_g1g58ce3/9789264241176-en.pdf .

[86]Rajan R and Zingales L, "Riskless Capitalism" (International Monetary Fund, 2023) journal-article

94B of the Income Tax Act, 1961,[87] which already recognises the dangers of excessive debt-loading, thereby reinforcing the need for a similar preventive mechanism within company law.[88]

Therefore, this two-phased limitation; combining a flexible fiscal cap with responsible borrowing regulations, would strike a balance between relaxed regulations for small businesses and necessary oversight once companies grow beyond a certain threshold. This hybrid approach minimizes the economic damage caused by unregulated growth and enhances transparency for regulatory authorities.

VI. CONCLUSION

In conclusion, the evolving regulatory landscape for OPCs reflects a tension between fostering entrepreneurial freedom and ensuring adequate oversight to prevent corporate misconduct. The removal of the mandatory conversion requirement has provided greater flexibility for OPCs, enabling them to grow without the constraints of financial caps. However, this regulatory disparity has led to three key specific compromises—reduced financial disclosure, lack of internal accountability, and unchecked conversions from dormant companies to

https://www.elibrary.imf.org/downloadpdf/journals/022/0060/002/article-A020-en.pdf .

[87] Income Tax Act 1961, s 94B.

[88] Sbs, 'Thin Capitalization - Restriction of Interest under Section 94B - Next Litigation Saga' (*SBS and Company*, 7 July 2025) https://sbsandco.com/thin-capitalization-restriction-of-interest-under-section-94b-next-litigation-saga/ accessed 1 January 2026.

OPCs, each of which increases the risk of misuse, particularly in the form of shell companies. The consequences of these grave regulatory lapses, as illustrated by the Rotomac and Malvika Steels cases, pose serious threats to financial integrity, transparency, and creditor protection.

While reinstating the previous legal stance might appear to mitigate some of these risks, it would conversely impose undue burdens on small entrepreneurs and limit their ability to scale their businesses. Instead, the path forward lies in adopting a more nuanced hybrid model that integrates the flexibility of the current framework with selective regulatory thresholds.

Drawing lessons from Bangladesh and Germany, India should implement a revised fiscal cap suited to its economic environment, combined with a borrowing cap based on the shareholder's paid-up capital or personal collateral, providing a more balanced solution. This dual-layered framework would allow OPCs to grow while maintaining necessary oversight, ensuring that larger OPCs transition into more regulated corporate structures once they exceed certain thresholds.

Ultimately, the solution lies in striking a careful balance between encouraging entrepreneurial growth and maintaining the integrity of the corporate ecosystem, ensuring transparency and accountability at every stage of a company's evolution.

THE DECISION IN KHODAY DISTILLERIES AND THE CURIOUS CASE OF SLP DISMISSALS

Nityesh Dadhich[*] and Ritesh Patnaik[**]

ABSTRACT

This paper begins by quantitatively characterising the burgeoning docket of the Supreme Court, the disproportionate contribution therein by SLPs, and espouses the view that this problem is a consequence of its conscious choices. It traces the expanding scope of Article 136 of the Constitution since independence and its philosophical underpinnings across decades to understand the present crisis. In doing so, the paper reflects upon the failure of the Supreme Court to frame appropriate guidelines to check the rising docket. It also reflects upon the two divergent strings of jurisprudence vis-à-vis maintainability of review petitions upon the dismissal of an SLP.

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This paper argues that while J. Sikri's opinion in Khoday Distilleries lays down the procedurally accurate interpretation and resolves the specific conflict of maintainability of review petitions, it missed an opportunity to address the concern regarding indiscriminate filing of SLPs, lay appropriate guidelines vis-à-vis discretion under Article 136 or even balance procedural rights with judicial efficiency. The paper emphasizes on the need for the procedure established in Khoday Distilleries to be coupled with additional caveats. In pursuit of evaluating such caveats, this paper delves into some of the reforms suggested so far. Specifically, this paper argues that the proposed Court of Appeals would only exacerbate the existing docket crisis whereas regulating the discretion under Article 136 improves judicial efficiency and thereby better protects equity for the larger society and the SC's effort at being a People's Court.

Keywords: *SLPs, Review, Merger, Maintainability, Docket*

I. INTRODUCTION

Till January 1, 2024, an astonishing 80,221 cases were pending adjudication before the Hon'ble Supreme Court of India **(SC** or **Supreme Court)**.[1] This figure speaks volumes about the brewing crisis before the Indian judiciary. However, the numbers missing in these reports expose an even more telling picture. Special Leave Petitions **(SLPs)** comprised 84.6% of the cases instituted before the SC.[2] Yet, the Supreme Court Annual Report(s) do not list the statistical data for SLPs separately.[3] This is also reflective of its efforts towards handling the greatest contributor to its docket.

The framers of the Constitution envisaged the Supreme Court to perform three important functions: *first,* a constitutional court interpreting the Constitution; *second,* an appellate court with the power to choose appeals from any order in any court; and *third,* a final court

[1] Gauri Kashyap, '80,221 cases pending in Supreme Court in January 2024', (Supreme Court Observer, February 3, 2024) https://www.scobserver.in/journal/80221-cases-pending-in-the-supreme-court-in-january-2024/ accessed 18 August 2025.

[2] Nick Robinson, 'A Quantitative Analysis of the Supreme Court's Workload', Journal of Empirical Studies 10 (2013) 570, 584; Alok Prasanna Kumar et al. 'Towards an Efficient and Effective Supreme Court: Addressing Issues of Backlog and Regional Disparities in Access' (Vidhi Centre for Legal Policy, February 2016) 17-18 https://vidhilegalpolicy.in/wp-content/uploads/2019/05/TowardsanEffectiveandEfficientSupremeCourt.pdf accessed 15 August 2025.

[3] Supreme Court of India, Indian Judiciary: Annual Report 2020-21, 84-85, https://main.sci.gov.in/pdf/AnnualReports/12012022_114003.pdf accessed on 2 August 2025.

with the power to do "complete justice".[4] As we argue later in the paper, the Court's inability to regulate its second role has impaired its ability to do justice to the other two functions. The article focuses on maintainability of review petitions after dismissal of SLPs and the interpretation of the doctrine of merger as differently interpreted by the Supreme Court, leading to varied interpretations causing various consequences impacting the ability of the court to perform its functions. The Article gives a broad overview of SLPs, its growth and its interrelation with public interest litigations. Post this, the article delves deep into the varied approaches adopted by the courts on maintainability of review petitions, which leads to a discussion on *Khoday Distilleries case,* where an attempt was made to put this discussion to an end. Yet the attempt leaves various questions unanswered, creating a need to reform the *status quo*.

The article begins with a quantitative examination of the Supreme Court's expanding docket and disproportionate contribution of SLPs in this caseload. This is supported by a historical and philosophical analysis of evolution Article 136 of the Constitution and a review of it along with the current judicial crisis. Article 136 of the Indian Constitution has been described to confer an "untrammeled reservoir of power incapable of being confined by definitional bounds"[5] and

[4] Raeesa Vakil, 'Jurisdiction' in Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta (eds.), The Oxford Handbook of Constitution (OUP 2016) 367-368.
[5] *Kunhayammed v State of Kerala* (2000) 6 SCC 359 ¶ 14.

inept of being limited by lower courts or statute.[6] The introduction traces the original intent of the drafters of the Constitution and analyses the trend of SLPs across decades. In doing so, it advocates the interlinkage between the rise of SLPs and the growth of Public Interest Litigation **(PILs)**. After which, the introduction also highlights the persistent reluctance of the Supreme Court to frame guidelines vis-à-vis SLP jurisdiction.

II. ARTICLE 136: THE CONSTITUENT ASSEMBLY AND EARLY YEARS OF INDEPENDENCE

The framers of the Constitution were influenced by the comparative constitutionalism in the United Kingdom, the United States and Canada while framing the roles of the different organs of the Government.[7] The Sapru Committee (1945) envisaged the highest court of the land to pose as a guardian of the Constitution.[8] Shri H.V. Pataskar equated the Supreme Court akin to a King, describing it as a fountainhead of justice among individuals on all matters.[9] Consequently, Article 136 (Article

[6] *Raj Krushna Bose v Binod* Kanungo AIR 1954 SC 202*; Zahira Habibullah Sheikh v State of Gujarat* (2004) 5 SCC 221; *Columbia Sportswear Co v DIT* (2012) 11 SCC 224.

[7] B. Muthu Kumar, The Need for Special Treatment in Special Leave Petitions in Salman Khurshid, Lokendra Malik & Yogesh Pratap Singh (eds.) The Supreme Court and the Constitution: An Indian Discourse (2020) 323 – 324.

[8] ibid.

[9] Constituent Assembly Debates, Vol. 8 (Lok Sabha Secretariat 1986) 639 (HV Pataskar).

112 of the Draft Constitution) granted wide discretion with the responsibility to regulate its own procedure.

However, the unfettered discretion granted under Article 136 was based upon one foundational assumption: that the Supreme Court would regulate itself.[10] Article 136 provides that "*the Supreme Court may, in its discretion, grant special leave to appeal…"*. Moreover, article 136 (Article 112 in the draft constitution) was considered as a last resort,[11] as said by Mr. Naziruddin Ahmed in the Constitutional Assembly debate "*The question of possible congestion of work in the Supreme Court has included many honourable Members to oppose the provisions of these amendments…The fear of creating a serious congestion in that court and also the fear that we will have to employ more judges to deal with those cases is behind this opposition. I submit, however, that this fear is unjustified. So far as the question of law is concerned, it is only a 'substantive question of law' which will enable a party to successfully obtain a certificate of special leave."*[12] This can be evidenced *first,* from the repeated disclaimer of restraint while granting leaves sparingly and *second,* to evolve principles that guide discretion under Article 136.[13] Thereby, the warning bells of using such

[10] *Raeesa Vakil* (n 4) 371.

[11] Special Leave Petitions and the Constituent Assembly Debates (Centre for Law & Policy Research, 9 May 2016) <https://clpr.org.in/blog/special-leave-petitions-and-the-constituent-assembly-debates/> accessed on 14 August 2025.

[12] Constitutional Assembly Debate dated June 14, 1949.

[13] Constituent Assembly Debates, Vol. 8 (Lok Sabha Secretariat 1986) **(CAD Debate)** 856, 14 June 1949 (BR Ambedkar); CAD Debate 639, 6 June 1949 (Alladi Krishnaswamy Ayyar).

discretion only in cases of "serious breach" and "exceptional" cases were rung by Dr. Ambedkar as early as in 1949.[14] In May 1950, the Supreme Court itself acknowledged this through a five-judge bench in *Pritam Singh v. The State,*[15] that "*on a careful examination of Article 136 along with the preceding Articles, it seems clear that the wide discretionary power with which the Court is invested under it, is to be exercised only in exceptional cases, where a substantial question of law is involved, or where the case is of such a nature that interference by this Court is necessary to remedy grave injustice.*"

III. THE GROWTH OF PILS AND RISE IN SLP FILINGS

Since independence, the Court has consistently reiterated the standard of special circumstances to be exercised sparingly.[16] The initial three decades post-independence saw this standard being somewhat maintained.[17] However, this standard was relaxed in 1979 as the emphasis of the Court shifted towards rendering "meaningful and socially relevant" justice to uphold rule of law.[18] In doing so, it

[14] CAD Debate (Lok Sabha Secretariat 1986) 640 (BR Ambedkar).
[15] *Pritam Singh v The State* AIR 1950 SC 169 ¶ 11.
[16] *Pritam Singh v The State* AIR 1950 SC 169; *Subedar v State of UP* (1970) 2 SCC 445.
[17] Rajeev Dhavan, *The Supreme Court Under Strain: The Challenge of Arrears* (Indian Law Institute, 1978).
[18] *State of Kerala v Kumari T.P. Roshana* AIR 1979 SC 765 ¶ 40.

assumed an error-correction role and undertook the duty beyond the mandate conferred by Article 136.[19]

It has been argued elsewhere that the expanding liberal standard adopted under SLPs coincided with the rise of the Public Interest Litigation (PIL) movement in India and employed strikingly similar language under Article 32 and Article 136 in its new avatar.[20] The consequences of this interpretation have been best substantiated through numbers.[21] The number of SLPs instituted since 1975 witnessed a meteoric rise (*see below:* ***Graph 1)*** since the advent of the PIL jurisprudence and has remained unchecked since then.[22] Jahnavi Sindhu and Vikram Aditya Narayan through their research argue that "*it is quite plausible that as the Court abandoned narrow interpretations of fundamental rights to do justice through PIL jurisprudence, it recognized a need to similarly abandon its narrow interpretation of Art. 136 so as to do justice to parties aggrieved by all*

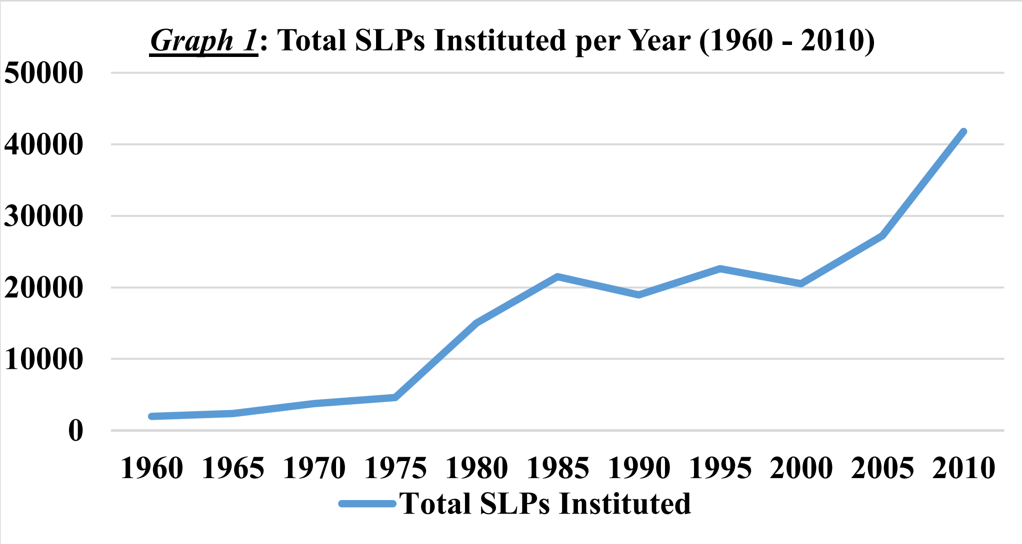
[19] *Indira Kaur v Sheo Lal Kapoor* (1988) 2 SCC 488 ¶ 7; *Jamshed Hormusji Wadia v Board of Trustees, Port of Mumbai* (2004) 3 SCC 214.

[20] Jahnavi Sindhu & Vikram Aditya Narayan, 'Institution Matters' Law and Politics in Africa, Asia and Latin America, 2018, Vol. 51(3), Special Issue, "The Indian Supreme Court in Crisis?" (2018) 290-331.

[21] Rajeev Dhavan, *The Supreme Court Under Strain: The Challenge of Arrears* (Indian Law Institute, 1978); *Nick Robinson* (n 2) and Alok Prasanna Kumar, et al. 'Towards an Efficient and Effective Supreme Court: Addressing Issues of Backlog and Regional Disparities in Access' Vidhi Centre for Legal Policy (February 2016).

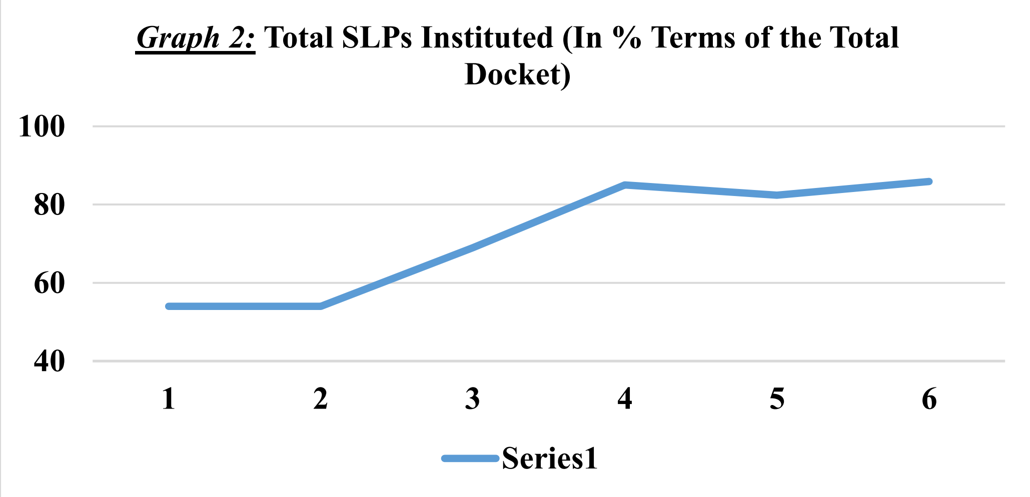
[22] Jahnavi Sindhu & Vikram Aditya Narayan, 'Institution Matters: A critical analysis of the role of the Supreme Court of India and the Responsibilities of the Chief Justice', Law and Politics in Africa, Asia and Latin America, 2018, Vol. 51, No. 3, Special Issue, 'The Indian Supreme Court in Crisis?' (2018) pp. 290-331, p. 301, available at < https://www.jstor.org/stable/10.2307/26630770>.

sorts of errors made by lower courts…. The total number of SLPs filed in 1985 is 368% more than the total number of SLPs filed in 1975.”[23]



[23] ibid p 302.

This is not just a function of the total cases filed before the SC, and can be witnessed by the data in percentage terms (***see below: Graph 2 and* Annexure I**).



From 1960 to 1975, the SLPs were kept in check and hovered around 54% in 1970 and increased to 69% in 1980. However, it saw an astounding increase to 85% in 1990. Barring two years, the percentage has remained over 80% since then.[24] The Supreme Court in *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai*[25] held that "*…in spite of the repeated pronouncements made by this Court declaring the law on Article 136 and repeatedly stating that this Court was a Court meant for dealing only with substantial questions of law….and that this Court was not meant for redeeming injustice in individual cases, the experience shows that such self-imposed restrictions placed as fetters*

[24] *Nick Robinson* (n 2).

[25] *Jamshed Hormusji Wadia v Board of Trustees, Port of Mumbai* AIR 2004 SC 1815.

on its own discretionary power under Article 136 have not hindered the Court from leaping into resolution of individual controversies once it has been brought to its notice that the case has failed to deliver substantial justice or has perpetuated grave injustice to parties or is one which shocks the conscience of the Court or suffers on account of disregard to the form of legal process or with violation of the principles of natural justice….The practice and experience apart, the framers of the Constitution did design the jurisdiction of this Court to remain an extraordinary jurisdiction whether at the stage of granting leave or at the stage of deciding the appeal itself after the grant of leave. This Court has never done and would never do injustice nor allow injustice being perpetuated just for the sake of upholding technicalities." This indicates the shift in jurisdiction interpretation by the Supreme Court, as what was earlier to be reserved for "special circumstances", was now being invoked more frequently.[26]

IV. THE RECENT DECADE: A MISSED OPPORTUNITY

In 2010, a Division Bench of the Supreme Court in *Mathai v. George* finally recognized the widening departure from the initial conception of Article 136 and its practice and referred the interpretation of Article 136 to a Constitutional Bench.[27] However, in 2016, the Constitutional Bench, consistent with its past approach, employed vague terminology

[26] *Jahnavi Sindhu & Vikram Aditya Narayan* (n 22).
[27] *Mathai v George* (2010) 4 SCC 358 ¶ 3, 26-29.

such as *"use the said power with circumspection"* and refused to frame any guidelines or restrict powers conferred under Article 136.[28] This fosters inconsistent standards across benches, and therefore contributes significantly to the massive backlog of SLPs. The argument that the Court should issue self-binding procedural rules, such as through the approach that formulated the Curative Petition in *Rupa Ashok Hurra v. Ashok Hurra,*[29] under Article 142 to do "complete justice", remains compelling. The success of Curative Petitions, which introduced specific and mandatory checks (such as certification by a Senior Counsel) shows that effective, judicially-crafted regulation can prevent any unintended abuse of extraordinary jurisdiction. While the Supreme Court's uneasiness to restrict discretion under Article 136 is understandable, the lack of any guidelines whatsoever exacerbates the problem of judicial backlog. Presently, the admission rate of SLPs is higher, subsequently resulting in higher litigation costs on parties and the system.[30]

V. EVALUATING REVIEW-JURISDICTION JURISPRUDENCE POST SLP DISMISSAL

[28] *Mathai v George* (2016) 7 SCC 700 ¶ 6.
[29] *Rupa Ashok Hurra v Ashok Hurra* AIR 2002 SC 177.
[30] Tarunabh Khaitan, 'The Indian Supreme Court's identity crisis: a constitutional court or a court of appeals' Indian Law Review (2020) ¶ 7-8.

Khoday Distilleries Ltd. v. Shri Mahadeshwara Sahkara Karkhane Ltd.[31] ***(Khoday Distilleries)*** turned out to be a watershed moment in determining the maintainability of review petitions vis-à-vis interpretation of Article 136 of the Indian Constitution as it resolved the procedural chaos sparked by two parallel strands of jurisprudence. We classify these two approaches, standing in stark contrast as, *first*, the decisions sanctifying "judicial discipline", and *second,* the decisions "balancing substantive merits and judicial propriety". While resolving these differences, the three-judge Bench in *Khoday Distilleries* affirmed the hair-splitting analysis undertaken in *Kunhayammed v. State of Kerala* ***(Kunhayammed)***[32]. We argue that while the approach in *Khoday Distilleries* accurately resolved the procedural question before it, the indiscriminate filings of SLPs and its ripple effect on the Supreme Court's larger role have not been adequately dealt with.

A. The "Judicial Discipline" Jurisprudence

The first line of reasoning is founded upon eulogizing the notion of "judicial discipline" and an expanded notion of the doctrine of merger and the principle of *res judicata.* This reasoning seeks to restrict the scope of review following the dismissal of an SLP, viewing any subsequent attempt to invoke review jurisdiction as "vexatious

[31] *Khoday Distilleries Ltd. v Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd* (2019) 4 SCC 376.
[32] *Kunhayammed v State of Kerala* (2000) 6 SCC 359.

litigation" or an abuse of the process of the court.[33] The leading authority for this interpretation is the three-judge bench decision of the Supreme Court in *Abbai Maligai v. K. Santhakumaran* (***Abbai Maligai***), wherein the Court held that the exercise of review jurisdiction after the dismissal of an SLP was "not proper" and "subversive of judicial discipline."[34]

The extent of judicial discipline is exemplified at its peak wherein dismissals of SLP *in limine* also operated as final order and acted as *res judicata* between parties before all courts in India, notwithstanding any pending adjudication.[35] In a latter case, the Supreme Court held that doctrine of merger is applicable if any reasons, howsoever meagre, are provided with a very limited exception where an SLP is dismissed without giving any reasons whatsoever.[36] Thus, the doctrine of merger would apply even if the dismissal is merely by writing "we find no merits". This strand of view has been subsequently criticized for its failure to realize that SLP admission is a "*discretionary*" power exercised by the Supreme Court and not an "*adjudicatory*" function wherein the court sits in an appellate role.[37]

B. "Not All Dismissals" Shift in Approach

[33] *Abbai Maligai v K. Santhakumaran* (1998) 7 SCC 386 ¶ 4; *State of Maharashtra v Shri Prabhakar Bhikaji Ingle* 1996 INSC 357 ¶ 3.
[34] ibid.
[35] *Sree Narayana Dharma-Sangam v Swami Prakasananda* (1997) 6 SCC 78.
[36] *Gangadhara Palo v Revenue Division Officer* (2011) 4 SCC 602 ¶ 6.
[37] *Abbai Maligai* (n 33) ¶ 23.

The extreme approach of complete bar expounded in *Abbai Maligai* was partly lifted by the other strand of jurisprudence. In *Meghmala v. G. Narsimha Reddy* ***(Meghmala)****,* the court permitted adjudication of review petitions filed prior to the dismissal of SLPs, but petitions filed after the dismissal of SLPs were not maintainable.[38] While this approach recognizes the discretionary role under SLPs, it incentivizes the filing of a review petition out of an abundance of caution and thereby contributes to the larger judiciary's docket. This approach found favour in the subsequent detailed analysis undertaken in *Kunhayammed.*

C. Kunhayammed and J. Sikri in Khoday Distilleries

J. Lahoti in *Kunhayammed* (speaking for the three-judge bench of the Supreme Court) painstakingly detailed the process adopted in Article 136 and divided it into a two-step process: *first,* admissibility of SLP wherein the Court is exercising its discretionary power and *second,* the hearing stage wherein the Court is exercising its appellate jurisdiction.[39] The analysis undertaken in *Kunhayammed* found unequivocal acceptance in J. Sikri's opinion in *Khoday Distilleries.* They clarify that when an SLP is dismissed, whether through a speaking or a non-speaking order, would not attract doctrine of merger.[40] It would merely mean that the case did not merit intervention on grounds of "exceptional" or "special circumstances". This was in

[38] *Meghmala v G. Narsimha Reddy* (2010) 8 SCC 383 ¶ 25.
[39] *Abbai Maligai* (n 33) ¶ 14.
[40] *Kunhayammed* (n 32) ¶ 26.2.

sharp contrast to the earlier approach to limit such exceptions to *in limine* orders.

On the other hand, once an SLP is admitted, it results in merger and the Supreme Court assumes an appellate role. Consequently, the review jurisdiction of the High Court is lost. Unlike the first approach,[41] this procedure satisfactorily enforced the effect of speaking orders given during dismissal of petition by holding that such reasons would only be the 'declaration of law by the Supreme Court' under Article 141.[42] Thereby, *Khoday Distilleries* resolved the conflict between *Kunhayammed* and *Abbai Maligai* and solidified the applicability of the doctrine of merger. Furthermore, on the question of whether review petitions are only maintainable if they are filed prior to the dismissal of the SLP, *Khoday Distilleries* supported the view in *Kunhayammed* that review can be filed even after dismissal of SLP in light of Order 47 Rule 1 of CPC.[43] Hence, the timing of when such review is filed is immaterial for evaluating the doctrine of merger.

D. Khoday Distilleries: Correct but Ineffective?

While *Khoday Distilleries* lays down the procedurally correct interpretation of the law, it has three major shortcomings: *first,* it fails to address the indiscriminate filings of SLPs that have plagued the judicial docket; *second,* its failure on the first front compromises its performance in its constitutional role, arguably its most important role

[41] *Gangadhara Palo v Revenue Division Officer* (2011) 4 SCC 602.
[42] The Constitution of India, art 14; *Kunhayammed* (n 32) ¶ 26.2.
[43] *Abbai Maligai* (n 33) ¶ 37.

and *third,* the inconsistency post-Khoday *Distilleries* goes against the very value the jurisprudence at its earliest intended to cherish i.e. judicial discipline.

b) <u>Burgeoning Docket of SLPs</u>

Khoday Distilleries presented the most opportune moment to regulate the indiscriminate filings of SLPs since 2016.[44] While it may be argued that the specific question of law referred was with regard to maintainability of review petitions, the interpretation of a narrow doctrine of merger effectively contributes towards such docket. In an empirical study, it was observed that the average time from filing of an SLP to a decision on admission is 71 days (***table given in*** **Annexure-II)**.[45] Therefore, it would not have been unrelated to deal with the indiscriminate filings of SLPs. This is especially given that a similar flexibility in the 1980s led to a rising spurt of SLPs that remain unchecked today.[46] It may also be argued that the subsequent inconsistency (as later argued) may also be owing to this concern.

c) <u>Dereliction of Constitutional duty due to Appellate Docket</u>

Due to the overwhelming SLP docket, the Supreme Court is time-starved and impaired of its ability to perform its constitutional

[44] *Mathai* (n 28).
[45] *Tarunabh Khaitan* (n 30).
[46] *Jahnavi Sindhu & Vikram Aditya Narayan* (n 17).

functions.[47] It does not just come at the cost of its constitutional function but in violation of its mandate under Article 145(3).[48] To substantiate this impairment through an instance, Tarunabh Khaitan depicts the Supreme Court's handling of its constitutional role in *Naz Foundation* as an example of its abdication.[49] The exploding SLP docket perpetuates a vicious cycle resulting in poor quality of reasoning, oral arguments not being recorded, poor quality of prayers and violation of *stare decisis.*[50] Important constitutional matters that go to the very root of our democracy await adjudication due to the disproportionate attention to SLP disputes.[51]

d) <u>Post Khoday Distilleries Inconsistency vis-à-vis Doctrine of Merger</u>

The third shortcoming is not much of its own doing as much as it is inability of the court to adhere to the doctrine of *stare decisis*.[52] This is

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[47] Rishad Ahmed Chowdhury, 'Missing the Wood for the Trees: The Unseen Crisis in the Supreme Court' (2012) 5 NUJS L Rev 351, 360.
[48] The Constitution of India, art 145(3); *Rishad Ahmed Chowdhury* (n 39) 351, 374.
[49] *Tarunabh Khaitan* (n 30) 7-8.
[50] Chintan Chandrachud, 'Constitutional Interpretation' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), The Oxford Handbook of the Indian Constitution (OUP 2016).
[51] Apoorva 'Substantial questions of law in cold storage? 35 Constitutional Bench matters pending before Supreme Court' (Vidhi Centre for Legal Policy, 1 February 2022) <https://vidhilegalpolicy.in/blog/substantial-questions-of-law-in-cold-storage-35-constitution-bench-matters-pending-before-supreme-court/> accessed on 12 August 2025.
[52] Upendra Baxi, 'The Travails of Stare Decisis in India' in A R Blackshield (ed), Legal Change: Essays in Honour of Julius Stone (Butterworths 1983) 38; Shrutanjaya Bharadwaj & Ayush Baheti, 'Precedent, stare decisis and the Larger Bench Rule:

symptomatic of the larger problem plaguing the adjudication of SLPs by a "polyvocal court".[53] Despite the detailed analysis in *Khoday Distilleries*, another three-judge bench in *T.K. David v. Kuruppampady Service Cooperative Bank Ltd.* ***(T.K. David)*** read the doctrine of merger differently.[54] In *T.K. David*, SLP was dismissed after which the petitioner filed a review petition before the High Court, which was also dismissed through a speaking order and on merits. The petitioners challenged the order dismissing the review petition and filed an SLP. Interestingly, the Court held that the challenge to the review petition must fail because the main judgment became final due to the earlier dismissal of SLP.[55] This stands in contrast with *Khoday decision* which held that dismissal of SLP at its discretionary stage does not result in merger and review petition can be filed even after such dismissal. But *T.K David* held that the SLP has to be mandatorily rejected because the "main judgment of the High Court cannot be affected in in any manner", and the Court does not "entertain a special leave petition in which no relief can be granted".[56]

Judicial Indiscipline at the Indian Supreme Court' Indian Law Review Vol. 6(1), 58-83.

[53] Andrew Green and Albert H Yoon, 'Triaging the Law: Developing the Common Law on the Supreme Court of India' (2017) 14 Journal of Empirical Legal Studies 683, 700.

[54] *T.K David v Kuruppampady Service Cooperative Bank* (2020) 9 SCC 92.

[55] *Rajeev Dhavan* (n 17).

[56] *Pritam Singh* (n 15).

This position was reiterated in *Sudarshan Budek v. State of Odisha*[57] wherein the court held that the appellant can only challenge the main judgment and not the order dismissing the review petition. While this inconsistency is pronounced, it is not surprising as the consequences of repeated rounds of litigation owing to the narrow interpretation of merger was warned earlier.[58] This approach blurs the distinction between the discretionary and appellate function of the Supreme Court yet again and the general inconsistency creates ambiguity in the process dealing with the largest contributor to the Supreme Court's docket. Ironically, this jurisprudence was initiated with ethos of *judicial discipline* and preventing *abuse of process.*

The law established by *Khoday Distilleries* case is much affirmed by the subsequent decisions. The High Court of Delhi in *National Highways Authority of India v. Gurugayoor Infrastructure Pvt. Ltd.*[59], on October 16, 2024, reiterated the applicability of *Khoday Distilleries case,* without even giving any obiter on revamping the existing framework. The Delhi High Court had to determine if SLP has been dismissed by the Hon'ble Supreme Court against an earlier interim order, whether the subsequent application for modification can be sustained? The Delhi High Court held that "*if an order of dismissal of*

[57] SLP (Civil) Diary No(s). 43363/2019 arising out of the impugned final judgment and order dated 11-09-2019 in RP No. 204/2019 passed by the High Court of Odisha at Cuttack, available here: <https://www.livelaw.in/pdf_upload/sudarshan-budek-vs-state-of-odisha-ll-2021-sc-151-390339.pdf> accessed on 2 August 2025.
[58] *B. Muthu Kumar* (n 7) 336.
[59] *National Highways Authority of India v Gurugayoor Infrastructure Pvt. Ltd* 2024 SCC OnLine Del 7222.

the SLP is a non-speaking order and no reasoning has been given by the Hon'ble Supreme Court for the same, then the review of the order challenged is permissible."[60] In this case, the SLP filed by the respondent was dismissed *in limine,* therefore the doctrine of merger was not applicable. The non applicability of the doctrine of merger meant that, the Delhi High Court could modify or clarify its earlier interim order, and it decided to determine the issues raised on merits.

VI. PROPOSED REFORMS AND ITS CHALLENGES

The procedure laid down in *Khoday Distilleries* might worsen, if not keep the same, the ever-expanding SLP docket. Thereby, it needs to be combined with urgent reforms. This section deals with the radical changes suggested and the challenges associated with them. This section argues that there is an urgent need to regulate the discretion under Article 136 given its disparate use, while arguing against establishing a Court of Appeals. Furthermore, it also advocates the exploration of a specialised board to filter cases taking a cue from the United States example.

A. Regulating the Discretion under Article 136

The Supreme Court has expressed extraordinary reluctance to restrict its powers or frame any guidelines in exercising its discretion under Article 136 of the Constitution. The only requirement is that "exceptional and special circumstances exist, that substantial and grave

[60] ibid.

injustice has been done".[61] It frequently employs vague phrases such as "grave injustice" and "shook the conscience of the court" as threshold for such discretion. However, as Seervai succinctly puts it, "to coin a phrase is not to indicate a standard".[62] Given the polyvocal nature of the court, such unguided discretion especially leaves itself vulnerable to the emotional subjectivity of individual judges.[63]

Simultaneously, the court has enthusiastically assumed an error-correction role, diluting the standard established for such extraordinary discretion.[64] Even if the adopted standard is to be accepted, it inclines more towards the potential injustice to a party, rather than the normative importance of such cases i.e. error-correction over norm-correction.[65] Further, the concerns raised by the Supreme Court in 2010 fell in deaf years despite the court seemingly adopting a "reasonable prospect of success" standard as opposed to the "exceptional circumstances" required under Article 136.[66] This begets the urgent requirement to guide the discretion under Article 136. Such attempts have been undertaken somewhat successfully in other domains (for instance, *Lalita Kumari* vis-à-vis registration of FIR(s),[67] *Arnesh*

[61] *Pritam Singh v The State* 1950 SCR 453 ¶ 8.
[62] HM Seervai, Constitutional Law of India: A Critical Commentary, Vol. 3 (4th edn, 2002) 2641; cited in Raeesa Vakil, '(n 4) 371.
[63] Justice Ruma Pal and Samaraditya Pal (eds) MP Jain's Indian Constitutional Law, Vol. 1 (6th edn, LexisNexis 2013) 318.
[64] Aparna Chandra, William H J Hubbard and Sital Kalantry, 'The Supreme Court of India: A People's Court?' (2017) 1 Indian Law Review 145, 148-49.
[65] *Tarunabh Khaitan* (n 30) 6.
[66] ibid.
[67] *Lalita Kumari v State of Uttar Pradesh* (2014) 2 SCC 1.

Kumar pertaining to arrests[68]). One of the ways to guide such discretion may be to identify types of cases that are to be excluded from Article 136.[69] This is also required to balance the need of individual rights with judicial efficacy that is interlinked to the larger public interest.

B. The National Court of Appeals

In 2016, the Supreme Court admitted an application seeking the establishment of a National Court of Appeal in different regions of India.[70] However, such an idea remains *firstly,* difficult to achieve and *secondly,* an undesirable objective. It is difficult to achieve as the establishment of such a court of appeal is a legislative function, as opposed to an internal procedure of the Supreme Court.[71] Furthermore, it is an undesirable objective, as Chowdhury argues, as Supreme Court remains one of the few public institutions that enjoys public confidence, and hence, its ingrained characteristic of its unifying nature may be compromised through such a proposal.[72]Moreover, given the

[68] *Arnesh Kumar v State of Bihar* (2014) 8 SCC 373.
[69] *Jahnavi Sindhu & Vikram Aditya Narayan* (n 17) 304.
[70] *V Vasanthakumar v H.C. Bhatia* (2016) 7 SCC 686.
[71] Rishad Ahmed Chowdhury, 'Missing the Wood for the Trees: A Critical Exploration of the Supreme Court of India's Chronic Struggle with its Docket' Dissertation, The Faculty of Law, Chicago, Illinois (June 2016) 168; Harsh Tiwari, 'Beyond Jugaad: A Proposal for a National Court(s) of Appeal, *Law School Policy Review* (16 July 2019), available at https://lawschoolpolicyreview.com/2019/07/16/beyond-jugaad-a-proposal-for-a-national-courts-of-appeal-part-i/ accessed on 2 December 2022.
[72] Ibid 170-71.

Court's established reluctance to part with its powers under Article 136, it would only increase the overall docket of the Indian judiciary.[73]

A variant of this proposal has been to establish regional benches of the Supreme Court itself without changing its characteristic roles.[74] While such a proposal may fulfill other goals (such as access to justice), it would only exacerbate the crisis of lowering the threshold under Article 136 and lead to varying jurisprudence between different benches, a problem identified with the polyvocal functioning of the court. Similarly, the division of powers between a Constitutional Court and a Courts of Appeal would result in similar, if not greater, problems being witnessed in the Supreme Court's error-correction intervention of the High Courts' decisions. This cannot be resolved by establishing a higher threshold of intervention, as has been the experience with the general jurisprudence under Article 136. Hence, the authors argue that a compositional change in the Supreme Court's structure may assist in realizing other objectives, however, exacerbates the SLP docket crisis.

C. *Specialised Benches, Proposed Board of SLPs and Other Proposals*

The idea of specialized benches has found overwhelming support from practitioners as well as the research undertaken in other jurisdictions.[75]

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[73] *Alok Prasanna Kumar et al* (n 2) 23.

[74] Law Commission of India, '*Report No. 229: Need for division of the Supreme Court into a Constitution Bench at Delhi and Cassation Benches in four regions at Delhi, Chennai/Hyderabad, Kolkata and Mumbai*' (2009).

[75] *Alok Prasanna Kumar et al* (n 2) 30-32.

The idea suggests allocating specialized benches for hearing SLPs categorized by subject matters: service matters, criminal matters, land laws, etc.[76] The Round Table Conference by Vidhi Centre for Legal Policy also advocated the engagement of subject-area experts in a structured manner (as *amicus curiae)* to assist in adjudication of disputes in specialized subject areas.

The Conference also suggested that the duration of oral hearings should be reduced.[77] While such a measure would be a step in the right direction, we believe it would be largely ineffective, as the existing time spent on oral hearing is already less and such a step would be difficult to implement, given the overarching influence and impact of Senior Advocates on admission of SLPs.[78] Amongst other suggestions, it has also implored the idea of dispensing oral hearings in certain matters, putting a page limit and formulating a National Litigation Policy (for government bodies).[79] All these changes could have been considered in *Mathai* and *Khoday Distilleries* and in the future, ought to be adopted by the Supreme Court to regulate its docket.

Taking a cue from the United States, greater engagement from young practitioners can benefit the Supreme Court in adjudicating greater number of SLPs. The Supreme Court of the United States **(SCOTUS**)

[76] Aparna Chandra, William H.J. Hubbard, and Sital Kalantry, 'The Supreme Court of India: An Empirical Overview of the Institution' Public Law and Legal Theory Working Papers, No. 660 (2018) 10.
[77] *B. Muthu Kumar* (n 7) 340-42.
[78] *Tarunabh Khaitan* (n 30); *Aparna Chandra et al* (n 54).
[79] *Alok Prasanna Kumar et al* (n 2).

appoints law clerks with the judges, whose opinion is relied upon by the judges. At least four out of nine judges need to agree to permit a review and may dismiss without reasons.[80] A similar model in the Indian context has been proposed wherein a Body would first receive the SLPs filed before the Supreme Court and ensure procedural compliance and render a preliminary opinion to the Court.[81] Such a body is proposed to be established through the Supreme Court Rules and may comprise of retired Supreme Court judges, akin to the power conferred by Article 128 of the Indian Constitution and industry experts.[82] Even if not an exact replication of the model, greater participation of young law students helps in fighting the backlog. While the Supreme Court judges may not be required to rely entirely upon the analysis of such law clerks, their analysis can lower the burden of the judiciary by effectively bringing out the crux of the case, and clarifying the underlying legal questions, so that all the ground-work is concluded. Consequently, the Supreme Court judges can apply their judicial mind to reach a conclusion. In order to ensure success of this mechanism, law clerks can be incentivized by offering competitive incentives.[83]

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[80] *B. Muthu Kumar* (n 7) 342.

[81] Arthad Kurlekar & Jaimini Vyas, 'Special Leave Petitions, an Impediment to Justice: Need for Structural Changes to Ensure Efficient Time Allocation of the Court' (2014) 3 Nirma U LJ 87, 94.

[82] ibid 95.

[83] *Alok Prasanna Kumar et al* (n 2) 24-25.

VII. CONCLUSION

> At the heart of the dispute lies the question: equity for whom, the individual litigant or society at large?[84]

The Supreme Court's disparate eagerness to perform the error-correction role has compromised its performance as a Constitutional Court. The concurrent spurt of SLP filings and the PIL jurisprudence depict a conscious role assumed by the Supreme Court and as data elicits, at the cost of its constitutional duty. The stubborn reluctance of the Supreme Court to frame guidelines in the exercise of its discretion under Article 136 has exacerbated the docket crisis.

While *Khoday Distilleries* resolves the specific conflict of maintainability of review petitions after the dismissal of an SLP by accurately siding with *Kunhayammed*, its narrower conception of doctrine of merger has a few consequences: it increases, if not keeps the same, the judicial docket and thereby, does not assist in the performance of the constitutional role. Moreover, the inconsistency post *Khoday Distilleries* has muddied the waters and brings forth the repeated cycles of litigation warned after the decision. This necessitates such interpretation to be coupled with a strict regulation under Article 136 and establishment of a National Court of Appeals or regional benches is not an appropriate substitute for such guidelines. Furthermore, this can be coupled with greater engagement of young

[84] Rishad Ahmed Chowdhury (n 39) 362; *State of Karnataka v Uma Devi* (2006) 4 SCC 1 ¶ 3.

practitioners, industry experts, specialized benches and regulation of oral and written submissions.

Lastly, as of now, the decision of *Khoday Distilleries case* is applicable as reiterated by the Delhi High Court in *National Highways Authority of India v. Guruvayoor Infrastructure Pvt. Ltd.*[85], that *Khoday Distilleries,* being the later judgment than *Deepak Khosla v. Montreaus Resorts Pvt. Ltd.*[86], and lays down the applicable law on determining the maintainability of any application once an SLP has been dismissed by the Hon'ble Supreme Court. In order to answer the question: equity for whom, the individual litigant or society at large, it must be realized that the attempt of the Supreme Court to perform error-correction role has compromised its performance as a constitutional court. Thus, the path to judicial efficiency and true systematic justice is not through any radical changes, but through regulation in exercise of discretionary powers under Article 136.

As Robert Frost would say,

"*Two roads diverged in a wood, and I—*

I took the one less travelled by,

And that has made all the difference."

This difference can be achieved by taking the road less travelled i.e. by resolving procedural ambiguity, coupled with urgent, systematic

[85] *National Highways Authority of India v Guruvayoor Infrastructure Pvt. Ltd* 2024 SCC OnLine Del 7222.
[86] *Deepak Khosla v Montreaus Resorts Pvt. Ltd.* 2014 SCC OnLine Del 1301.

caveats to regulate the floodgates, along with the procedures laid down in *Khoday Distilleries.* The Supreme Court should maintain statistical reporting of SLPs, and ensure data driven transparency, as this would transfer the vague standard of 'circumspection' into a verifiable metric, providing a standard against which the Supreme Court can determine its efficiency in ensuring justice for all.

Thus, we conclude with the much-needed caveat that "while it is a mistake to deny a deserved SLP, it is a gross and inexcusable mistake to grant an undeserved SLP".[87] Proper screening of SLP applications on pre-determined metric can ensure that judicial resources are preserved for the resolution of such constitutional and normative questions that will truly evolve the shape of our democracy in the years to come. This needs to be adopted as the standard and philosophy to deal with the docket crisis, in light of the existing jurisprudence.

[87] *B. Muthu Kumar* (n 7) 344.

ANNEXURE – I

TOTAL SLPS & PERCENTAGE OF SLPS AS PART OF TOTAL DOCKET

Data for Graph 1: Total SLPs Instituted per Year[88] (1960 – 2010)

YEAR	TOTAL SLPS INSTITUTED
1960	1971
1965	2366
1970	3749
1975	4588
1980	15014
1985	21486
1990	18962
1995	22614
2000	20528
2005	27240
2010	41800

Data for Graph 2: SLPs as Per Cent of Supreme Court Docket[89] (1960 – 2010)

[88] Jahnavi Sindhu & Vikram Aditya Narayan, "Institution Matters: A critical analysis of the role of the Supreme Court of India and the Responsibilities of the Chief Justice", Law and Politics in Africa, Asia and Latin America, 2018, Vol. 51, No. 3, Special Issue, The Indian Supreme Court in Crisis?" 301.
[89] ibid 302.

YEAR	TOTAL SLPS INSTITUTED (IN % TERMS)
1960	54
1970	54
1980	69
1990	85
2000	82.4
2010	85.9

ANNEXURE – II

TIME DURATION FOR SLPS

(Source: Tarunabh Khaitan)[90]

TYPE	SAMPLE SIZE	MINIMUM (IN DAYS)	MEAN (IN DAYS)	MEDIAN (IN DAYS)	MAXIMUM (IN DAYS)
T2 – T1	1088	0	71	334	4227
T3 – T1	186	0	1602	1681	6338

T2 – T1 → Time taken from institution of SLP to decision on admission

[90] *Tarunabh Khaitan* (n 30).

T3 – T1 → Time taken from institution of SLP to final disposal, where such SLPs were admitted

MEANS, METHODS, AND MACHINES: CLASSIFYING TECH-ENABLED TERROR UNDER IHL AND ICL

Harsh Mahaseth[*]

ABSTRACT

Terrorist actors increasingly mobilise artificial intelligence, human enhancement and other advanced technologies, straining weapon-centred legal categories. This paper asks when Artificial Intelligence systems and bio-enhanced capabilities qualify as "weapons, means or methods of warfare" under Additional Protocol I and how Article 36 weapons-review duties apply when the instrument is partly human and partly technological. It evaluates downstream implications for the International Humanitarian Law principles of distinction, proportionality and unnecessary suffering; situates enhancement within the Biological and

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Toxin Weapons Convention and Chemical Weapons Convention; and integrates International Human Rights Law concerns over consent, bodily integrity, privacy and data security, including guidance from UNESCO bioethics norms. Turning to accountability, the paper maps International Criminal Law pathways, individual liability, aiding and abetting (Article 25(3)(c)), command responsibility (Article 28) and negligence-based theories, while addressing autonomy-driven responsibility gaps. It proposes a practical classification approach and a regulatory–criminalisation pathway that recognises certain enhancements and Artificial Intelligence's use as "weapons," extends ex ante reviews and dual-use safeguards, and specifies ex post modes of liability for designers, deployers and commanders. The result is a coherent template for governing technology-enabled terrorism across International Humanitarian Law, International Human Rights Law, and International Criminal Law.

Keywords: *Terrorism, Artificial Intelligence, International Humanitarian Law, International Human Rights Law, International Criminal Law, Liability.*

I. INTRODUCTION

There has been a spike in terrorist activities worldwide and news tabloids are filled with cases of violence spurred by terrorism. Adding to this threat, automated tasks performed using Artificial Intelligence (AI) can potentially increase the scale and impact of these attacks, especially when carrying out cyberattacks. Gone are the days when terrorism was limited to unleashing bullets upon people and buildings. In recent years, most terrorist attacks in Europe have been perpetrated not by using new technology, but by low-technological means, such as large-scale explosions or mass shootings, and involving easily accessible items used as weapons, such as cars, trucks, knives, and guns.[1] With technological advancements, drones can now cause much more destruction than the small drones did in the Syrian battlefield in

[1] David Parker, Julia Pearce, Lasse Lindekilde, and M Brooke Rogers, '*Challenges for Effective Counterterrorism Communication: Practitioner Insights and Policy Implications for Preventing Radicalization, Disrupting Attack Planning, and Mitigating Terrorist Attacks'* (2019) 42(3) *Studies in Conflict & Terrorism* 264, 264-291 https://pure.au.dk/portal/en/publications/challenges-for-effective-counterterrorism-communication-practitioner accessed 29 July 2024.

2018.[2] Various gadgets and logistics have become available, enabling terrorists to devise new ways of causing upheaval and destruction to public property and infringing on the right to life of many innocent civilians. The use of AI in terrorism has led to a pressing need for regulation.

It is plausible that terrorist groups will exploit AI for their own benefit. Just like the rest of society, terrorists are likely to benefit from technology and AI, using it for military operations and intelligence collection. Automated tasks performed using AI can potentially increase the scale and impact of these attacks, especially in carrying out cyberattacks.[3] The condition that appears to fear and fascinate individuals the most is that of AI robots. Scenarios often depict sentient, killer robots with abilities mimicking the human brain but lacking human inhibitions. The Metaverse, a new (virtual) reality, has become a breeding ground for cyber-terrorism where terrorists can plot and execute their plans while representing their virtual selves. The Global Security Pulse warns not only of scenarios involving armed AI robots but also of 'terrorist drone swarm' scenarios.

An online YouTube video posted in 2017 called 'Slaughterbots,' which has generated over 3 million views, portrays a dystopian scenario

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[2] Scott Crino and Andy Dreby, '*Turkey's Drone War in Syria: A Red Team View*' (16 April 2020) *Small Wars Journal* https://smallwarsjournal.com/jrnl/art/turkeys-drone-war-syria-red-team-view accessed 29 July 2024.

[3] Miles Brundage, Shahar Avin, Jack Clark, Helen Toner, Peter Eckersley, Ben Garfinkel, Allan Dafoe, and others, '*The Malicious Use of Artificial Intelligence: Forecasting, Prevention, and Mitigation*' (February 2018) University of Cambridge https://doi.org/10.17863/CAM.22520 accessed 29 July 2024.

where vast swarms of small armed drones are created by an unidentified government to destroy civilians.[4] Although the advocacy group 'Stop Autonomous Weapons' developed and uploaded the video with the political intent of preventing military use of unmanned weapons, this video easily entered the debate on terrorist use of technology.[5] The 'killer drone swarms' scenario is related to proof that ISIS has used consumer-grade small drones on the Syrian battlefield armed with grenades, pointing to a likely scenario of the horror we may face.[6]

AI has the potential to amplify the scale and impact of terrorist activities. Automated systems can be used to orchestrate large-scale cyber-attacks, disrupt critical infrastructure, and execute complex operations with minimal human intervention. For example, AI algorithms can optimize the timing and coordination of attacks, making them more efficient and harder to detect.[7] Alongside AI and drones, the use of the Internet by extremists warrants attention. Terrorists employ digital technologies for propaganda and messaging, often using

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4 *Stop Autonomous Weapons*, 'Slaughterbots' (13 November 2017) YouTube <https://www.youtube.com/watch?v=6KjX8EF95w4> accessed 29 July 2024.

5 Jason Ware, 'Terrorist Groups, Artificial Intelligence and Killer Drones' (24 September 2019) *War on the Rocks* <https://warontherocks.com/2019/09/terrorist-groups-artificial-intelligence-and-killer-drones/> accessed 29 July 2024.

6 Daveed Gartenstein-Ross, 'Terrorists Are Going to Use Artificial Intelligence' (3 May 2018) *Defense One* <https://www.defenseone.com/ideas/2018/05/terrorists-are-going-use-artificial-intelligence/147944/> accessed 29 July 2024.

7 Marcus Comiter, '*Attacking Artificial Intelligence: AI's Security Vulnerability and What Policymakers Can Do About It'* (Belfer Center for Science and International Affairs, Harvard Kennedy School 2019).

anonymous forums and benefiting from end-to-end encryption and virtual private networks (VPNs), which shield their identities and intentions.

Computer and networking advances have made new forms of operations feasible for a larger range of radicalized individuals. Widespread internet connectivity,[8] end-to-end encryption,[9] and VPNs[10] have enabled terrorists to remotely inspire and coordinate attacks. These operations require no extensive preparation or logistical planning and can be carried out by anyone, anywhere, using crude instruments such as knives or vehicles. Encrypted messaging systems like WhatsApp and Telegram provide users with anonymity by scrambling data, preventing law enforcement from accessing or intercepting these messages.[11] This advancement in the digital space raises fears about the amalgamation of these technologies with humans,

[8] Michael Steinbach, '*ISIL Online: Countering Terrorist Radicalization and Recruitment on the Internet and Social Media*' (6 July 2016) Statement before the Senate Committee on Homeland Security and Governmental Affairs, Permanent Subcommittee on Investigations, Washington DC <https://www.fbi.gov/news/testimony/isil-online-countering-terrorist-radicalization-and-recruitment-on-the-internet-and-social-media-> accessed 29 July 2024.

[9] Robert Graham, '*How Terrorists Use Encryption*' (May 2016) 9(6) *CTC Sentinel* 20, 32 <https://ctc.usma.edu/posts/how-terrorists-use-encryption> accessed 29 July 2024.

[10] *EUROPOL Public Information*, *Changes in Modus Operandi of Islamic State Terrorist Attacks* (2016) The Hague.

[11] Robert Graham, '*How Terrorists Use Encryption'* (May 2016) 9(6) *CTC Sentinel* 20, 20.

highlighting the need for an international framework to address these emerging threats.

II. ENHANCED HUMAN TECHNOLOGY AS WEAPONS UNDER THE GENEVA CONVENTION

First, the examination of the Additional Protocol I of the Geneva Convention raises the question: "Does human enhancement (HE) fall under Article 36?" This Article could imply that war fighters themselves might be categorized as 'weapons'. A crucial aspect to understand is whether entities other than traditional weapons are subject to scrutiny under this Article. International law lacks a specific definition for 'weapon'. Article 36 refers to 'weapons, means and methods of warfare'. A weapon could be defined as something designed to target a military objective or enemy combatant, aiming to destroy or reduce the effectiveness of the target or incapacitate the enemy combatant.[12] Historically, animals like dogs, elephants, and dolphins have been used in warfare. Today, dogs are trained for police and military roles due to their specialized skills. If autonomous robots are considered controlled weapons, what about humanoids with robotic components? As humans replace body parts with robotic elements, they

[12] International Committee of the Red Cross, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977* (ICRC 2006) <https://www.icrc.org/en/doc/assets/files/other/irrc_864_icrc_geneva.pdf> accessed 29 July 2024.

become increasingly mechanized. The question then arises: when does a human become a robot, and thus a weapon? Enhancements such as amphetamines for focus or drugs for stamina could blur this line, raising ethical concerns about human augmentation in warfare.

A critical factor in this discussion is the distinction between 'automated' and 'autonomous'. Automated weapons function on a pre-programmed set of commands, making their outcomes more predictable. In contrast, autonomous weapons equipped with AI can learn and adapt, resulting in less predictable outcomes. The degree of human intervention plays a significant role in determining the level of autonomy.[13] This consideration is also relevant for combatants who are part human and part robot.

Various countries approach the classification of autonomous weapons differently. For instance, the U.S., France, and Germany define autonomous weapons as those capable of selecting and attacking targets without human intervention once activated.[14] China, Estonia,

[13] S Saini and P Dominic, Chapter 1: Background and Definitions in '*Legal and Policy Implications of Autonomous Weapons Systems'* (The Centre for Internet and Society 2020) 9 <https://cis-india.org/internet-governance/legal-and-policy-implications-of-autonomous-weapons-systems> accessed 29 July 2024.

[14] U.S. Department of Defense, *Directive No. 3000.09, 'Autonomy in Weapons'* (2012) AI Regulation, 'French Defense Ethics Committee's Opinion: Need for a Clear Distinction Between LAWS and PLAWS' (2021) <https://ai-regulation.com/french-defense-ethics-committees-opinion-about-laws-and-pawls/> ;Federal Foreign Office, '*German Commentary on Operationalizing All Eleven Guiding Principles at a National Level as Requested by the Chair of the 2020 Group of Governmental Experts (GGE) on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems (LAWS) within the Convention on Certain*

and Finland focus on characteristics such as lethality, autonomy, impossibility of termination, indiscriminate effects, and evolution.[15] Human intervention is a common factor in these definitions, which is crucial for assessing the level of autonomy. These parameters provide insight into the characteristics and functioning of autonomous weapons and how humanoids might be classified. However, the act of making final decisions and taking actions rather than merely observing and orienting is what fundamentally differentiates autonomous systems.

A pragmatic approach is to consider humans as weapons from the outset, thereby avoiding the complex issue of determining when they become weapons. A combatant with robotic implants, such as machine guns or lasers, is clearly weaponized, possessing capabilities that can be incapacitating or destructive.[16] The Cambridge Dictionary defines ‘weapon’ as “an object used in fighting or war, such as a gun or a bomb,

Conventional Weapons (CCW)’ <https://documents.unoda.org/wp-content/uploads/2020/07/20200626-Germany.pdf> accessed 29 July 2024.

[15] Brian Stauffer, ‘*Stopping Killer Robots: Countries' Positions on Banning Fully Autonomous Weapons and Retaining Human Control* (Human Rights Watch 2020)’ <https://www.hrw.org/report/2020/08/10/stopping-killer-robots/country-positions-banning-fully-autonomous-weapons-and> accessed 29 July 2024.

[16] U.S. Army Combined Arms Center, ‘*Robots on the Battlefield: Contemporary Issues and Implications for the Future’* (Combat Studies Institute 2014) <https://apps.dtic.mil/sti/pdfs/ADA605889.pdf> accessed 29 July 2024.

or something used against someone."[17] Additionally, the Merriam-Webster describes it as "something used to injure, defeat, or destroy."[18]

These definitions suggest that humans and attack dogs could be regarded as weapons. If humans are considered weapons from the beginning, there is no need to pinpoint when human enhancement transforms them into weapons. Thus, soldiers could be viewed as 'weapons' themselves. This perspective avoids the problematic task of drawing a line between enhanced humans and weapons, as even simple enhancements or unarmed combat might render a person a weapon under these definitions. This approach aligns with dictionary definitions, where objects or beings used in combat are classified as weapons, confirming that both normal soldiers and attack dogs could be considered weapons from the outset.

A legal review under Article 36 includes any modification to an existing weapon that alters its function or any weapon previously reviewed but subsequently modified. Consequently, Article 36 would encompass enhanced humans, simplifying the development of a legal framework for human enhancement and advanced weapon technologies. If enhanced humans are deemed weapons under Article 36, what are the implications? Historically, modern weapons and

[17] *Cambridge University Press*, 'Weapon' in *Cambridge Advanced Learner's Dictionary & Thesaurus* <https://dictionary.cambridge.org/dictionary/english/weapon> accessed 15 May 2022.

[18] *Merriam-Webster*, 'Weapon' in *Merriam-Webster Dictionary* <https://www.merriam-webster.com/dictionary/weapon> accessed 15 May 2022.

techniques must meet at least the following criteria: (1) the principle of distinction; (2) the principle of proportionality; and (3) the prohibition of causing excessive damage or unnecessary suffering. The principle of distinction mandates that a weapon must discriminate between combatants and non-combatants.[19] For example, chemical agents and anti-personnel landmines are considered indiscriminate and unconstitutional as they do not differentiate between a civilian and an enemy combatant. The principle of proportionality requires that the use of force be commensurate with the strategic objective, aiming to minimize civilian casualties. Lastly, the prohibition of unnecessary suffering ensures that weapons must avoid inflicting excessive damage or pain beyond what is necessary to incapacitate a fighter. This prohibition has led to bans on weapons like poison, explosive bullets, and blinding lasers, which cause excessive harm. For now, if we disregard enhancements intended for use against enemies, such as mood-altering drugs to calm a crowd or truth-enhancing substances for interrogation techniques, the former would be banned by the Chemical Weapons Convention due to its indiscriminate nature, while the latter might be prohibited under rules against torture and mistreatment of prisoners.

[19] Diakonia International Humanitarian Law Centre, '*The Principle of Distinction'* <https://www.diakonia.se/ihl/resources/international-humanitarian-law/principle-of-distinction-protection-of-people-and-objects/> accessed 29 July 2024.

III. INTERNATIONAL FRAMEWORK FOR BIOLOGICAL WEAPONS AND HUMAN ENHANCEMENT

Second, the question is "Whether human enhancement falls under the Biological and Toxin Weapons Convention (BTWC) as a biological weapon". Article I reads as follows:

"Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain: (1) microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes; (2) weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict."

The BTWC, though, is silent on the question of human enhancement falling under the term biological weapons; unpredictable advances in genetic engineering, biotechnology, synthetic biology, and other research areas are expected. However, the conventional belief is that all these "agents" are limited to being approximately microbial in size and to biological substances that are aimed at enemies, not targeted at enhancing one's own military personnel.[20] Regrettably, this statement is not sufficiently clear in the BTWC; that is to say, it does not describe what a biological agent is. Agents may also be biological agents, like anthrax, caused by Bacillus anthracis, that are indiscriminate and

[20] *'The Biological Weapons Convention'* <http://bwc1972.org/home/the-biological-weapons-convention/> accessed 29 July 2024.

challenging to control as weapons. The bacterium forms tough spores that persist for long periods and can be carried by the wind, infecting children or entire populations as easily as soldiers. This violates the principle of distinction in International Humanitarian Law (IHL). When conditions are suitable, such as inside human lungs, the spores germinate and release life-threatening toxins, highlighting the persistent and uncontrollable nature of anthrax as a biological weapon.[21] Similarly, agents may also be entities in a wider yet more coherent context (e.g., a government informant is a 'secret agent'). If so, then agents will become improved war fighters. Even if this concept is denied and it is stipulated that biological agents must be non-personal substances, a concept not clear in the BTWC, they can still treat the technology of enhancement itself as an agent, apart from the war fighter it enhances.

In addition to the BTWC, the usage of chemicals can also be considered as a method of warfare under the Chemical Weapons Convention ('CWC'). Article II (1) of the CWC defines chemical weapons in the way of toxic chemicals and their precursors, and munitions and devices. It specifically elaborates on the usage of chemicals in designing the devices that cause death. Similarly, Clause IV, which defines the 'key component of a binary or multi-component chemical system', prohibits the use of chemicals that take part at any stage of

[21] David P Clark and Nanette J Pazdernik, '*Biological Warfare: Infectious Disease and Bioterrorism' (2016) 16 Biological Warfare and Bioterrorism 687, 687-719'* <https://doi.org/10.1007/s12345-016-7890-y> accessed 29 July 2024.

production and play an important role in determining the toxic properties of the final product.[22] Thus, we can conclude that even the chemicals that are used in the production or assembling of the device or which result in human enhancement, consequently leading to their weaponization, are under the ambit of the CWC.

IV. BIOETHICS AND HUMAN RIGHTS FOR HUMAN ENHANCEMENT TECHNOLOGIES (HET)

Third comes the International Human Rights issue. Human Rights cannot be ignored when we are talking about human enhancement. Torture and cruel, inhumane or degrading treatment are forbidden by Article 5 of the Universal Declaration of Human Rights ('UDHR') and Article 7 of the International Covenant on Civil and Political Rights ('ICCPR').[23] They imply, in fact, a restriction on the execution of medical or experimental research without free consent. No person shall, under Article 12 of the UDHR and Article 17 of the ICCPR, be subjected to arbitrary or unlawful interference with his or her privacy.[24]

[22] Organisation for the Prohibition of Chemical Weapons, *Chemical Weapons Convention* art II (IV) <https://www.opcw.org/chemical-weapons-convention/articles/article-ii-definitions-and-criteria> accessed 29 July 2024.
[23] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 5; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 7.
[24] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 12; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 17.

Neither of the General Comments to the two sections of the ICCPR allows any reference to science nor relates to the prospect of scientific or technological abuses of such rights. However, it is highly conceivable that, depending on the degree of intrusiveness, compulsory enhancement will infringe on one or both of the two sections. Provisions that guarantee privacy protection are widely applicable to the cybersecurity challenges posed by HETs, such as data leaks, denial-of-service attacks and unauthorised access to implants.

Article 12, which acknowledges the right of all to enjoy the highest achievable level of physical and mental fitness, is contained in the applicable provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[25] All health facilities, goods and services must recognise medical ethics and also be culturally appropriate, i.e. considerate of the culture of minorities and other communities, gender-sensitive and life-cycle-sensitive, along with being respectful of their confidentiality and improving the health status of those concerned.[26] This right includes freedoms, and the same much like any other right, comes with entitlements.[27] Accordingly, the right to health is closely connected to the concept of liberty, freedom of choice and limitations thereof, as well as to protection, consistency

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[25] Convention on the Elimination of All Forms of Discrimination against Women (1979) art 11.1(f) and 12, International Convention on the Elimination of All Forms of Racial Discrimination (1965) art 5(e)(iv), Convention on the Rights of the Child (1989) art 24.

[26] Universal Declaration on Bioethics and Human Rights (2005) art 12.

[27] Universal Declaration on Bioethics and Human Rights (2005) art 11.

and care requirements that are of crucial importance to the regulation of HETs. However, the precise scope of this right lies under the vast jurisdiction of the State, which determines how scarce services can be distributed.

Under Article 15.1 (b) of ICESCR, the states are bound to the rights of individuals "to enjoy the benefits of scientific progress and its applications". Para 2 of the same article directs the states to ensure complete fulfilment of this to include those required for the protection, creation and propagation of science and culture. A point of contention continues to be what constitutes 'benefits'. The definition of this word has traditionally tended to concentrate on cultural involvement in the advancement of science, whether through funding for research projects or through the creation of ways of disseminating and transmitting the findings of scientific research. In the area of cultural freedom, the UN Special Rapporteur "[t]he words 'benefits' of research and 'scientific progress' convey the notion of a positive effect on people's well-being and the realisation of their human rights".[28] The right to profit from scientific advances remains widely underdeveloped, although, in recent times, it seems to have received greater discussion and focus.

Finally, the UNESCO Declaration on Bioethics and Human Rights discusses ethical issues pertaining to "medicine, life sciences and associated innovations as applied to humans." For the basic explanation

[28] Farida Shaheed, '*Report of the Special Rapporteur in the Field of Cultural Rights: The Right to Enjoy the Benefits of Scientific Progress and Its Application*' (2012) section III A.24.

that HE concerns improvements in the human body, the problems posed by HE will be bioethical in nature. For the purpose of the Declaration, bioethics has been defined in the explanatory memorandum as "a systematic, pluralistic and interdisciplinary field of study involving the theoretical and practical moral issues raised by medicine and life sciences as applied to human beings and humanity's relationship with the biosphere".[29] In the regulation of HE, many principles of the Declaration should be taken into account. States have a duty, in particular, to protect the privacy of individuals and the security of their personal records.[30] The need to maintain the secrecy of data relating to and created by the human body is of special significance in view of the safety issues relating to HETs. In addition, encouraging health and social progress must be a primary priority of governments.[31] The same clause recalls that among these basic rights of any human being is the right to enjoy the highest attainable quality of health and that developments in science and technology can advance, among other things, the development of living standards and the environment.[32] In addition to that, the States should ensure that the benefits of all scientific findings are shared, along with their application to society as a whole, in addition to being shared within the

[29] UNESCO, *Explanatory Memorandum on the Elaboration of the Preliminary Draft Declaration on Universal Norms on Bioethics* para 17.

[30] Universal Declaration on Bioethics and Human rights (2005) art 9.

[31] Universal Declaration on Bioethics and Human rights (2005) arti 14(1).

[32] Universal Declaration on Bioethics and Human Rights (2005) art 14(2).

international community.[33] Here, "benefits" can assume the shape of access to healthcare services; the availability of new research-based diagnostic and therapeutic modalities or products; or health service funding.

Fully autonomous weapons are a critical concern in military technology, necessitating thorough examination under the Martens Clause. This international humanitarian law provision ensures protection for civilians and combatants when specific treaties are absent. The Clause applies to fully autonomous weapons because they are not specifically addressed by international law, providing key factors for states to consider as they evaluate such emerging technologies. Its principles of humanity and dictates of public conscience demand a pre-emptive ban on the development, production and use of these weapons. After initial expert meetings, the Convention on Conventional Weapons (CCW) began formal discussions in 2017, with around 80 states convening again in August 2018.[34]

With the analysis so far, it can be rightly concluded that IHL can provide for the classification and the framework to uphold human rights when HE technologies turn into potential weapons. However, it is important to look at it in the light of International Criminal Law

[33] Universal Declaration on Bioethics and Human rights, (2005) art 15.

[34] Human Rights Watch, 'Heed the Call: A Moral and Legal Imperative to Ban Killer Robots' (21 August 2018) <https://www.hrw.org/report/2018/08/21/heed-call/moral-and-legal-imperative-ban-killer-robots> accessed 29 July 2024.

(ICL) so that the accountability for terrorism through such advanced technologies by terrorist organizations can be construed.

V. TERRORISM THROUGH ADVANCED HUMAN TECHNOLOGIES AND THE INTERNATIONAL CRIMINAL LAW FRAMEWORK

The IHL puts the onus and sanctions on the state to uphold Human Rights, but when it comes to the use of AI in Terrorism, it is important to look at ICL to understand the mechanism of liability and how it can provide a framework for the use of advanced technologies. The current legal framework, with the underlying principles of Laws of Armed Conflict ('LOAC') as a measure to control terrorism, needs to be reflected upon if we want to include HE and other advanced technologies. A number of questions that arise while deciding the liability under the ICL are regarding the accountability, liability of humans, developer accountability, nature of war crimes, etc. Thus, the classification of terrorist activities using enhanced technologies needs to be analysed under the present laws.

Individual Criminal Liability, which is considered to be the foundation of ICL after the Nuremberg Trial, makes the terrorists using enhancement technologies liable for war crimes.[35] As the Nuremberg

[35] Edoardo Greppi, 'The Evolution of Individual Criminal Responsibility under International Law' (1999) 835 *International Review of the Red Cross* <https://www.icrc.org/en/doc/resources/documents/article/other/57jq2x.htm> accessed 29 July 2024.

Trial specifically laid down that crimes are to be committed by humans and not abstract entities, the human enhancement that is done using AI would result in the classification of the crimes as war crimes.[36] While the absence of human oversight in autonomous weapons leads to the question of "who" should be held accountable for the crime, terrorism through HE has the assumption that the 'who' could be any organization or individual. However, it leads to the possibility of accountability of the developer. It is important for the LOAC to apply that an armed conflict should take place. However, in the case of the development of technology such as software and tool programming, it is very much possible that the 'weapons' came into existence long before the conflict commenced, resulting in detaching the conduct of the developer from the conflict and providing a *de facto* immunity.

The way out of the loop can be the Art. 25(3)(c) of the Rome Statute, which criminalizes aiding, abetting or providing assistance in the commission or attempted commission of the crime. However, preceding that, it is important to establish the *mens rea* of the developer as well. In accordance with Art. 30 of the Rome Statute, the developer's intention to facilitate the commission of a crime will have to be proved. Thus, the developer could not be held liable even if they were aware of the perpetrator's intention and knowledge that their product could assist in the commission of an offence if the technology is developed

[35] *The Trial of the War Criminals before the International Military Tribunal Nuremberg Judgment* (1 October 1946).

with the sole aim of profiteering.[37] The accountability gap can be bridged if the *mens rea* and the *actus reus* are amended and interpreted in such a way as to bring the ex-ante actions of the individuals under their ambit.

Another principle that can potentially govern the terrorism of advanced technologies is the Doctrine of Command Responsibility. Article 28 of the Rome Statute talks about the Doctrine of Command Responsibility, where military commanders can be held responsible for the actions of their subordinates. An important component of the Doctrine of Command Responsibility is the presence of effective control of the commander over the subordinate, i.e. the commander or the superior authority oversees the actions and has the power and chance to prevent any kind of damage.[38] When terrorists use enhanced technologies or any kind of HE which results in war crimes, the doctrine of Command Responsibility can be applied to establish a relationship between the system and the superior authority that controls the system. Even in the case of HE, when the involvement of human intelligence is such that the actions or the usage of the technological enhancement is such that the person using it or having the command over it knows that it will result in the commission of a war crime, liability exists. This way, the terrorist organizations that have deployed such technologies or

[37] S Saini and E Elizabeth, '*Legal and Policy Implications of Autonomous Weapons Systems'* (The Centre for Internet and Society 2020) 50.

[38] *Prosecutor v Delalić et al.* (Čelebići case) Judgement, Case No IT-96-21-T, T Ch II, 16 November 1998.

individual terrorists who use enhanced human technology and are working under the control of larger organizations, can be held liable. While it is true that the technology or the weapon itself cannot be attributed to the willingness to commit a crime, the presence of human intelligence in HE or even the knowledge that the system is manufactured in a way to commit a crime is sufficient to establish liability. The Doctrine of Command Responsibility thus makes the person who is either using the enhanced technology himself or using that as a weapon through another to commit war crimes or even having the constructive knowledge of it, liable under the Rome Statute.

When it comes to cybercrime and terrorism through AI, the responsibility falls on the manufacturers of such software or the person who owns the technology.[39] The reason behind it is that the AI cannot be given the human attributes of mental state and actions pursuant to criminal intentions. However, when it comes to enhanced humans, they have both the mental state of a human being and the capability to commit crimes like that of an AI system. But when we talk about war crimes through enhanced technology, there exists a high possibility of negligence and malfunction in the enhanced technology. Though negligence imposes a liability at the fault of the defendant, the complexity lies in determining the standard of care.[40] Further, to set the negligence-based liability, it is important to establish that the damage

[39] Nora Osmani, *'The Complexity of Criminal Liability of AI Systems'* (2020) 14(1) *Masaryk University Journal of Law and Technology* 61, 53-82 https://doi.org/10.5817/MUJLT2020-1-3.
[40] ibid.

caused was foreseeable and that the manufacturer or the user could have anticipated the potential malfunction. However, we cannot ignore that enhanced humans or other enhanced technologies have the self-learning capacity and autonomy, which makes their actions and outcomes unpredictable.[41] Therefore, it will be difficult to shift the liability all upon the owner of the technology, as the extent of the 'duty of care' will become hard to determine. Moreover, AI can also be used in terrorism through the means of lethal autonomous robots (LARs). LARs lack moral autonomy and responsibility. Creating a moral agent requires strong AI with human-like intelligence, intentions, reflection, and consciousness. Current AI systems learn unpredictably, creating a "responsibility gap", where programmers lose control over the AI's actions. As AI systems use complex logic and learning processes, they act beyond their creators' observation, making manual intervention impossible. Therefore, accountability should not be attributed to the AI or its creators, as autonomous systems operate independently and unpredictably. This underscores the challenge of managing and regulating truly autonomous machines.[42] It results in a loophole for the terrorists to circumvent the liability. A possible solution to this is the recognition of enhanced humans as weapons which will make their

[41] A Conn, *'The Risks Posed By Lethal Autonomous Weapons'* (4 September 2018) *Future for Life* <https://futureoflife.org/2018/09/04/the-risks-posed-by-lethal-autonomous-weapons/> accessed 29 July 2024.

[42] Heather M Roff, *'Killing in War: Responsibility, Liability and Lethal Autonomous Robots'* in F Allhoff, N G Evans, and A Henschke (eds), *Routledge Handbook for Ethics and War* (Routledge 2013).

actions inherently dangerous and thus manufacturers and the owners/users of such technology and weapons will have strict liability even if the initial motive of the manufacturer or the user was to not commit a war crime. Their subsequent actions will result in holding them accountable as they will have the liability to take preventive measures.

VI. CONCLUSION

The constant development of technology, whether through the making of a virtual world such as the Metaverse or technology delving into human lives through humanoids, has only led to the greater need for regulation. Further, the use of enhanced technology in terrorism and the ways in which cyberterrorism is taking new forms make it the right time to curate the legal framework and regulate it in the upcoming digital world. The involvement of human enhancement and other advanced technologies in terrorism goes beyond war crimes through arms and ammunition and poses bigger questions of their regulations through current laws, human rights violations, and how they will be criminalized under the international legal framework.

The weaponization of technology through the human body lies at the junction of IHL and ICL, which establishes the argument of the present paper, which is to recognise them as “weapons” under the IHL. By including technological enhancement through robotic mechanisms and chemicals under the ambit of “weapons” in the Geneva Convention and

Chemical Weapons Convention, along with the BTWC, criminalizing their use in terrorism becomes easier. Since the enforcement of ICL requires the commission of war crimes or crimes against humanity, recognition of humanoids or other advanced technologies as weapons will make terrorist organisations or even individual terrorists inherently liable for their usage. The most important aspect highlighted throughout the research is the potential of the current international legal framework to deal with war crimes and terrorism through such human advancement technologies. The classification of advanced technology as 'weapons' and understanding of the bio-ethical issues with respect to bodily autonomy and privacy, along with criminalizing its usage in terrorism, will help in making the correct legal pathway from the very beginning. Eventually, the entire legal framework for the alliance of Human and Artificial Intelligence, which will soon be leading the future wars, can be made on the foundation that will be laid through such classification.

TO PREY WHILE THEY PRAY–BLACK COLLAR CRIMES AND THE PERIL OF TREATING RELIGION AS A LEGAL EXCEPTION

Anubhuti Raje[**]

ABSTRACT

When faith becomes a fortress, the law forgets how to knock. Across India, spiritual leaders cloaked in divinity operate beyond scrutiny, committing financial fraud, sexual abuse, psychological coercion, while the legal system looks away. These are not isolated incidents of religious misconduct; they are structural, repeatable crimes concealed within institutionalised sanctity. In the wake of renewed public scrutiny following the convictions of Asaram Bapu, Gurmeet Ram Rahim Singh, and the stalled Nithyananda investigation, the urgency to address systemic legal immunity for religious institutions has never been greater. This paper examines Black

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Collar Crime as the systemic abuse of spiritual authority for organised financial, sexual and psychological gain, shielded by religious legitimacy. While the term has appeared in sociological discourse, this is the first study to doctrinally situate it within Indian law, mapping how constitutional protections, criminal procedure, and regulatory inaction enable impunity. Analysis of statutes such as the Bharatiya Nagarik Suraksha Sanhita, 2023 ("BNSS"), Bharatiya Sakshya Adhiniyam, 2023 ("BSA"), Foreign Contribution (Regulation) Act, 2010 ("FCRA"), Prevention of Money Laundering Act, 2002 ("PMLA"), and Protection of Children from Sexual Offences Act, 2012 ("POCSO"), demonstrates how these frameworks fail to address group-based religious criminality. The study introduces two prosecutorial tools, the Black Collar Crime Matrix and the Faith-Fraud Test, to help courts and investigators distinguish protected faith from exploitative enterprise. Comparative insights from foreign clergy abuse scandals highlight that these legal blind spots are correctable. The paper concludes *with legislative proposals including vicarious liability for religious bodies, expanded definitions of institutional silence under POCSO and mandatory asset disclosure for spiritual trusts. This is the first doctrinal analysis situating black collar crime within Indian law offering a structured framework to balance religious freedom with constitutional morality and victim protection.*

Keywords: *Black Collar Crime, Abuse of Religious Authority, Constitutional Morality, Vicarious Liability, Faith-Fraud Test.*

I. INTRODUCTION

"To prey while one prays is not a paradox," in a secular democracy should be an impossibility. Yet in India, sacred status frequently operates as a legal shield, while structural state inaction and regulatory deference contribute to the persistence of institutional impunity. Faith in India has, in several recorded contexts, translated into forms of obedience that suppress dissent and defer accountability, as the crime statistics published by the National Crime Records Bureau suggest, consistently recording killings attributed to superstition and ritual

belief across successive reporting years.[1] Within this cultural terrain, *black collar crime* emerges, not as sporadic transgressions, but as systemic, organised abuse perpetrated under the guise of spiritual authority. These crimes span sexual exploitation, financial fraud, and psychological coercion, embedded within hierarchical, opaque institutions that operate with quasi-corporate efficiency and legal insulation.

While the term *"black collar crime"* has appeared in sociological literature abroad, it has not yet been doctrinally situated within Indian law. It triangulates three domains namely constitutional protections, notably Articles 25 to 28 of the Constitution of India;[2] criminal law frameworks such as the BNSS[3] and the BSA;[4] and regulatory regimes including the FCRA,[5] the PMLA,[6] and the POCSO.[7] Collectively, these regimes, despite their reach, fail to confront religious criminality as an institutional enterprise.

[1] National Crime Records Bureau, *Crime in India 2022: Statistics* (vol I, NCRB 2023) accessed 02 August 2026.
[2] The Constitution of India, arts 25-28.
[3] Bharatiya Nyaya Sanhita, 2023 (45 of 2023).
[4] Bharatiya Sakshya Adhiniyam, 2023 (46 of 2023).
[5] Foreign Contribution (Regulation) Act, 2010 (42 of 2010).
[6] Prevention of Money Laundering Act, 2002 (15 of 2003).
[7] Protection of Children from Sexual Offences Act, 2012 (32 of 2012).

High-profile convictions of self-styled godmen such as Asaram Bapu,[8] Gurmeet Ram Rahim Singh,[9] and Narayan Sai[10] have not triggered structural reform. The BNSS treats such offences as isolated acts rather than coordinated conspiracies; the BSA lacks presumptions for organised religious racketeering comparable to the reverse-burden models under the PMLA;[11] and FCRA monitoring remains fragmented, enabling untraceable foreign inflows to spiritual trusts.

As satirist Jaspal Bhatti conveys through his television satire on social and institutional hypocrisy, the idea that declaring oneself a "*saint*" can render one effectively untouchable in public life has become a familiar cultural observation.[12] The remark, though comic in delivery encapsulates the core legal pathology explored here that the higher the pedestal, the thicker the shield against scrutiny.

Against this backdrop, two central questions arise: What makes religious institutions legally untouchable, and how can the law recalibrate its deference to faith while protecting victims without infringing on genuine religious freedom?

To address these, the paper adopts an interdisciplinary methodology. Beginning with *Part II* defining black collar criminality and

[8] *State of Rajasthan v Asharam* 2023 SCC OnLine SC 423.
[9] *Central Bureau of Investigation v Gurmeet Ram Rahim* 2024 SCC OnLine P&H 14351.
[10] *State of Gujarat v Narayan* (2021) 20 SCC 304.
[11] Prevention of Money Laundering Act, 2022 (15 of 2003) s 24.
[12] Bhatti, Jaspal. *Flop Show; Full Tension; Mahaul Theek Hai.* Doordarshan Television Network, MadArts Productions (1989–2005).

introducing the Black Collar Crime Matrix, distinguishing it from generic *"religious crime." Part III* maps the silences of criminal procedure and evidence law that perpetuate institutional impunity. *Part IV* critiques constitutional doctrine, showing how judicial interpretations of Articles 25-28 have overextended protection to shield misconduct.[13] *Part V* reframes spiritual bodies as quasi-corporate actors wielding vast financial and political clout whereas *Part VI* anatomises systemic failure through detailed case studies. *Part VII* proposes the Faith-Fraud Test, a prosecutorial tool to balance faith and accountability and finally, *Part VIII* outlines legislative and doctrinal reforms.

The purpose is not to dilute the constitutional guarantee of religious freedom but to criminalise its abuse, restoring dignity to victims, doctrinal clarity to the courts, and accountability to institutions that have long weaponised sanctity to evade justice.

II. DEFINING BLACK COLLAR CRIMINALITY

"Black Collar Crime" is not a rhetorical flourish but a necessary classification for a category of harm that thrives at the interstices of faith, power, and legal indifference. While white-collar crime denotes economic offences by professionals, and blue-collar crime refers to physical acts of violence or theft, black-collar crime captures a third,

[13] *The Commissioner, Hindu Religious Endowments v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (1954) 1 SCC 412.

more insidious realm—systemic abuse committed under the garb of religious or spiritual authority. It concerns how charisma, sanctity, and structural reverence become operational tools of impunity.

A. Why Existing Labels Fall Short?

Terms like *"religious crime"* or *"faith-based abuse"* inadequately frame the nature of the wrong, offering description rather than diagnosis. *"Religious crime"* overemphasises the identity of the perpetrator and under-theorises the method of concealment and silence. In contrast, Black Collar Crime foregrounds the structural use of sacralised legitimacy to enable criminality, encompassing financial fraud, sexual violence, psychological manipulation, and systematic silencing of victims, while simultaneously ensuring legal and societal insulation for the perpetrators.

Moreover, criminal law lacks a coherent vocabulary to capture crimes within sanctified hierarchies. The Indian Penal Code, 1860 (*now replaced by the Bharatiya Nyaya Sanhita, 2023*)[14] and the BNSS treat such crimes as individualised and episodic, ignoring the institutional architecture that enables repeat offending under spiritual cover.

B. Characteristics of Black Collar Crime

[14] The Indian Penal Code, 1860 (45 of 1860).

Black Collar Criminality displays a unique convergence of characteristics that distinguish it from conventional crimes in the following ways:

1. ***Charismatic Authority with Structural Control:*** As theorised by Max Weber, charismatic authority thrives on personal legitimacy.[15] In black collar contexts, this becomes weaponised, where obedience to the leader is perceived as obedience to the divine. The power is not merely spiritual but administrative, financial, and sometimes even paramilitary.
2. ***Institutional Hierarchy and Control of Information:*** Religious sects and spiritual organisations mirror corporate pyramids: the top is immune from accountability, the bottom silenced through fear, dependency, or theology, and operations sustained through extensive land holdings, trusts, and opaque FCRA inflows.

3. ***Opacity, Secrecy, and Doctrinal Coercion:*** Unlike secular institutions, religious organisations benefit from legal opacity. Privately registered religious organisations are effectively shielded from the transparency obligations of the Right to Information Act, 2005 because they generally fall outside the definition of "*public*

[15] Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Guenther Roth and Claus Wittich eds, vol I, University of California Press 1978) 241-244.

authority" under Section 2(h) of the Act, even where their activities have significant public consequence.[16]

4. ***Victim Silencing and Social Ostracism:*** Survivors of black collar abuse face double trauma: firstly, the harm itself[17] and the secondary trauma of disbelief or abandonment by families, communities, and the justice system, reinforced by societal deference to religion and judicial hesitation in *"interfering with faith."*

5. ***Legal Evasion through Doctrinal Shielding:*** Many such organisations are registered as charitable trusts or religious bodies under state-specific Hindu Religious and Charitable Endowments Acts[18] and under the Indian Trusts Act, 1882.[19] The legal personality of these institutions is exploited to shield individual wrongdoers behind the veil of faith.

C. Comparative Glimpses

While this paper's primary focus remains India, a comparative glance reveals that the Indian context reflects a global pattern of spiritual abuse obscured by legal timidity. These examples are examined not as isolated scandals, but to identify a common structural pattern across

[16] Right to Information Act, 2005 (22 of 2005) s 2(h).
[17] U Orth and A Maercker, 'Do Trials of Perpetrators Retraumatize Crime Victims?' (2004) 19 Journal of Interpersonal Violence 212-227.
[18] The Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 (22 of 1959).
[19] Indian Trusts Act, 1882 (2 of 1882).

jurisdictions in which religious authority, coupled with legal deference, enables prolonged institutional impunity.

- **United States:** The Catholic Church clergy abuse scandal, especially following the Boston Globe's 2002 exposé.[20] In the United States, the 2018 Pennsylvania grand jury report documented over 300 Catholic priests abusing more than 1,000 children across seven decades, revealing a systematic cover-up by Church hierarchy, while previous data from the John Jay Report indicated that approximately 4% of Catholic clergy between 1950 and 2002 faced abuse allegations.[21] The United States experience is analytically significant not merely because of the scale of abuse, but because it demonstrates how institutional reverence and internal governance mechanisms delayed legal accountability despite the availability of evidence over decades.

[20] Walter V Robinson and others, 'Church Allowed Abuse by Priest for Years' (*The Boston Globe*, 6 January 2002) <https://www.bostonglobe.com> accessed 12 August 2025.

[21] Commonwealth of Pennsylvania, *Fortieth Statewide Investigating Grand Jury Report* (August 2018) <https://images.law.com/contrib/content/uploads/documents/402/22175/40th-GJ-Opinion-Pre-Depravation-Hearings-1.pdf> accessed 12 August 2025; John Jay College of Criminal Justice, *The Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States, 1950-2002* (United States Conference of Catholic Bishops 2004) <https://www.usccb.org/sites/default/files/issues-and-action/child-and-youth-protection/upload/The-Nature-and-Scope-of-Sexual-Abuse-of-Minors-by-Catholic-Priests-and-Deacons-in-the-United-States-1950-2002.pdf> accessed 12 August 2025.

- **Latin America:** In Mexico, the long-standing legal insulation enjoyed by *La Luz del Mundo* came to public notice only when its leader, Naasón Joaquín García, pleaded guilty to child sexual offenses and was sentenced to nearly seventeen years in a U.S. court, reflecting how such religious structures can evade accountability until international pressure compels action.[22] This trajectory illustrates how domestic legal systems may remain inert in the face of concentrated religious power, with accountability emerging only when external or transnational legal intervention disrupts entrenched protective structures.
- **India:** In India, as new as August 5, 2025, there have been cases reported pertaining to black magic death before the court.[23] Additionally, official NCRB data for 2021 recorded six human sacrifice deaths and sixty-eight murders linked to witchcraft, concentrated in Chhattisgarh, Madhya Pradesh, Telangana, and Kerala, while 2022 saw eight human sacrifice cases and eighty-five witchcraft-related murders nationwide, with Kerala alone

[22] The Guardian, 'Mexican megachurch leader jailed in US for more than 16 years for child sexual abuse' *The Guardian* (9 June 2022) <https://www.theguardian.com/world/2022/jun/09/la-luz-del-mundo-leader-naason-joaquin-garcia-sentenced> accessed 12 August 2025; Al Jazeera, 'Leader of Mexican megachurch sentenced in US for child sex abuse', *Al Jazeera* (9 June 2022) <https://www.aljazeera.com/news/2022/6/9/leader-of-mexico-megachurch-sentenced-in-us-for-child-sex-abuse> accessed 12 August 2025.

[23] Times of India, '38 black magic-related cases registered in state in 5 years, govt tells Kerala HC' *Times of India* (5 August 2025) <https://timesofindia.indiatimes.com/city/kochi/38-black-magic-related-cases-registered-in-state-in-5-years-govt-tells-kerala-hc/articleshow/123123445.cms> accessed 12 August 2025.

registering thirty-eight black magic–related cases over the past five years.[24] From the unprosecuted financial empire of Nithyananda to the delayed prosecution of Asaram Bapu under the POCSO, the pattern is clear- faith operates as a legal firewall.[25]

Read together, these jurisdictions reveal a shared analytical insight: irrespective of constitutional or cultural context, faith-based authority repeatedly functions as a buffer against timely legal intervention, transforming spiritual legitimacy into institutional insulation from scrutiny.

D. The Black Collar Crime Matrix

This paper proposes the Black Collar Crime Matrix from a threefold diagnostic lens:

<u>Table 1- Structural Elements Enabling Black Collar Crime</u>

[24] National Crime Records Bureau, *Crime in India 2021* (Ministry of Home Affairs 2022) Vol 2, Table 3A.2; Deccan Herald, 'Human Sacrifices in India Over the Years', *Deccan Herald* (16 October 2022) <https://www.deccanherald.com/india/interactive-human-sacrifices-in-india-over-the-years-1154106.html> accessed 12 August 2025; The Hindu, 'Foolproof investigation launched into suspected 'human sacrifice' of two women, says Kerala CM' *The Hindu* (11 October 2022) <https://www.thehindu.com/news/cities/Kochi/foolproof-investigation-launched-into-suspected-human-sacrifice-of-two-women-says-kerala-cm/article65996086.ece> accessed 12 August 2025.

[25] Protection of Children from Sexual Offences Act 2012, (32 of 2012); *State of Rajasthan v Asharam* (n 7).

COMPONENT	DESCRIPTION	IMPLICATION
Spiritual Cover	Offender's actions are cloaked in theological legitimacy	Ensures public reverence and social insulation
Structural Crime	Abuse is embedded in an organisational hierarchy, not isolated conduct	Enables repetition, silence, and replication
Legal Evasion	Exploits constitutional and statutory loopholes to avoid scrutiny or prosecution	Reduces accountability and procedural visibility

This matrix enables prosecutors, judges, and policymakers to shift focus from individualised faith-based crimes to systemic patterns of impunity sustained by legal silence.

III. THE IMBALANCE OF ACCOUNTABILITY

India's constitutional framework grants religious organisations wide autonomy under Articles 25 to 28,[26] a gesture rooted in secularism, but this autonomy often enables impunity. Spiritual leaders and faith-based institutions have leveraged constitutional protections to shield misconduct, including sexual violence, trafficking, financial fraud, and illegal confinement.[27] The legal fabric meant to guarantee freedom of religion has become a refuge for unaccountable power.

This section critiques how doctrinal ambiguities and judicial silences have allowed religious organisations to escape scrutiny, even as analogous institutions, such as corporations or terror groups, are held collectively accountable. It argues for an urgent reconceptualization of legal liability and state oversight vis-à-vis religious actors.

A. Article 25

Article 25 guarantees religious freedom but subjects it to public order, morality, and health.[28] This qualification remains under-enforced. Courts have inconsistently applied it, protecting religious practices even when they produce clear harm. In *Bijoe Emmanuel v. State of Kerala*,[29] the Court upheld the primacy of personal belief, yet when

[26] Constitution of India, arts 25–28 (n 2).
[27] National Crime Records Bureau, *Crime in India* (2021) 20.
[28] The Constitution of India, art 25(1).
[29] *Bijoe Emmanuel v State of Kerala*, (1986) 3 SCC 615.

religious acts cause criminal injury, as with ritual-based sexual abuse or coercion, courts rarely invoke the "morality" limitation.

The problem lies in morality being read as cultural or religious rather than constitutional, grounded in the dignity and autonomy of the individual. Religious freedom ends where criminal harm begins. Failure to enforce this boundary has allowed spiritual authority to override basic rights.

B. Article 26- Denominational Rights Without Accountability

Article 26 allows religious denominations to manage their own affairs.[30] But who qualifies as a *"denomination"* remains ill-defined. In *The Commissioner, Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Shirur Mutt*,[31] the Supreme Court conferred wide latitude to religious bodies, treating even recently formed sects as denominations. Later cases like *Ismail Faruqui* reinforced this hands-off approach, solidifying judicial deference.[32]

This framework enables powerful religious organisations to operate with legal immunity. Many are registered as charitable trusts but function as unregulated empires, controlling land, education, media, and public opinion. When these entities become complicit in

[30] The Constitution of India, art 26.

[31] *The Commissioner, Hindu Religious Endowments v Sri Lakshmindra Thirtha Swamiar of Shirur Mutt* p 11.

[32] *M. Ismail Faruqui (Dr) v Union of India*, (1994) 6 SCC 360.

criminality, the law remains hesitant to ascribe institutional liability, treating abuse as the isolated misconduct of individuals.

C. Organised but Unaccountable- The Blind Spot in Group Liability

Indian criminal law recognises group-based offences in contexts such as terrorism,[33] economic crime,[34] and corporate misconduct.[35] These frameworks allow courts to presume group complicity, shift the burden of proof, and prosecute institutions. Yet no equivalent framework exists for religious organisations, despite their organised nature. When a 'godman' is convicted, the institution continues untouched, its assets intact, and its devotees uninformed. Unlike corporations, there is no concept of vicarious or command liability for faith-based groups.

This selective legal blindness sends a dangerous signal—organised criminality under the guise of religion will not face institutional scrutiny.

Table 2- Unequal Statutory Accountability in Indian Law

STATUE	PROVISION	SCOPE OF LIABILITY	TREATMENT OF GROUP-	RELEVANCE TO BLACK

[33] The Unlawful Activities (Prevention) Act 1967, (37 of 1967) s 15.
[34] Prevention of Money Laundering Act 2002, (15 of 2003) s 24.
[35] The Companies Act 2013, (18 of 2013) s 2(60) Ch XXVII.

			BASED OFFENCES	COLLAR CRIME
Bharatiya Nyaya Sanhita, 2023	§§ 173-176, 170(2), 184	General criminal procedure and offences	Focuses on individual actors; lacks provisions for institutional liability	Ignores spiritual hierarchies and organised criminality within religious institutions
Bharatiya Sakshya Adhiniyam, 2023	§§ 22, 27, 114	Presumptions in evidence law	No reverse burden or presumption for religious fraud or coercion	Allows undue deference to religious figures; no evidentiary safeguard for victims
Unlawful Activities (Preventi	§ 15	Defines "terrorist act"	Recognises collective intent and action; holds entire	Shows potential for organisational accountabilit

on) Act, 1967			organisations liable	y, missing in religious contexts
Maharashtra Control of Organised Crime Act, 1999	§§ 2(d), 3(2), 23	Defines and penalises organised crime	Explicit liability for syndicates and networks	Could serve as model for prosecuting structured spiritual abuse rings
Prevention of Money Laundering Act, 2002	§ 24	Reverse burden of proof for laundering	Assumes guilt in financial crimes; applicable to organisations	Could be extended to cover opaque spiritual donations and FCRA violations

Companies Act, 2013	§ 2(60), Chapter XXVII	Corporate liability and fraud	Recognises directors' and companies' liability for acts of employees and agents	Model for vicarious liability that can inform religious trust regulation
Protection of Children from Sexual Offences Act, 2012	§§ 19, 21	Mandatory reporting and aggravated offences	No institutional liability; only individuals prosecuted	Fails to hold ashrams/gurus accountable as systemic enablers of abuse

Table 2 reveals the statutory blind spot in addressing organised abuse by spiritual institutions, in contrast to other group-based offences.

D. Extending Vicarious Liability to Religious Bodies

Section 107 of the BNS introduces vicarious liability for corporate entities.[36] The logic is that organisations acting through human agents must bear responsibility for crimes that further institutional objectives.

The same principle applies to spiritual trusts and missions. When crimes like rape, child abuse, or financial fraud occur within institutional spaces enabled by obedience structures and coercion, liability must extend beyond the individual. If a company cannot distance itself from its CEO's illegal acts, why should a religious trust escape scrutiny when its spiritual leader offends?

Legislative reform must address this gap, by imposing vicarious liability on religious entities, attaching accountability to trustees, managers and office bearers.

E. *Article 27 & 28- State Support, Silent Compliance*

Article 27 forbids taxpayers from funding religious activity.[37] Article 28 bars religious instruction in state-funded institutions. Yet in practice, the state supports religious organisations through land leases, tax exemptions, and government-sponsored pilgrimages. Simultaneously, many religious schools receiving public aid continue to impart ideological indoctrination.

[36] Bharatiya Nyaya Sanhita, 2023 (45 of 2023) s 107.
[37] The Constitution of India, art 27.

This institutional complicity gives religious bodies both state endorsement and legal protection, without demanding transparency. The FCRA regime, which regulates foreign funding, has been used selectively, often weaponised politically, while systemic offenders enjoy continuity under the guise of tradition.[38] The framers of the Constitution envisioned religious freedom as a safeguard for belief, not a cover for abuse. Today, Articles 25 to 28 have become tools of strategic immunity for religious elites. The solution is not to curtail freedom of faith, but to ensure that this freedom does not shield systematic exploitation.

Unless courts and lawmakers revisit their doctrinal hesitations, the Indian state will remain a passive enabler of black-collar crime. A secular republic cannot afford selective blindness in the name of faith.

IV. MAPPING INDIAN LEGAL SILENCE

Religious criminality in India is not only under-reported alone; it is structurally under-recognised.[39] While Indian criminal law has tools to tackle organized violence, financial fraud, and group criminality, these mechanisms falter when the perpetrator is a spiritual or religious entity. This section maps the statutory vacuum that enables black collar crime, and offers a doctrinal argument for including group liability

[38] The Foreign Contribution (Regulation) Act, 2010 (42 of 2010) s 4.
[39] Bharatiya Nyaya Sanhita, 2023 (45 of 2023); Bharatiya Sakshya Adhiniyam, 2023 (46 of 2023).

frameworks, analogous to corporate criminal law, within this blind spot.

A. Black Collar Crime and the Bharatiya Nyaya Sanhita, 2023

BNS has introduced several procedural and substantive changes to India's penal framework. However, it remains silent on the question of institutional or group-based abuse. For instance, while Sections 173 to 176 criminalize public nuisance and offences relating to public health and morality, they treat such crimes as isolated acts of individuals, not patterns emerging from systemic abuse within religious organisations. [40]There is no provision classifying repeated sexual, financial, or psychological harm by religious bodies as organised criminality, like gangs or cartels under special statutes.

Further, Section 170(2) of the BNS, which deals with unlawful assemblies, makes no mention of institutional or spiritual collectives that incite violence or coercion under the guise of devotion.[41] Section 184, which criminalises failure to protect victims of sexual offences, fails to impose any duty on religious institutions, even where known patterns of sexual abuse exist within their ranks. This is a gaping omission, especially considering the judicial precedent under Criminal Procedure Code, 1973, Section 39, which mandates public reporting of

[40] The Bharatiya Nyaya Sanhita 2023, (45 of 2023) §§ 173-176.
[41] The Bharatiya Nyaya Sanhita 2023, (45 of 2023) § 170(2).

grave offences.[42] Its lack of enforcement in religious settings highlights the selective application of duty-based criminal norms.

B. Bharatiya Sakshya Adhiniyam- Presumptions Without Application

The BSA, India's revamped evidence law, also fails to disrupt the halo of presumed innocence surrounding religious leaders. Section 22 concerns the relevancy of character evidence but remains silent on whether spiritual authority should influence evidentiary thresholds.[43] This is critical as in multiple cases involving religious leaders, courts have implicitly relied on the accused's *"revered status"* to discredit victim testimony, despite no such provision existing in statutory law.[44] Section 27, which allows for the admissibility of information received in police custody, could be used to build conspiracy frameworks implicating multiple actors within an institution. Yet, in practice, investigation officers rarely pursue this line in cases involving religious figures, treating each offence as atomised rather than institutional.[45] Moreover, Section 114, which allows courts to presume certain facts based on human conduct and experience, is not triggered even when

[42] The Bharatiya Nyaya Sanhita 2023, (45 of 2023) § 184; The Criminal Procedure Code 1973, (2 of 1974) s 39.
[43] The Bharatiya Sakshya Adhiniyam 2023, (47 of 2023) § 22.
[44] *State of Punjab v Gurmit Singh*, (1996) 2 SCC 384; *Rai Sandeep v State (NCT of Delhi)*, (2012) 8 SCC 21; *State of Himachal Pradesh v Raghubir Singh*, (1993) 2 SCC 622; *Asaram Bapu v State of Rajasthan*, 2019 SCC OnLine SC 1070.
[45] Justice J.S. Verma Committee Report on Amendments to Criminal Law (2013); *State of Karnataka v J. Jayalalitha* (2017) 6 SCC 263; *CBI v Ramesh Gelli* (2016) 3 SCC 788.

victims of spiritual abuse exhibit consistent patterns of coercion, isolation, and delayed reporting. This doctrinal stagnation suggests that courts, though empowered to presume institutional abuse, choose not to when the accused wears the garb of sanctity.[46]

C. *Where Group Liability Exists, and Where It Does Not*

The legal inconsistency becomes stark when one compares the treatment of spiritual institutions with that of other organised groups.

Under the UAPA, Section 15 criminalises *"terrorist acts"* committed by organisations, allowing for designation of entire groups as unlawful.[47] Similarly, the Maharashtra Control of Organised Crime Act, 1999 uses Sections 2(d), 3(2), and 23 to treat group-based planning and benefit-sharing as aggravating factors, enabling the prosecution of entire criminal networks. These laws recognize that harm can be institutional, not just individual.[48]

Even in financial crimes, the PMLA, under Section 24, reverses the burden of proof, an acknowledgment that white-collar crimes are often orchestrated in layers of obfuscation.[49] The law demands that once basic facts are proven, the onus shifts to the accused to explain

[46] The Bharatiya Sakshya Adhiniyam 2023, (47 of 2023) §§ 27, 114.
[47] The Unlawful Activities (Prevention) Act 1967, (37 of 1967).
[48] The Maharashtra Control of Organised Crime Act 1999, (30 of 1999) §§ 2(d), 3(2), 23.
[49] Prevention of Money Laundering Act 2002, (15 of 2003) s 24.

legitimate sources of wealth. There is no reason this rationale should not apply to religious institutions receiving large-scale donations under opaque structures, particularly where violations of the FCRA have been consistently reported but rarely prosecuted.

This selective legal architecture implies that organised harm is prosecutable only when committed by political, financial, or militant actors, but not by spiritual institutions.

D. The Case for Vicarious and Institutional Liability

Incorporating institutional liability into the realm of spiritual harm is not legally unprecedented. The BNS, under Section 107, provides for the concept of vicarious liability in the context of corporate criminality. This principle, where higher-level actors can be held responsible for the actions of their subordinates if committed in the course of business, must be analogously extended to religious enterprises.[50] Religious institutions, especially those that operate trusts, receive public donations, own land, and control digital platforms, qualify as legal actors within the meaning of *"persons"* under various statutory schemes. If a company can be held vicariously liable for acts committed by its board, why not an ashram or mutt whose head permits, overlooks, or indirectly sanctions abuse?

A Faith-Fraud Nexus must thus be recognized in law. When religious actors manipulate spiritual narratives to coerce, isolate, or exploit, the

[50] The Bharatiya Nyaya Sanhita 2023, (45 of 2023) s 107.

crime transcends individual misconduct. It becomes a systemic institutional failing, and should be treated as such under law.

E. A Doctrinal Call for Reform

The absence of statutory recognition for black collar crime exposes a deeper normative failure: the legal system persistently treats religion as a private and inviolable sphere, insulated from public accountability. This doctrinal shield not only denies victims meaningful access to justice but also corrodes the constitutional guarantees of dignity, equality and the rule of law.

A Black Collar Crime Exception must be legislated to impose a heightened standard of institutional scrutiny whenever offences arise within religious settings. This provision should be inserted as an Explanation or Exception to Sections 170 and 184 of the *Bharatiya Nyaya Sanhita* 2023, accompanied by mandatory evidentiary presumptions under Sections 114A and a proposed 114B of the *Bharatiya Sakshya Adhiniyam* 2023, modelled on the presumptions applied in sexual offence cases.

Absent such reforms, Indian criminal law will continue to operate with deliberate partial blindness, unyielding against visible adversaries yet deferential in the presence of spiritual authority.

Table 3- Unequal Accountability, Group-Based Criminality in Indian Law

LEGAL DOMAIN	STATUTE	PROVISION(S) INVOKED	GROUP LIABILITY RECOGNISED?
Organized Crime	Maharashtra Control of Organised Crime Act, 1999	§§ 2(d), 3(2), 23	Yes
Terrorism	Unlawful Activities (Prevention) Act, 1967	§ 15	Yes
Financial Crimes	Prevention of Money Laundering Act, 2002	§ 24	Yes (Reverse burden)
Religious Institutions	Bharatiya Nyaya Sanhita, 2023	§§ 170(2), 173-176, 184	No

Evidentiary Framework	Bharatiya Sakshya Adhiniyam, 2023	§§ 22, 27, 114	No

Table 3 illustrates the legal asymmetry wherein group-based liability frameworks are rigorously enforced in select domains but systematically excluded when it comes to religious institutions.

V. CONSTITUTIONAL COMPLICITY

The Constitution of India guarantees a wide range of religious rights. This protective framework has been transformed into a shield for institutional wrongdoing Fundamental rights under Articles 25 to 28 were intended to balance faith with public order and individual liberty, but judicial interpretations have allowed organised religious power to override dignity, equality, and accountability.[51] This section critically examines the doctrinal overreach and institutional misapplication of religious freedom in the Indian context and argues that the constitutional silence toward systemic abuse by spiritual institutions violates the foundational right to dignity under Article 21.[52] It calls for a renewed jurisprudence grounded in constitutional morality, a

[51] The Constitution of India arts, 25-28 (n 3).

[52] The Constitution of India, art 21.

principle that must prevail when individual rights are trampled under the banner of collective faith.[53]

A. Article 25- The Shielding of Harm in the Name of Faith

Article 25(1) of the Constitution grants all persons the freedom of conscience and the right to freely profess, practice, and propagate religion.[54] In *Javed v. State of Haryana*, the Supreme Court upheld a law barring individuals with more than two children from contesting Panchayat elections.[55] Petitioners claimed that their religious tenets encouraged large families. The Court correctly rejected this claim, holding that personal religious beliefs must yield to public interest.

Similarly, in *Bijoe Emmanuel v. State of Kerala*,[56] the Court sided with school children who refused to sing the national anthem on religious grounds. While this decision protected non-conformist belief, its doctrine has since been expanded to defend organised institutional resistance to state regulation, often where *"belief"* is neither personal nor sincerely held but used as a tactical defence by powerful institutions.

The logic in *Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat*,[57] similarly highlights this tension. The Court upheld a municipal decision

[53] *Navtej Singh Johar v Union of India,* (2018) 10 SCC 1.
[54] The Constitution of India art, 25(1).
[55] *Javed v State of Haryana* (2003) 8 SCC 369.
[56] *Bijoe Emmanuel v State of Kerala*, (n 25).
[57] *Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat*, (2008) 5 SCC 33.

to close slaughterhouses during Jain festivals, citing religious sensibilities. While this appeared benign, it paved the way for the State to selectively accommodate religious practices without adequately assessing their impact on non-believers or subordinate group members within the religion itself, such as women or children subjected to oppressive spiritual environments.

B. Article 26- The Overbreadth of Denominational Autonomy

Article 26 grants every religious denomination the right to manage its own affairs in matters of religion, including establishing institutions and acquiring property.[58]

The Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Thirtha Swamiar of Shirur Mutt,[59] remains the bedrock of Article 26 jurisprudence. It laid down the test that religious denominations are entitled to autonomy not just in matters of worship, but in administration, so long as the activity is *"essential to religion."* While this test was designed to protect authentic religious practice, courts have routinely accepted claims of *"essentiality"* with insufficient scrutiny, allowing commercial or coercive activities to masquerade as religiously protected. This interpretive generosity was further entrenched in *Ismail Faruqui v. Union of India*, where the

[58] The Constitution of India, art 26.

[59] *The Commissioner, Hindu Religious Endowments v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, (1954) 1 SCC 412.

Court, while upholding the acquisition of the Babri Masjid site by the State, noted that the mosque was not an essential part of Islamic worship.[60] While this observation allowed state intervention in that specific context, the broader precedent reinforced judicial discretion in evaluating *"essentiality,"* often without a coherent test.

This unchecked autonomy raises a crucial structural concern—Indian courts have rarely required denominations to prove their claim to represent a distinct religious identity. In practice, ashrams, mathas, and godmen-led trusts claim denominational status without doctrinal or community-wide legitimacy, thereby hijacking constitutional protection to insulate opaque and abusive practices.

C. Article 27–Public Money for Private Faith

Article 27 prohibits the use of tax proceeds for promoting or maintaining any particular religion or religious denomination.[61] The State routinely subsidises religious events, manages temple boards, and allocates land and funds to faith-based institutions, many of which operate with little transparency and no independent oversight.

This constitutional gap becomes particularly dangerous when the institutions in question are credibly accused of large-scale abuse. Public funds and state facilitation, for example, in the form of subsidized pilgrimages or land allotments, thus risk indirectly

[60] *M. Ismail Faruqui (Dr) v Union of India* (n 28).
[61] The Constitution of India, art 27.

supporting spiritual organizations that engage in coercion, trafficking or fraud.

Even when courts have reviewed such allocations, their approach remains deferential. In *Subramanian Swamy v. State of Tamil Nadu*,[62] the Court upheld the State's management of the Chidambaram temple but emphasized the limited nature of state interference. This ambivalence, between the duty to protect and the deference to religious autonomy, has allowed the continued flow of public resources to opaque spiritual empires, further entrenching their impunity.

D. Article 28- Evasive Accountability in Religious Education

Article 28 prohibits religious instruction in educational institutions wholly maintained out of State funds.[63] However, the provision is riddled with exceptions. It does not apply to institutions administered by the State but established under endowments or trusts requiring religious instruction, nor does it bar voluntary attendance at religious teaching in recognized but not publicly funded institutions. While they may formally comply with Article 28, these institutions often promote hierarchical devotion to a spiritual leader, discourage critical thinking, and blur the lines between education and conversion.

[62] *Subramanian Swamy v State of T.N* (2014) 5 SCC 75.
[63] The Constitution of India, art 28.

Survivors of institutional abuse have consistently reported being recruited or initiated into such institutions through their educational wings, where belief was subtly cultivated and dissent punished. Yet, regulatory frameworks under the Right to Education Act[64] and University Grants Commission guidelines[65] have remained agnostic to these harms.

E. A Dignitarian Argument from Article 21

While Articles 25-28 have traditionally been seen as protective of religious rights, they must be re-read in conjunction with Article 21, which guarantees the right to life and personal liberty, now expansively interpreted to include dignity, autonomy, and freedom from exploitation.[66]

The Supreme Court has affirmed the primacy of dignity in *Common Cause v. Union of India*,[67] and *Puttaswamy v. Union of India*,[68] holding that personal liberty includes the right to privacy, bodily integrity, and decisional autonomy. When religious institutions engage in systematic physical, psychological, or sexual abuse, and when the State fails to prevent, investigate, or punish such abuse, it is not merely a failure of

[64] The Right of Children to Free and Compulsory Education Act, 2009.
[65] The University Grants Commission Act 1956, (3 of 1956).
[66] The Constitution of India, art 21.
[67] *Common Cause v Union of India* (2018) 5 SCC 1.
[68] *K.S. Puttaswamy v Union of India* (2015) 10 SCC 92.

governance. It is a constitutional failure, a direct affront to the victim's Article 21 rights.

Moreover, the jurisprudence on custodial violence (as in the case of *DK Basu v. State of West Bengal*)[69] imposes a heightened duty on the State to protect individuals from harm by powerful actors, especially in closed environments. Spiritual institutions function much like carceral spaces, marked by hierarchy, control, and secrecy, and yet they escape this higher scrutiny.

By allowing religious autonomy to override dignitarian imperatives, the Constitution, as interpreted and enforced today, enables complicity in harm. Victims of black collar crime thus do not merely suffer abuse, they suffer abandonment.

F. Constitutional Morality Over Ritual Sovereignty

The time has come to re-anchor India's religious freedom jurisprudence in constitutional morality, a concept reaffirmed by the Court in *Navtej Singh Johar v. Union of India*,[70] and *Indian Young Lawyers Association v. State of Kerala*,[71] *(famously known as the* **"Sabarimala Temple Case"**). Constitutional morality demands that

[69] *DK Basu v State of West Bengal* (1997) 1 SCC 416.

[70] *Navtej Singh Johar v Union of India* (p 47).

[71] *Indian Young Lawyers Assn. v State of Kerala*, (2017) 11 SCC 577.

private belief be protected only to the extent it does not infringe upon the constitutional values of dignity, equality, and autonomy.

Spiritual organizations, when acting as large institutional actors that control wealth, personnel, education, and influence, must not be treated as passive bearers of religious belief but as quasi-public bodies accountable to constitutional norms. Just as the Court in *Zoroastrian Co-operative Housing Society*[72] recognized that private entities exercising public functions are subject to constitutional scrutiny, so too must mathas, ashrams and religious trusts be examined not only in terms of their theological claims but their real-world conduct.

This reconceptualisation must also reflect in statutory reform–constitutional protections for religious denominations should be made contingent on demonstrable internal accountability, audited compliance with human rights standards, and statutory registration under a new oversight framework for spiritual bodies.

VI. SPIRITUAL BODIES AS QUASI-CORPORATE ACTORS

Contemporary spiritual institutions including ashrams, mutts, sectarian trusts and guru-led networks, operate far beyond informal communities of religious practice.[73] They are vast legal-economic entities, managing land, capital, personnel, digital influence, and transnational flows of

[72] *Zoroastrian Coop. Housing Society Ltd. v District Registrar, Coop. Societies (Urban)* (2005) 5 SCC 632.
[73] The Constitution of India, art 19(1)(c); The Societies Registration Act, 1860 (21 of 1860).

money.[74] Despite operating with corporate scale and sophistication, they are treated as sacred, unincorporated collectives.[75] This disjunction has enabled regulatory evasion, institutional opacity, and insulation from criminal liability.[76] This section argues for a shift in the legal imagination–religious bodies must be recognized and regulated as quasi-corporate actors subject to enterprise liability, compliance norms and personal accountability for harm.

A. The Economic and Legal Anatomy of Modern Spiritual Institutions

Indian spiritual institutions are among the wealthiest non-state actors in the country.[77] Major mutts and ashrams own vast swathes of real estate, receive international donations under the FCRA, operate educational and medical arms, run social media operations, and even engage in commercial activity like product sales and event management. Many operate under the legal shell of public charitable

[74] The Income Tax Act, 1961 (43 of 1961) s 11-13.
[75] The Charitable and Religious Trusts Act, 1920 (14 of 1920).
[76] The Companies Act, 2013 (18 of 2013) s 2(60).
[77] Controller and Auditor General of India, *Compliance Audit for the year ended March 2022 (Hindu Religious Institutions and Charitable Endowments Department, Government of Tamil Nadu*), Report of the Controller and Auditor General of India; India Today, 'The Rise of Spiritual Gurus' Empire of Wealth', *India Today*, 19 June 2011 <https://www.indiatoday.in/india/photo/the-rise-of-spiritual-gurus-empire-of-wealth-365710-2011-06-19> accessed August 25, 2025.

trusts or registered societies but are seldom subjected to the compliance scrutiny faced by comparable private sector entities.

Most importantly, these institutions are legally recognized entities. They sue and are sued, own immovable property, receive exemptions under tax laws (e.g., Sections 11-13 of the Income Tax Act, 1961), and hold FCRA registrations to receive foreign funds. They hire staff, lease land, purchase security services, and outsource digital operations. In form and function, they are legal persons, but without the obligations of one.

This is not an abstract concern. Survivors of abuse in such institutions face a critical accountability gap–the guru or spiritual head is often protected by concentric circles of trustees, managers, and legal entities. When wrongdoing occurs, financial fraud, illegal confinement, or sexual abuse–investigations often stall because the institution lacks formal responsibility and trustees claim ignorance or distance.

B. Trust Structures and the Evacuation of Responsibility

Most spiritual institutions in India are governed through trust law, either under the Indian Trusts Act, 1882 (for private trusts) or under State-specific public trust laws (such as the Bombay Public Trusts Act, 1950 or the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959). These frameworks permit religious trusts to be registered with minimal disclosure, and oversight mechanisms remain rudimentary.[78] Critically, trustees are not treated as directors, and the trust itself is not treated as a legal person in the corporate sense.[79] This creates several gaps including:

- No principle of command responsibility–trustees deny responsibility for operational decisions.[80]
- No vicarious liability–The trust is rarely held criminally responsible for actions committed under its aegis.[81]
- No mandatory disclosures–Annual returns, audits, and compliance are often weakly enforced, especially in religious trusts.[82]
- No beneficiary protection–Spiritual "*devotees*" or residents are not treated as beneficiaries with enforceable rights.

The FCRA has somewhat enhanced scrutiny, requiring registration and reporting of foreign donations.[83] Institutions such as the *Sanatan Sanstha or Narayan Sai Trust* have continued operations despite

[78] The Indian Trusts Act,1882 (2 of 1882); Bombay Public Trusts Act, 1950 (29 of 1950) ss 18-22; The Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 (22 of 1959).
[79] The Indian Trusts Act, 1882 (2 of 1882) s 10.
[80] The Companies Act, 2013 (18 of 2023) s 69.
[81] The Companies Act, 2013 (18 of 2023) s 2(60).
[82] The Income Tax Act, 1961 (43 of 1961) s 12A; The Bombay Public Trusts Act, 1950 (29 of 1950) s 32.
[83] Foreign Contribution (Regulation) Act, 2010 (42 of 2010) ss 12, 17.

credible reports of violence or abuse, demonstrating that registration alone does not ensure accountability.

C. Why Corporate-Style Liability Is Doctrinally Justified?

The evolution of corporate criminal liability in India offers a strong doctrinal template for regulating spiritual institutions.[84] Beginning with *Standard Chartered Bank v. Directorate of Enforcement*, the Supreme Court affirmed that companies can be prosecuted for offences requiring mens rea. This was extended in *Iridium India Telecom Ltd. v. Motorola Inc.*,[85] where the Court noted that corporate bodies can have a *"guilty mind"* through their directing minds.

This reasoning should be extended to non-profit religious enterprises. In many cases of spiritual abuse:

- The institution facilitates the abuse by controlling access, funding silence, or intimidating whistleblowers.
- The brand value of the institution enables continued abuse by shielding the abuser in spiritual legitimacy.
- The infrastructure and personnel of the institution are deployed to isolate, punish, or discredit victims.

[84] *Standard Chartered Bank v Directorate of Enforcement* (2006) 4 SCC 278.
[85] *Iridium India Telecom Ltd. v Motorola Inc.*, (2011) 1 SCC 74.

This is *functional equivalence* with corporate misconduct. Just as corporations are liable when their agents commit fraud or cause environmental harm, spiritual institutions must be liable for enabling abuse or protecting abusers. Indeed, Section 69 of the Companies Act, 2013 allows for liability of both the company and its officers in default.[86] A similar statutory framework for spiritual organizations would allow for:

- Institutional liability for criminal acts occurring within the ashram/mutt.
- Officer liability for trustees, managers, or senior devotees who knew or should have known.
- Reputational sanctions, such as deregistration or blacklisting under FCRA or income tax exemptions.[87]

D. Treating Mutts and Ashrams as Legal Enterprise Persons

The law has long recognised that legal personality is a matter of legal fiction. Hindu idols have long been treated as legal persons for purposes of property ownership (*Pramatha Nath Mullick*),[88] and trade

[86] The Companies Act, 2013 (18 of 2013) s 69.
[87] Foreign Contribution (Regulation) Act, 2010 (42 of 2010) ss 14-15; The Income Tax Act, 1961 (43 of 1961) s 12AA.
[88] *Pramatha Nath Mullick v Pradyumna Kumar Mullick* 1925 SCC OnLine PC 22.

unions, cooperatives, and even ships (*MV Elisabeth*) have been granted personhood[89] for specific legal ends.[90]

Given this doctrinal flexibility, it is both legitimate and urgent to treat spiritual institutions as enterprise persons, legal actors that can be held liable for harm, compelled to report misconduct, and subjected to independent oversight.

This would entail:

1. Mandatory registration of all religious institutions above a certain asset threshold under a new *Spiritual Enterprises Regulation Act*, akin to the Companies Act.

2. Public disclosure norms–assets, donors, expenditures, and audit reports must be disclosed annually.

3. Internal grievance redressal mechanisms, analogous to the POSH Act, with third-party oversight.[91]

4. Criminal liability–institutions can be named as accused in FIRs; trustees can be held personally liable for negligent supervision.

[89] The Trade Unions Act, 1926 (16 of 1926) s 13; The Co-operative Societies Act, 1912 (2 of 2012).
[90] *M.V. Elisabeth v Harwan Investment and Trading (P) Ltd.* 1993 Supp (2) SCC 433.
[91] Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (14 of 2013) s 4.

This proposal is not about undermining religion but about treating quasi-corporate spiritual actors by the same legal standards as any other institution controlling assets, people, and reputational legitimacy. Just as a private school is liable for abuse by its staff, so too must a spiritual trust be liable for abuse by its agents.

VII. CASE STUDY – ANATOMY OF BLACK COLLAR CRIME

The phenomenon of *"black collar crime"*, serious offences committed by self-styled spiritual leaders, presents a legal paradox: despite credible evidence of abuse, economic fraud, and institutional manipulation, prosecutions are delayed, diluted, or derailed.[92] This is not from a lack of statutory tools but from a persistent failure to activate them effectively.[93] Examining the cases of Asaram Bapu, Gurmeet Ram Rahim Singh, Narayan Sai, and Nithyananda reveals a systemic blind spot in treating religious power as criminal power.

A. Asaram Bapu

Convicted in 2018 for the rape of a minor under POCSO and IPC provisions, Asaram's prosecution was plagued by years of procedural

[92] The Indian Penal Code, 1860 (45 of 1860); The Protection of Children from Sexual Offences Act, 2012 (32 of 2012); The Code of Criminal Procedure, 1973 (2 of 1974) s 39.

[93] The Code of Criminal Procedure, 1973 (2 of 1974) s 173; The Bharatiya Nyaya Sanhita, 2023 (45 of 2023) ss 170, 184.

adjournments, intimidation, and reporting failures under CrPC §39 and POCSO §19.[94] The ashram was treated as a passive backdrop rather than an active enabler, with no institutional liability pursued despite evidence that staff and close aides facilitated isolation, indoctrination, and concealment.[95] This framing as an individual's moral failing, rather than a systemic abuse sustained by hierarchy, exemplifies the law's refusal to read religious institutions as structured entities with enterprise culpability.

B. Gurmeet Ram Rahim Singh

Leader of Dera Sacha Sauda, Singh was convicted of rape and implicated in murder and mass castration.[96] The CBI took years to frame charges after a High Court transfer, and despite the Dera's extensive foreign funding, no FCRA, FEMA or tax charges were pressed.[97] Operating as a *"shadow government"* with armed guards, volunteers, and an internal justice system, the Dera was never treated as an organised crime syndicate under laws like MCOCA.[98] Political patronage insulated it from scrutiny, while public rallies and intimidation campaigns silenced witnesses, illustrating how spiritual

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[94] The Protection of Children from Sexual Offences Act, 2012 (32 of 2012) ss 4–6, 19; The Code of Criminal Procedure, 1973 (2 of 1974) s 39.

[95] The Code of Criminal Procedure, 1973 (2 of 1974) ss 91, 160, 173.

[96] *Sant Gurmeet Ram Rahim Singh v Central Bureau of Investigation*, 2017 SCC OnLine P&H 3863; The Indian Penal Code, 1860 (45 of 1860) ss 302, 376, 120B.

[97] The Foreign Contribution (Regulation) Act, 2010 (42 of 2010) ss 11–17; The Foreign Exchange Management Act, 1999 (42 of 1999); The Income Tax Act, 1961 (43 of 1961) ss 12A–13.

[98] The Maharashtra Control of Organised Crime Act, 1999 ss 2(d), 3(2), 23.

identity distorts prosecutorial priorities and shields institutions from financial and organised crime frameworks.

C. Narayan Sai

As Asaram's son and heir, Narayan Sai replicated his father's coercive ecosystem, facing charges of rape, confinement, conspiracy, and forgery.[99] Despite clear evidence of command obedience, blackmail, and coordinated abuse, the prosecution treated him as an isolated offender rather than part of a designed command structure. No charges targeted the trust or ashram, nor were CrPC §§91 or 204 used to compel disclosure of records and donation trails. The omission of Sections 34 and 120B to address institutional conspiracy reflects a broader judicial failure to map accountability chains within religious organisations.[100]

D. Nithyananda

Accused of rape, confinement, child abuse, and financial fraud, Nithyananda evaded arrest and declared a self-styled *"Hindu sovereign nation"* called Kailasa.[101] India's ineffective extradition measures under BNSS, combined with the absence of decisive MLAT use, left

[99] The Indian Penal Code, 1860 (45 of 1860) ss 376, 342, 120B, 420; The Code of Criminal Procedure, 1973 (2 of 1974) ss 91, 204.

[100] The Indian Penal Code, 1860 (45 of 1860) ss 34, 120B; The Code of Criminal Procedure, 1973 (2 of 1974) ss 91, 204.

[101] The Indian Penal Code, 1860 (45 of 1860) ss 376, 344, 370, 420; The Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016); The Protection of Children from Sexual Offences Act, 2012 (32 of 2012) ss 19–21.

warrants unexecuted.[102] The institution's cross-jurisdictional operations, spanning Tamil Nadu, Gujarat and Karnataka, were never consolidated under CrPC §§220-223, nor was the trust prosecuted despite orchestrating and financing the abuse.[103] Even in fugitivity, the organisation continued digital outreach, fundraising and *"citizenship"* schemes, exposing the State's tolerance of open defiance to its jurisdiction.

Across these four examples, the patterns are consistent, structural opacity, doctrinal reluctance to impose collective liability, procedural leniency toward politically connected spiritual leaders, and judicial exceptionalism that treats godmen as sui generis rather than systemic risks.[104] The failure to invoke doctrines of group criminality under IPC §§34, 120B, 107-109 or financial laws like PMLA and FCRA allows such organisations to survive, rebrand, and perpetuate harm under successor leadership.[105] This is less prosecutorial negligence than a structural design flaw: spirituality operates as a cloak of legal immunity, delaying trials, weakening charges, and suppressing witnesses. Until Indian criminal law confronts spiritual institutions as

[102] The Bharatiya Nagarik Suraksha Sanhita, 2023 (46 of 2023) ch XXXI; Mutual Legal Assistance Treaties (MLATs) under The Code of Criminal Procedure, 1973 (2 of 1974) ch VIIA.
[103] The Code of Criminal Procedure, 1973 (2 of 1974) ss 220–223.
[104] The Indian Penal Code, 1860 (45 of 1860) ss 34, 107–109, 120B; The Prevention of Money-Laundering Act, 2002 (15 of 2003) s 24; The Foreign Contribution (Regulation) Act, 2010 (42 of 2010) ss 11–15.
[105] The Maharashtra Control of Organised Crime Act, 1999 ss 2(d), 3(2), 23 (n 91); The Unlawful Activities (Prevention) Act, 1967 (37 of 1967) s 15 (n 29); The Companies Act, 2013 (18 of 2013) s 2(60) (n 70).

potential enterprise offenders, black collar crime will persist as an endemic, unacknowledged form of criminality, rooted in charisma, cloaked in sanctity and immune by design.

VIII. LEGISLATIVE AND DOCTRINAL PROPOSALS

The preceding analysis reveals a systematic vacuum: while Indian law offers robust tools to address individual crime, it falters when those offences are embedded within institutions of religious power.[106] What sustains such abuse is not only faith-based cover but also legal exceptionalism, especially under Article 26, and outdated criminal thresholds that presume individual guilt while overlooking collective structures.[107] The following proposals aim to rebalance the equation, restoring dignity to victims without undermining legitimate belief.

A. Extending Criminal Liability to Spiritual Institutions

Current criminal procedure does not provide for holding religious organisations collectively liable when offences arise from institutional design, tolerance, and knowledge. Neither the BNSS nor the BSA attributes responsibility to a spiritual body and its governing board, even when the conduct is systemic and enabled by organisational

[106] The Constitution of India, arts 25–28; The Bharatiya Nyaya Sanhita, 2023 (45 of 2023); The Bharatiya Nagarik Suraksha Sanhita, 2023 (46 of 2023).
[107] The Constitution of India, art 26(b); S R Bommai v Union of India (1994) 3 SCC 1.

structures. Comparable regimes, such as the Companies Act and environmental statutes, already recognise vicarious liability for collective entities.[108]

A targeted amendment should insert into the BNSS a clause, modelled on Section 107 of the BNS, to impose liability where:

- Multiple offences are committed by affiliated persons, including preachers, trustees and caretakers;
- The institution had actual as well as constructive knowledge of the conduct;
- The acts occurred in the course of religious duty and institutional representation.[109]

This would enable prosecutors to proceed against the institutional entity alongside individual offenders, acknowledging the enterprise nature of abuse and closing the accountability gap created by the exceptional treatment of religious bodies.

B. Treating Institutional Silence as an Aggravating Factor under POCSO

[108] The Companies Act, 2013 (18 of 2013) s 2(60) (n 70); The Environment (Protection) Act, 1986 (29 of 1986) s 16.
[109] The Bharatiya Nyaya Sanhita, 2023 (45 of 2023) s 107

The POCSO mandates reporting under Section 19 but does not treat sustained institutional silence as a distinct aggravating circumstance.[110] Spiritual organisations frequently suppress complaints, coach witnesses, and create a hostile environment for disclosure, yet the statute addresses only individual failure to report.[111]

Section 28 should be amended to include specific aggravating factors that warrant enhanced sentencing:

- Wilful suppression of complaints by the head of the institution;
- Coaching, intimidation and coercion of witnesses by religious authorities;
- A documented pattern of prior complaints ignored by the organisation.

Incorporating these provisions would ensure that courts assess institutional conduct alongside individual acts, recognising silence as an active mechanism of harm that perpetuates abuse within spiritual enterprises.[112]

C. *Defining the 'Black Collar Enterprise' in Law*

[110] The Protection of Children from Sexual Offences Act, 2012 (32 of 2012) ss 19, 21.
[111] The Protection of Children from Sexual Offences Act, 2012 (32 of 2012) s 28.
[112] The Bharatiya Nagarik Suraksha Sanhita, 2023 (46 of 2023) ch XVII.

Indian statutes do not contain a legal definition capable of capturing the structural nature of abuse within spiritual institutions.[113] Existing descriptors such as *"sect"* and *"cult"* are sociological, lack juridical precision, and fail to trigger targeted procedural safeguards. Without a statutory category, prosecutorial and judicial approaches default to treating offences as isolated acts committed by individuals. A model clause should be introduced, either as part of special legislation or through amendment to the BNSS, defining a Black Collar Enterprise as:

> *"A religious or spiritual institution, trust, or body corporate, whether registered or unregistered, that:*
> *(a) derives authority through claimed divine status and theological mandate;*
> *(b) exercises control over members through spiritual influence and isolation;*
> *(c) engages in, facilitates, or sustains repeated legal violations, including sexual, economic and physical abuse;*
> *(d) demonstrates systemic suppression of complaints and resistance to external oversight."*

This definition would create a statutory trigger for applying enhanced investigative powers, expedited trial procedures, and enterprise

[113] The Maharashtra Control of Organised Crime Act, 1999 ss 2(d), 3(2), 23 (n 91); The Unlawful Activities (Prevention) Act, 1967 (37 of 1967) s 15.

liability provisions comparable to those available under MCOCA and UAPA.

D. Limiting Article 26 Immunity in Cases of Systemic Victimisation

Judicial interpretation of Article 26(b) since *Shirur Mutt* has preserved extensive autonomy for religious institutions in managing their internal affairs, even in circumstances involving economic opacity and governance failures.[114] This protection has, in practice, been extended to organisations implicated in sustained abuse, allowing them to invoke constitutional immunity to resist oversight.

The Supreme Court should formulate, through Article 142,[115] a doctrinal test establishing that:

> *"When a religious institution is found through judicial inquiry or official investigation to have facilitated, enabled, or tolerated systemic violations of fundamental rights, including sexual, physical, and economic abuse, it shall not be entitled to immunity under Article 26(b), and its management shall be subject to statutory regulation without exemption."*

[114] The Constitution of India, art 26(b) (n 26); The Commissioner, Hindu Religious Endowments v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt (p 11).
[115] The Constitution of India, art 142.

Such a clarification would align with the trajectory set in *Sabarimala Temple Case*, where the Court prioritised dignity and equality over ritual autonomy, and would prevent the continued misuse of constitutional protection by harm-producing institutions.[116]

E. Strengthening Financial Transparency of Religious Institutions

Spiritual organisations in India commonly operate as public trusts or Section 8 companies, yet they remain outside the asset disclosure and governance standards applicable to corporate entities and political parties.[117] While the FCRA requires reporting of foreign contributions, domestic financial flows often remain opaque, creating conditions for misuse, diversion of funds, and concealment of illicit activity.

Regulatory reform should address this gap through:

- Amendments to SEBI guidelines[118] mandating enhanced financial disclosures from trusts exceeding a defined threshold of annual receipts or landholdings;

[116] *Indian Young Lawyers Assn. v State of Kerala* (p 65).
[117] The Income Tax Act, 1961 (43 of 1961) ss 11–13; The Foreign Contribution (Regulation) Act, 2010 (42 of 2010) ss 11–17; The Companies Act, 2013 (18 of 2013) s 8.
[118] The Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, regs 33–36.

- A dedicated schedule under the FCRA Rules requiring quarterly publication of audited financial statements for religious institutions with annual receipts above ₹1 crore;[119]
- Mandatory audit rotation to prevent entrenched conflicts of interest;
- A centralised registry of affiliated institutions, trustees, and beneficiaries.

Such measures would extend financial transparency obligations to spiritual enterprises, enabling earlier detection of economic offences and aligning regulatory oversight of religious trusts with that of other significant public-facing entities.

F. Towards a Coherent Doctrinal and Institutional Framework

The proposed reforms collectively address the structural deficiencies that have allowed spiritual enterprises to evade legal accountability despite documented patterns of abuse. They are designed to integrate enterprise liability, aggravating factors for institutional silence, a clear statutory definition of black collar crime, constitutional limits on Article 26 protection and mandatory financial transparency into the criminal justice framework.

This approach affirms the constitutional value of religious freedom while rejecting the premise that faith-based institutions occupy a

[119] The Foreign Contribution (Regulation) Rules, 2011, rr 17–20.

jurisdiction-free zone. It aligns with the jurisprudence of constitutional morality, as articulated in *Navtej Singh Johar* and *Sabarimala*,[120] which prioritises the dignity and equality of individuals over the autonomy of unaccountable power structures. The Constitution, as repeatedly emphasised by the Supreme Court, is a living document that must animate all aspects of governance, including the regulation of religious bodies when they function as vehicles of systemic harm.

Adopting this framework would mark a decisive shift from treating spiritual offences as isolated acts of deviance to recognising them as manifestations of organised, institutional criminality. It would also restore balance between the protection of genuine religious practice and the imperative to safeguard citizens from abuse conducted under the cover of sanctity.

IX. CONCLUSION

The question before Indian law is not whether faith should be free, but whether freedom of religion should include the freedom to harm.[121] This paper has demonstrated how Indian legal doctrine and criminal process have failed to grapple with the systemic abuse emerging from certain religious institutions, abuse that is sustained not just by silence or delay, but by a deeper deference to the spiritual as legally

[120] *Indian Young Lawyers Assn. v State of Kerala*, (p 65) & *Navtej Singh Johar v Union of India,* (p 47).
[121] The Constitution of India, art 25(1) (n 24).

untouchable.[122] The perpetrators of such abuse do not act alone; they operate within cloistered structures of trust, economic insulation and theological coercion that defy conventional legal frameworks.[123] Yet, even in the face of repeated scandals, the law continues to treat such cases as anomalies rather than endemic features of unchecked spiritual power.[124]

The need, is not to restrict religious freedom but to criminalise its exploitation.[125] Religious liberty, like any other right, must carry with it reciprocal responsibilities.[126] This paper has sought to lay the foundation for a legal shift that takes seriously the organised nature of spiritual abuse and the institutional impunity that enables it.[127]

It does so by introducing the term black collar criminality, offering a clear legal category for harms committed by spiritual actors under the guise of religious legitimacy.[128] Drawing from white collar

[122] The Code of Criminal Procedure, 1973 (2 of 1974) s 39; The Protection of Children from Sexual Offences Act, 2012 (32 of 2012) s 19.

[123] The Indian Trusts Act, 1882 (2 of 1882) (n 15); The Bombay Public Trusts Act, 1950; The Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959.

[124] *State of Rajasthan v Asharam* (p 7); *Central Bureau of Investigation v Gurmeet Ram Rahim* (p 8); S*tate of Gujarat v. Narayan* (p 9).

[125] The Constitution of India, art 25(2)(b).

[126] The Constitution of India art 21 (n 46); *K.S. Puttaswamy v Union of India* (p 62).

[127] The Constitution of India art 26(b); *The Commissioner, Hindu Religious Endowments v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (p 11).

[128] The Maharashtra Control of Organised Crime Act, 1999 (n 91); The Unlawful Activities (Prevention) Act, 1967 (37 of 1967) s 15; The Companies Act, 2013 (18 of 2013) s 2(60).

criminology and corporate accountability principles, the paper argues that these crimes must be treated not as aberrations but as patterned phenomena deserving of structured legal recognition. The term is intended to move discourse beyond the sensational headlines of *"godman crimes"* and instead embed these acts within a rigorous framework of accountability.[129]

The paper has further proposed a recalibration of constitutional interpretation. By critically examining Articles 25 to 28, it has exposed how vague terms like *"denomination"* and *"religious freedom"* have been overextended to shield institutions from scrutiny, often at the cost of the dignity and safety of victims.[130] Where systemic abuse occurs, especially with state complicity or inaction, constitutional morality must override private belief. The State's role is not to defer to religious power, but to uphold fundamental rights when they are most vulnerable to violation.

A prosecutorial solution is also advanced in the form of the Faith-Fraud Test, a structured multi-factor tests to help police, courts and regulators identify religious enterprises that operate in clear divergence from secular law. The test emphasises early statutory triggers such as opacity, coercive theology, and patterns of member isolation, and is

[129] *Standard Chartered Bank v Directorate of Enforcement*; *Iridium India Telecom Ltd. v. Motorola Inc.*, (p 78).
[130] *Common Cause v Union of India* (p 61); *M. Ismail Faruqui (Dr) v. Union of India* (p 28).

designed for use at the threshold of criminal proceedings or constitutional review.

Finally, the paper reframes spiritual institutions as quasi-corporate actors. From land ownership and FCRA inflows to trust structures and internal hierarchies, these institutions operate with financial and administrative complexity on par with corporate entities, but without the corresponding legal duties. The proposal to treat them as legal persons under criminal law paves the way for the insertion of vicarious liability clauses, mandatory asset disclosures and aggravated penalties for institutional silence.

What emerges is not a call for religious disenchantment, but for legal realism. Faith, after all, cannot demand immunity from law when it exercises control over bodies, property and power. A truly secular constitutional order does not erase religion, but demands its coexistence with accountability. It ensures that belief, however sacred, must yield where it begins to harm.

In a democratic society founded on dignity and rights, the spiritual must never eclipse the legal. To secure justice for victims of black collar crime is not to suppress belief, it is to rescue it from impunity.

REJECTING LEX SPECIALIS, AFFIRMING SYSTEMIC INTEGRATION: THE ICJ'S ADVISORY OPINION IN OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

Abhijeet Shrivastava[*]

ABSTRACT

In its landmark advisory opinion on the Obligations of States in Respect of Climate Change, the International Court of Justice opined that States have obligations under a wide range of treaties, and customary international law, to, among other things, ensure the protection of the climate system from anthropogenic greenhouse gas emissions, and to prevent significant harm thereof. While its findings will be studied on many issues for decades to come, the present commentary focuses on an underlying matter of methodology. As a Court with general subject-matter jurisdiction, the Court was entrusted with the request for an advisory opinion to

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opine on the implications of a variety of international legal norms. It was argued by some participants that the climate change treaty regime constituted lex specialis, i.e., a body of special rules which precluded the applicability of other rules of international law that may, otherwise, have been relevant as regards the conduct of States with respect to climate change. The Court, however, rejected this argument; not only that, the Court affirmed the necessity to interpret certain norms in question whilst taking account of other relevant rules of international law, i.e., it signalled support towards the systemic integration principle in the climate change context. This commentary studies the approach of the Court on both a general and granular level, seeking to examine the key insights and noteworthy omissions in the reasoning of the Court on the interrelationship between a variety of international legal norms. It will be seen that the Court's approach reflects a balance of harmonisation, respecting the consent of States not to be bound by certain

rules, and a pragmatism in international climate change governance.

Keywords: *International Court of Jutice (ICJ), State Obligations, Lex Specialis, Climate Change.*

I. INTRODUCTION

23rd July 2025 will be remembered as a historic day, considering that the International Court of Justice ("ICJ") delivered, unanimously, its highly anticipated advisory opinion on the *Obligations of States in respect of Climate Change*.[1] The advisory opinion, which was requested by the United Nations General Assembly, is significant for many reasons. Over 100 States and international organisations participated in the written and oral stages of the proceedings, something unprecedented in the history of the Court.[2] Such wide engagement attests to the perceived importance of the challenges surrounding climate change, as well as the role of the Court in clarifying the obligations of States thereof. Uniquely, the impetus for this advisory opinion was borne of the collective efforts of those

[1] *Obligations of States in respect of Climate Change* (Advisory Opinion) [2025] <https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf> accessed 18 July 2025.

[2] *Climate Change AO* (n 1) ¶¶ 17, 24, 35.

marginalised the most by climate change, the foundation for which was laid by youth mobilisation from within the Pacific Island countries.[3]

In a nutshell, the Court affirmed that States have obligations under international law to protect and prevent harm to the climate system, including with respect to fossil fuel activities within their jurisdiction. The Court's advisory opinion was wide-ranging in terms of the themes it touched upon in respect of their implications regarding climate change.[4] Most Judges also authored individual or joint opinions appended to the advisory opinion; some of these have been characterised as a dissent "in all but name".[5] However, as a corollary, this fact demonstrates that the issues over which consensus could indeed develop and materialize in the text of the advisory opinion should be given great weight as an authoritative statement by the world's highest court, despite the formally non-binding character of an advisory opinion.[6]

[3] Margaretha Wewerinke-Singh, Ayan Garg and Jacques Hartmann, 'The advisory proceedings on climate change before the International Court of Justice' [2023] 102 QIL, Zoom-in 23-43.
[4] *Climate Change AO* (n 11) i-iv.
[5] Mario Prost, 'Disaster Passing as Miracle? A Critical Take on the ICJ's Climate Advisory Opinion' (*EJIL:Talk!*, 14 August 2025), <https://www.ejiltalk.org/disaster-passing-as-miracle-a-critical-take-on-the-icjs-climate-advisory-opinion/> accessed 14 August 2025.
[6] Vahid Rezadoost, 'Unveiling the 'author' of international law — The 'legal effect' of ICJ's advisory opinions' [2024] 15:4 Journal of International Dispute Settlement 506-533.

The Court's advisory opinion concerns a wide array of topics of controversy, including, but far from being limited to, the continuity of statehood despite the submergence of territory owing to sea-level rise, the scope and content of the obligation to prevent significant harm to the climate system, due diligence as a standard of conduct for measuring compliance with particular primary obligations and other important issues.[7] The Court's views and omissions will, undoubtedly, be studied for years to come.

This commentary, however, will focus on one cross-cutting issue concerning the methodology of the Court, which affected its findings—namely, the systemic interrelationship between rules of international law from a range of contexts and areas, when it comes to the obligations of States with respect to climate change.

In this regard, two particular matters will be addressed: the Court's rejection of the argument that the climate change treaty regime constituted a '*lex specialis*' (i.e., a body of special rules in the climate change context) to the exclusion of other international legal rules; and secondly, the Court's slightly cautious, but noteworthy approach to the 'systemic integration' of rules of different rules of international law, in identifying and giving meaning to the obligations of States concerning climate change. The Court's views on these matters will have an

[7] 'Systemic Impacts and Structural Shifts: Climate Change and the Role of the ICJ Advisory Opinion' (*Völkerrechtsblog*, August 2025) <https://voelkerrechtsblog.org/symposium/symposium-on-the-icj-climate-change-advisory-opinion/> accessed 18 December 2025.

enduring influence not only in the climate change discourse, but in any proceeding in the future where *lex specialis* or systemic integration questions arise.

II. THE *LEX SPECIALIS* CONTROVERSY

The United Nations Framework Convention on Climate Change ("UNFCCC"), 1992, was the first treaty specifically regulating international climate change governance.[8] Under the purview of this regime, other treaties of significance were also adopted. The Kyoto Protocol, 1997, was the first treaty creating obligations for certain States towards cutting emissions; however, it was widely regarded as a failure for many reasons, including the fact that binding obligations were limited to 'Annexe I' (i.e., developed) countries.[9] The Paris Agreement, 2015, was seen as a breakthrough, given the fact that it crafted obligations for all countries, whether developed, developing, or least developed, towards emission cuts and other measures with a view to tackling climate change.[10] This agreement, however, was also not without its deficiencies and concessions. It was made possible by the

[8] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

[9] Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162; Christopher Napoli, 'Understanding Kyoto's Failure' [2012] 32:2 The SAIS Review of International Affairs 183-196.

[10] Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79.

formulation of "Nationally Determined Contributions" ("NDCs"), which were commitments made voluntarily by each country towards a common global temperature target.[11] Whereas promising on first impressions, there increasingly arose questions on whether NDCs would be ambitious enough, or in any case, timely, to ensure the realisation of the goals envisaged under the Paris Agreement.[12] Moreover, the Paris Agreement was drafted with notable omissions; as but one example, its text does not restrict activities surrounding fossil fuels, which are the most prominent contributors to climate change.[13] Further decisions on such issues could be made, with the consensus of the States Parties, within the framework of the Conference of the Parties to these treaties.[14] Still, this regime of successive treaties constituted what the Court characterised as the climate change treaty regime.

The Court held that States in formulating their NDCs must ensure their ambitions are progressively higher rather than merely a cosmetic exercise, and in line with a stringent 'due diligence' standard, tempered by the principle of common but differentiated responsibilities and

[11] ibid art 4(2).
[12] Manjana Milkoreit, 'The Paris Agreement on Climate Change—Made in USA?' [2019] 17:4 Perspectives on Politics 1019-1037.
[13] Abhijeet Shrivastava, 'A Moment for Momentum: Due Diligence Regarding Fossil Fuel Activities in the ICJ's Advisory Opinion' (*Indian Blog of International Law*, 9 August 2025) <https://allaboutil.wordpress.com/2025/08/09/due-diligence-regarding-fossil-fuel-activities/> accessed 18 December 2025.
[14] *Climate Change AO* (n 1) ¶ 184.

respective capabilities.[15] However, one question remained—were the obligations under this regime, such as to develop and act on NDCs, exclusive to other possible obligations that might be implicated by climate change? In other words, was the climate change treaty regime a '*lex specialis*', a body of special rules regulating the conduct of the States Parties regarding that phenomenon, precluding the applicability of obligations under other areas, such as the law of the sea, human rights law or customary international law more widely?[16] It is noteworthy that to characterise a body of law as '*lex specialis*' may imply, depending on the circumstances, either (a) that it is of exclusive application, displacing other rules (as a tool of conflict resolution), or (b) that it results in that body of law being co-applicable with others, but acting as the interpretive prism for the co-applicable rules (as a tool of harmonisation).[17] Here, it was argued in the former conception.

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[15] *Climate Change AO* (n 1) ¶¶ 233-249.

[16] *Climate Change AO* (n 1) ¶¶ 162, 166; Abhinandita Biswas, 'ICJ Rejects the Narrow Framing of Lex Specialis in its Climate Change Advisory Opinion' (*Indian Blog of International Law*, 11 August 2025) <https://allaboutil.wordpress.com/2025/08/11/icj-rejects-the-narrow-framing-of-lex-specialis/> accessed 12 August 2025.

[17] Amirabbas Kiani, 'From 'Nuclear Weapons' to 'Climate Change': The ICJ's Approach to the lex specialis Maxim' (*Opinio Juris*, 7 November 2025) <https://opiniojuris.org/2025/11/07/from-nuclear-weapons-to-climate-change-the-icjs-approach-to-the-lex-specialis-maxim/ed> accessed 18 December 2025; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 229-261.

This argument was advanced, strategically, by countries, such as those highly reliant on fossil fuels, that sought to minimise international legal scrutiny to the fullest extent possible. To suggest that the climate change treaty regime, with its deficiencies, was the exclusive body of international law that addressed the obligations of States Parties as regards climate change, was a tactic to deny the applicability of a variety of other international legal norms, which could impose possibly more stringent requirements than the voluntary or less than truly effective targets set within this regime.

A year prior to the ICJ's delivery of its advisory opinion on this matter, the International Tribunal on the Law of the Sea ("ITLOS") had already pronounced on the implications of climate change, particularly for States Parties of the United Nations Convention on the Law of the Sea ("UNCLOS"), 1982.[18] The ITLOS was also presented with an argument that the climate change treaty regime constituted a '*lex specialis*', to the extent of excluding the applicability of UNCLOS when it came to the obligations of States Parties concerning the oceans and the marine environment; or, even if UNCLOS co-applied, the thresholds via which the breaches of UNCLOS obligations were to be determined, were to be found in NDCs and other commitments undertaken under the climate change treaty regime.[19] The ITLOS

[18] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

[19] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Advisory Opinion) (2024) ITLOS Case No 31 para 220.

unanimously and firmly rejected the *lex specialis* contention. In the view of the ITLOS, while the climate change treaty regime and the provisions of the UNCLOS pertinent to States Parties' conduct surrounding climate change were complementary, this did not mean that their obligations under the UNCLOS "would be satisfied simply by complying with the obligations and commitments under the Paris Agreement".[20] In this vein, the ITLOS signalled clearly that the UNCLOS could, depending on the circumstances, impose a more stringent standard of conduct than foreseen in the climate change treaty regime.[21] The separate, but complementary, application of these international legal rules was preserved.

The ICJ followed the path set forth by the ITLOS in many ways. Like the ITLOS, the ICJ found that whereas a number of wide-ranging obligations under international law were pertinent with respect to climate change, these obligations were not, as such, displaced by the climate change treaty regime.[22] In this regard, the climate change treaty regime offered no indication that it was meant to apply to the exclusion

[20] ibid ¶¶ 223-224.
[21] Bastiaan Klerk, 'The ITLOS advisory opinion on climate change: Revisiting the relationship between the United Nations Convention on the Law of the Sea and the Paris Agreement' [2025] 34:1 Review of European, Comparative and International Environmental Law 181-193; Christina Voigt, 'ITLOS and the importance of (getting) external rules (right) in interpreting UNCLOS' (*Verfassungsblog*, 29 May 2024) <https://verfassungsblog.de/itlos-and-the-importance-of-getting-external-rules-right-in-interpreting-unclos/> accessed 18 December 2025.
[22] *Climate Change AO* (n 1) ¶¶ 162-171

of the applicability of other rules that may bear on the same subject matter, namely, climate change.[23] Therefore, the Court opined on a variety of international legal norms which regulated the conduct of States Parties as regards climate change, including, as previously mentioned, the customary duty to exercise due diligence to prevent significant harm (in this instance) to the climate system.[24]

However, the ICJ went further to state:

> *"As it is difficult to determine in the abstract the extent to which the climate change treaties and their implementation practice influence the proper understanding of the relevant customary obligations and their application, the Court considers that, at the present stage, compliance in full and in good faith by a State with the climate change treaties, as interpreted by the Court (see paragraphs 174-270 above), suggests that this State substantially complies with the general customary duties to prevent significant environmental harm and to co-operate. This does not mean, however, that the customary obligations would be fulfilled simply by States complying with their obligations under the climate change treaties (see Climate Change, Advisory Opinion, ITLOS Reports 2024, pp. 85-86, para. 223). While the treaties and customary international law inform each*

[23] *Climate Change AO* (n 1) ¶¶ 168-169.
[24] *Climate Change AO* (n 1) ¶ 172.

> *other, they establish independent obligations that do not necessarily overlap."*[25]

The first part of this paragraph can possibly be interpreted as watering down the Court's rejection of the *lex specialis* argument. It could be viewed as suggesting that, although the climate change treaty regime did not wholesale displace other obligations pertinent to climate change, it did, however, provide for the operational thresholds for examining breaches of the former. In effect, then, a State compliant with its NDCs, or other such commitments, "substantially complies" with other rules under international law; the burden is on its opponents to demonstrate otherwise.

That, however, is not the end of the story. As the second part of the same paragraph warns, referring clearly to the view of ITLOS on the matter, complementary obligations nevertheless retain their separate existence. A State compliant with its obligations under the climate change treaty regime may, despite that, be acting in a given situation in breach of its obligations under the UNCLOS, human rights treaties, or of customary legal norms, such as the prevention principle. Judges Charlesworth, Brant, Cleveland, and Aurescu emphasise in their joint declaration devoted to this issue that:

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[25] *Climate Change AO* (n 1) ¶ 314.

> *"When read in isolation, these formulations of the relationship between customary law and treaty law with respect to climate change appear ambiguous and potentially misleading. They must, however, be read within the frame of the whole Opinion, in conjunction with its relevant findings. In our view, paragraphs 314 and 315 should not be interpreted to suggest that compliance with customary rules may be assessed only by reference to the climate change treaties, since the Court expressly rejects this reading when emphasizing that obligations under customary law are not fulfilled simply by States complying with their obligations under the climate change treaties. As the Court recognizes, the treaties and customary international law establish independent obligations that do not necessarily overlap. Any other interpretation would run contrary to the rules of international law and the Opinion as a whole."*[26]

Judge Tladi, in his declaration, suggests that the Court's choice to include this paragraph was because, as a "practical matter, the Paris Agreement "currently commands much of the attention of the States".[27] The Court's reference to the climate change treaty regime, then, as a yardstick to evaluate, at least as a starting point, compliance with other

[26] *Obligations of States in respect of Climate Change* (Joint declaration of Judges Charlesworth, Brant, Cleveland and Aurescu) [2025] <https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-09-en.pdf> accessed 18 December 2025.

[27] *Obligations of States in respect of Climate Change* (Declaration of Judge Tladi) [2025] <https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-12-enc.pdf> accessed 18 December 2025.

legal obligations, can be seen as a result of pragmatism, not a concession in principle. The Court, then, rightly rejected the submissions seeking the climate change treaty regime to monopolise international legal governance on the issue; yet, it appeared to favour a presumption of compliance with other rules when the climate change treaty regime itself is complied with.

That being the case, the question arises whether, and how, the Court referred to the possible overlap or interrelationships between this range of international legal norms in respect of climate change.

III. SYSTEMIC INTEGRATION IN CLIMATE CHANGE

Under international law, States may assume obligations under a range of treaties across specialist areas, or under customary international law, which may, in some situations, parallelly regulate or have a bearing on the same subject-matter. Such was the case, as argued by a majority of participants, with regard to climate change;[28] indeed, the very framing of the question submitted to the Court in the request for an advisory opinion included references to a range of international legal norms,[29] including as the prevention principle, commitments under the UNCLOS, certain multilateral environmental agreements ("MEAs"), or the two most significant human rights treaties—the International

[28] *Climate Change AO* (n 1) ¶ 163.
[29] *Climate Change AO* (n 1) ¶ 1.

Covenant on Civil and Political Rights ("ICCPR"),[30] and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"), 1966.[31] Not just that, participants submitted on the possible implications of treaties and customary principles from a number of other areas of international law, such as international trade law, international investment law, international civil aviation law, and international humanitarian law.[32]

There was, then, a clear decision to be made—whether, and which rules of international law the Court would address, and of those that it chose to address, how it would define their interrelationship.

In this regard, this Section examines, in general, the systemic integration principle (A), the Court's present approach to 'relevance' of a rule for interpreting another rule (B), and its view on when such a rule is 'applicable in the relation between' the States in question (C).

A. The Systemic Integration Principle

It is useful to highlight, as a methodological matter, the principle of systemic integration under international law. In essence, in giving meaning to an international legal norm, it is incumbent upon the interpreter to take account of other 'relevant rules' of international law

[30] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[31] International Covenant on Economic, Social, and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.
[32] *Climate Change AO* (n 1) ¶¶ 173, 317.

that may be 'applicable in the relations between' the States in question.[33] Considering that international law is a legal system, and not just a set of regimes operating in silos, it is essential to interpret complementarily applicable obligations so as to give rise to a single set of coherent obligations.[34] This principle is codified, notably, under Article 31(3)(c) of the Vienna Convention on the Law of Treaties, 1969.[35] However, systemic integration is of significance not just in respect of the interpretation of treaty obligations, but also other norms, such as customary international legal principles, as seen already in the Court's statement on how the climate change treaty regime may inform the interpretation of relevant customary obligations.[36]

This raises two questions of significance—how would the Court determine which other rules of international law were 'relevant' to the interpretation of an international legal norm? That is, what criteria would the Court refer to for determining which other rules were proximate enough in content to be accounted for in interpreting a given

[33] Campbell McLachlan, *The Principle of Systemic Integration in International Law* (OUP 2024) ¶ 3.206.
[34] Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc A/CN.4/L.702, 18 July 2006 ¶ 14(4).
[35] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).
[36] Margaret Young, 'Systemic Integration of Obligations in an Era of Climate Change: Stability and Optimal Control' [2025] British Yearbook of International Law 1, 3.

rule? Secondly, how would the Court define which obligations are 'applicable in the relations' between the States in question—is a unison of identity required between States Parties to different treaties? In other words, could the Court, in interpreting obligations under a treaty or a customary norm, refer to rules under treaties without universal participation from States?

Scholarship shows that the Court has not had the opportunity to clarify the latter question.[37] The former question, i.e., which factors the Court considers in determining relevance, can be answered with a few indicative past examples. The Court has affirmed the principle of contemporaneous interpretation—rules that may be relevant to the interpretation of an obligation may have arisen after the emergence of the norm being interpreted.[38] In case a given international legal norm cross-references or has a close similarity in formulation to another rule, these norms may be interpreted coherently through systemic integration.[39] Similarities, for the purpose of establishing relevance, may also be discerned through other considerations, such as whether the object and purpose of a treaty alleged to contain relevant rules

[37] See Sotirios-Ioannis Lekkas, Panos Merkouris and Daniel Peat, 'The Interpretative Practice of the International Court of Justice' [2023] 26:1 Max Planck Yearbook of United Nations Law Online 316, 334-343.
[38] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16 ¶ 53.
[39] *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* (Preliminary Objections) [2017] ICJ Rep 3 ¶ 89.

resembles that of the primary treaty in question.[40] The present advisory opinion, then, offered a critical opportunity to the Court to clarify and elucidate further upon both the requirement of 'relevance' and of the rule being 'applicable in the relations' between the given States.

B. Identifying Relevant Rules

Turning to the question of relevance, insights may be found, firstly, from the Court's identification at the outset of the "most directly applicable law" in the proceedings, to which it was nudged to "have particular regard" in the request for the advisory opinion.[41] The Court took note of those treaties and norms which were mentioned in express terms in the request, such as, namely, the United Nations Charter, the UNFCCC, UNCLOS, certain MEAs, international human rights law, and certain customary international legal principles such as the prevention principle. The Court further noted:

> *"The Court emphasizes that this list serves to determine only the applicable law which is most directly relevant for answering question (a) put to it by the General Assembly. It is without prejudice to other rules of international law that may also be relevant under various circumstances in the context of climate change. Such rules may be found, for example, in*

[40] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)* (Preliminary Objections) [2021] ICJ Rep 71 ¶ 104.
[41] *Climate Change AO* (n 1) ¶¶ 1, 99, 113-114.

> *international trade law, international investment law, and international humanitarian law.''*[42]

From the approach of the Court, it is inferable that a few pragmatic considerations played a role in its selection of the applicable law, including the invocation thereof in express terms in the question posed to it, and the frequency with which certain rules were invoked during the course of the proceedings.[43] Ultimately, if the Court chose not to address certain rules as the most directly applicable law in the first place (such as trade, investment, or humanitarian and criminal law), it would also not have had the opportunity to clarify their interrelationship with other norms of international law. However, as the Court cautions, its advisory opinion was not exhaustive, and its decision not to address these rules should not be interpreted as indicating that the rules it omitted operate in silos; on the contrary, the views of certain Judges engage with some of the rules and regimes omitted from the advisory opinion, and their interrelationship with different norms.[44]

As regards the above-named international legal norms which the Court indeed decided to address in the advisory opinion, there was one common thread—a finding from the Court that the norm in question had implications over the subject-matter of the proceedings, i.e.,

[42] *Climate Change AO* (n 1) ¶ 173.
[43] *Climate Change AO* (n 1) ¶¶ 133, 370, 419.
[44] See *Obligations of States in respect of Climate Change* (Declaration of Judge Cleveland) [2025] <https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-10-en.pdf> accessed 18 December 2025.

climate change.[45] The Court stated, as mentioned above, that the framework of the climate change treaty regime may inform the interpretation of customary international legal norms having a bearing on the climate system, such as the prevention principle and the duty to co-operate.[46] So, too, the other way around—the climate change treaty regime, and any interpretive ambiguities therein, would have to be rationalised with reference to the principle of prevention and the duty to co-operate; hence, their complementary character.[47] Considering the common aegis under which the climate change treaties were established, the Court had no qualms affirming their interpretive interrelationship.[48] As regards MEAs, the Court referred to certain obligations under the Ozone Layer Convention, 1985,[49] The Montreal Protocol, 1987,[50] The Biological Diversity Convention, 1993,[51] and the Desertification Convention, 1994,[52] Insofar as the Court found that the concerned obligations regarding specific spheres of the environment

[45] *Climate Change AO* (n 1) ¶¶ 113-145.
[46] *Climate Change AO* (n 1) ¶ 314.
[47] *Climate Change AO* (n 1) ¶¶ 309-315.
[48] *Climate Change AO* (n 1) ¶¶ 116-121.
[49] Vienna Convention for the Protection of the Ozone Layer (adopted 22 March 1985, entered into force 22 September 1988) 1513 UNTS 293.
[50] Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTS 3.
[51] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 179.
[52] United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (adopted 14 October 1994, entered into force 26 December 1996) 1954 UNTS 3.

were ultimately connected, in the circumstances, to the regulation of the climate system, which was the subject-matter of the proceedings.[53] The same applies in its analysis of the UNCLOS, with respect to obligations concerning the protection and preservation of the marine environment.[54]

Likewise, as regards obligations under the ICCPR, the ICESCR, and the right to a clean, healthy, and sustainable environment, the Court stated as follows (indicative of its affirmation, in general, to systemic integration):

> *"The Court is of the view that international human rights law, the climate change treaties and other relevant environmental treaties, as well as the relevant obligations under customary international law, inform each other (see paragraphs 309-315 above). States must therefore take their obligations under international human rights law into account when implementing their obligations under the climate change treaties and other relevant environmental treaties and under customary international law, just as they must take their obligations under the climate change treaties and other relevant environmental treaties and under customary international law into account when implementing their human rights obligations."*[55]

[53] *Climate Change AO* (n 1) ¶¶ 316-315.
[54] *Climate Change AO* (n 1) ¶ 339.
[55] *Climate Change AO* (n 1) ¶ 404.

It seems, then, that the moment the Court found that a given international legal norm regulated, in some form, the subject-matter of the proceedings, i.e., the conduct of States surrounding the climate system, every such norm was seen as, at least potentially, relevant for the purposes of systemic integration with the other norms also characterised in this manner. Thus, in other words, all of the international legal norms identified as the "most directly relevant" in the proceedings by the Court should be seen as complementary and systemic in application, giving rise to a single set of coherent obligations.

In a nutshell, then, the Court affirmed, in principle, the role of systemic integration in interpreting the most directly applicable law to the proceedings. The Court may be critiqued, however, for not going further. After all, the advisory opinion would have been much more enriching if the Court provided practical guidance on how, for instance, obligations under the UNCLOS, the climate change treaty regime, the prevention principle, and human rights law could, in a given situation, give rise to a coherent set of legal obligations, especially on issues of significance, such as fossil fuel production, consumption and subsidies. Therefore, rather than just stating the necessity of the complementary interpretation of different international legal norms in respect of climate change, the advisory opinion could have been more impactful had it given operational insights regarding systemic integration. It may also be considered that the Court addressed three forms of "harmony":

intra-regime (as between treaties comprising the climate change treaty regime), between treaty law and customary law (such as the Paris Agreement and the prevention principle), and inter-regime (as between rules from, say, the law of the sea, MEAs and other fields).[56] On this understanding, one may more precisely say that although the Court offered useful insights on the first and second categories, its analysis on inter-regime harmony, a topic of immense importance in an increasingly fragmented climate governance discourse, could have offered much-needed clarity. As the world's highest Court, and the only Court with general subject-matter jurisdiction, that too, having been entrusted with a wide-ranging set of norms, the Court ought to have seized this opportunity.

Nevertheless, the significance of the Court's insistence on how these rules may inform each other, cannot be overstated, and will surely offer a range of possibilities on future thinking and argument on the matter. In any event, further insights in this regard may be discerned from the views of the ITLOS,[57] or the advisory opinion also recently delivered by the Inter-American Court of Human Rights on the Climate

[56] Caroline Foster, 'The 2025 International Court of Justice Advisory Opinion on Obligations of States in respect of Climate Change' [2025] International and Comparative Law Quarterly 1, 4.

[57] Khaled Elmahoud, 'The ITLOS Advisory Opinion: Human Rights as a Withered Branch of International Law?' (*EJIL: Talk!*, 24 June 2024) <https://www.ejiltalk.org/the-itlos-advisory-opinion-human-rights-as-a-withered-branch-of-international-law/> accessed 18 December 2024.

Emergency and Human Rights,[58] and the decisions of other specialist courts and tribunals.

C. The Applicability of Relevant Rules

It is a trite matter that treaties only establish obligations as between States Parties to the treaty.[59] Regarding the present proceedings, the question remains how the Court determined which rules were 'applicable in the relations' between States, when it concluded that such rules had an interpretive relationship. For example, were obligations under the ICCPR, the UNCLOS or MEAs material for those States that were not parties to these agreements, when it came to the determination of universal obligations, such as the customary prevention principle? The Court's answer here, as with its view on the *lex specialis* argument, requires close attention.

In principle, the Court, whenever insisting that a treaty rule could be used to interpret another rule, was sure to ensure it respected the consent of non-State Parties by adding a disclaimer, such as the one that follows:

[58] Rebecca McMenamin, 'The ICJ climate advisory opinion and systemic integration' (*Cambridge International Law Journal*, 8 August 2025) <https://cilj.co.uk/the-icj-climate-advisory-opinion-and-systemic-integration/> accessed 18 December 2025; Climate Emergency and Human Rights, Advisory Opinion AO-32/25, Inter-American Court of Human Rights (29 May 2025).
[59] VCLT (n 35) art 34.

> …In this regard, the obligations incumbent upon States parties to the Biodiversity Convention complement those set forth in climate change treaties, insofar as the States concerned are also parties to those instruments.[60]

Thus, by cautioning that the effect of systemic integration was limited as between those States that were parties to both the treaty containing the rule being interpreted and the treaty containing the relevant external rule, the Court struck a balance between ensuring the complementarity of different rules of international law and the absence of the consent of non-States Parties.

In at least one instance, concerning the interpretation of customary norms in light of the climate change treaty regime, the Court appears to water down this balance by stating:

> *"….On this basis, the Court considers that it is possible that a non-party State which co-operates with the community of States parties to the three climate change treaties in a way that is equivalent to that of a State party, may, in certain instances, be considered to fulfil its customary obligations through practice that comports with the required conduct of States under the climate change treaties. However, if a non-party State does not co-operate in such a way, it has the full burden*

[60] *Climate Change AO* (n 1) ¶¶ 324, 329, 334.

> *of demonstrating that its policies and practices conform with its customary obligations."*[61]

As discussed earlier, for the Court, a State Party's compliance with the climate change treaty regime would imply a presumption favouring its compliance with its customary obligations concerning the climate system, such as the prevention principle and the duty to co-operate. The foregoing observation may be seen as a corollary of this view; for any non-State Party acting inconsistently with the standards specified under this regime, it will be presumed that, while not being in breach of the treaties (as a non-Party), it may be in breach of its customary obligations. In positivist terms, the conclusion of the Court may be critiqued for giving treaty norms functional equivalence with the content of customary norms, especially since it did not anywhere suggest that the scope of the concerned treaty and customary obligations was identical. Nor did the Court, and it could not, find that the treaties, wholesale, reflected co-existing customary norms. In pragmatic terms, however, one may understand the approach of the Court as seeking to ensure that there is some yardstick with which to examine breaches of customary obligations for non-State Parties to the climate change treaty regime, rather than leaving this matter with no operational insight.

[61] *Climate Change AO* (n 1) ¶ 315.

What might explain the Court's choice of referring only to the climate change treaty regime in this observation on treaty norms that may show thresholds for compliance with universal customary norms? Why not also refer to the MEAs, the UNCLOS, or human rights treaties it considered? Again, the answer is likely pragmatic—the treaties under this regime have universal or near-universal ratification.[62] In this sense, then, the Court's approach to the interpretive relationship between international legal norms through systemic integration, including on whether a unison of identity is necessary between the norms, can be described as balanced—neither conservative to the point of dismissing the complementarity of certain norms, nor progressive to the extent of dismissing the requirement of State consent to treaties.

IV. CONCLUSION

The ICJ should be appreciated, like the ITLOS, for firmly rejecting the unfounded argument that the climate change treaty regime constituted a *lex specialis*, displacing every other international legal norm that had a bearing on States' conduct surrounding climate change. The Court's approach to systemic integration in respect of the interpretation of complementary international legal norms as regards climate change reflects a balance of positivist caution and providing an enriching and coherent account of otherwise distinct norms. The Court only addressed those rules which it considered the "most directly relevant" as applicable law, thus reserving its position on less directly relevant

[62] *Climate Change AO* (n 1) ¶ 223.

norms, such as under international economic law, while addressing other topics ranging from the law of the sea, MEAs, and international human rights law. Although insisting that these norms are to be interpreted and applied as a single set of coherent obligations, the Court could have gone further, if only illustratively, to provide operational guidance on how such coherence may be developed as between obligations from different specialist areas of international law. Moreover, the Court's approach to the relationship between the climate change treaty regime and customary international law, in respect of both States Parties and non-States Parties thereof, reflects more of a dependence on pragmatism than the Court might wish to admit. However, one cannot fully fault the Court, given the complexity of the matter, and since the Court was not dealing with the specific facts of a dispute, but rather, striving to answer a question on the obligations of States in a general form. Perhaps further proceedings, including in contentious cases in the future, could clarify some of these enduring controversies. In any event, the fact that the Court accepted, in principle, the interpretive relationship between a wide range of international legal norms, offers fertile ground for practitioners and academics to give concrete meaning to international law as a legal system in the climate change context. That foundation, provided unanimously, cannot be taken for granted. While one cannot easily think of a phenomenon more complex than climate change, the insights of the Court on the *lex specialis* and systemic integration principles will surely influence its methodology, and that of other courts and tribunals, in the future. At least, the Court is to be praised for leaving the door open.

A STEP BACKWARD FOR ARBITRATION REFORM: A LEGISLATIVE COMMENT ON THE INDIAN STAMP ACT WITH SPECIAL REFERENCE TO THE MAHARASHTRA STAMP (AMENDMENT) ACT, 2024

Ahan Gadkari[**]

ABSTRACT

The levy of stamp duty on arbitral awards represents both a constitutional problem and an economic distortion. Unlike court decrees, which are exempt from stamp duty, domestic awards are subject to ad valorem duties under the colonial Indian Stamp Act 1899, a burden drastically escalated by the Maharashtra Stamp (Amendment) Act, 2024. The result is twofold: enforcement of arbitral awards is made prohibitively expensive, and parties are perversely incentivised to arbitrate outside

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India to avoid these costs. Far from facilitating arbitration, the State has erected a barrier that frustrates its own proclaimed policy of promoting India as an arbitration hub.

In addition to these concerns, the Maharashtra Stamp Amendment (Act), 2024 also creates a repugnancy by classifying awards in a manner inconsistent with the Arbitration and Conciliation Act, 1996's treatment of awards as decrees for enforcement, and further raises an Article 304(a) issue by imposing undue fiscal burdens on inter-State commercial activity. The classification between domestic and foreign awards is constitutionally indefensible, failing the Article 14 test of reasonable classification. These doctrinal flaws are aggravated by the practical consequences: disproportionate costs in high-value claims, exploitation of stamp duty objections by award debtors to delay enforcement, and the deterrence of small and medium enterprises from pursuing arbitration altogether. A narrow workaround, reflected in the Karnataka High Court's view that money awards for damages fall outside the scope of

Stamp Duty, provides a temporary safeguard until broader reform is undertaken. Stamp duty on arbitral awards is problematic on every front. It rests on a flawed doctrine, offends constitutional guarantees, and is economically self-defeating.

Keywords: *Stamp Duty, Arbitral Awards, Maharashtra Stamp (Amendment) Act, 2024, Enforcement, Arbitration*

I. INTRODUCTION

Consider this hypothetical: Company A has a dispute with Company B. Both parties had opted for an arbitration clause while entering into the contract, stating that the seat of arbitration shall be in Mumbai. The officials from Company A believe that such a process will provide them with a cost-effective dispute resolution. However, their spending journey has just begun. Firstly, Company B has refused to nominate an arbitrator, so Company A had to approach the High Court for a Section 11 appointment. Then, Company A now finds that the court has referred the dispute to an arbitral institute (more costs). After that, Company A goes through the arbitration, and at the end, when the award has been published, it finally believes that relief is in sight.

Company B is not even challenging the award, so now the costs should come to an end, right? Wrong. Company A will now need to bear 0.75% of the award costs as stamp duty before executing the award.

Such a duty is not levied upon court decrees for execution. Further, as clarified by the Supreme Court in *Shriram EPC Limited v. Rioglass Solar SA*,[1] such a duty is not attracted by foreign arbitral awards. No other country in the world applies stamp duty on arbitral awards.[2] So why must Indian domestic awards have to suffer through the extra payment of stamp duty? This concern lies at the very foundation of the present comment. Beyond these economic inefficiencies, such a statute also raises Constitutional issues relating to the legislative repugnancy under Article 254 and discriminatory fiscal treatment under Article 304(a). Such concerns are exacerbated by the recent Maharashtra Stamp (Amendment) Act, 2024 (hereinafter referred to as "Maharashtra Amendment").[3]

Under the prevailing legal framework in India, governed by the Indian Stamp Act, 1899 (hereinafter referred to as "Stamp Act"), an arbitral award is regarded as an "instrument" capable of conferring, modifying, or extinguishing rights, thereby rendering it liable to stamp duty in

[1] *Shriram EPC Limited v Rioglass Solar SA* AIR 2018 SC 4539.
[2] Arbitration Act 1996, s 66 (UK); Stamp Act 1981, sch 1 (UK); International Arbitration Act 1994 (2020 Rev Ed) ss 19 and 29; Arbitration Act 2001 (2020 Rev Ed) s 46(Sing); Stamp Duties Act 1929 (2020 Rev Ed) Sch 1 (Sing); Arbitration Ordinance (Cap 609) ss 84 and 92 (HK); Stamp Duty Ordinance (Cap 117) s 4 (HK).
[3] Maharashtra Stamp (Amendment) Ordinance, 2024.

accordance with the relevant state *legislation*.[4] In the State of Maharashtra, such a duty is levied under the Maharashtra Stamp Act, 1958. Pursuant to Section 3 of the Maharashtra Stamp Act,[5] every instrument executed within the territorial limits of the state attracts stamp duty as prescribed in Schedule I of the enactment. An arbitral award falls within this statutory scheme, and consequently, an award rendered within Maharashtra must be duly stamped as a condition precedent to its enforceability or legal efficacy.

Further, stamp duty falls within State List Entry 63 and Concurrent List Entry 44,[6] which allows States, after consent from the President under Article 242(2),[7] to determine how much stamp duty will be attracted by various instruments in that State. Until recently, with the exception of a few States like Karnataka,[8] most States had a nominal cost attached to stamp duty, to the tune of Rs. Hundred or Rs. Five Hundred.[9] A case in point is the Maharashtra Stamp Act, which levied a stamp duty of Rs. Five Hundred before replacing it with an *ad-valorem* calculation after the Maharashtra Amendment. Maharashtra, with financial centres such as Mumbai and Pune, has been considered an attractive

[4] The Indian Stamp Act, 1899 (2 of 1899) s 2 (14).
[5] The Maharashtra Stamp Act, 1958 (60 of 1958).
[6] The Constitution of India, 1950 art 246.
[7] ibid, art 242 (2).
[8] Karnataka Stamp Act, 1957 (34 of 1957) sch I, art 11.
[9] The Indian Stamp (Tamil Nadu Amendment) Act, 1958; Stamp (Andhra Pradesh Amendment) Act, 1922.

destination for arbitration in India. However, the current amendment raises the costs to an extent which will make it impractical for parties to choose to arbitrate in Maharashtra. For example, before this amendment, an award of Rs. Forty Lakhs would have attracted a flat stamp duty of Rs. Five hundred, which is a nominal cost. Now, it will attract a stamp duty of Rs. Thirty thousand, which is a substantial cost to pay for recognition of an award the party has already won.

Additionally, while the Supreme Court has affirmed that the Stamp Act functions as a fiscal statute intended to secure state revenue, not as a tool for litigants to exploit technicalities against their opponents,[10] it frequently becomes a tactic employed by award debtors to hinder the execution of awards. One of the primary challenges the imposition of such *ad valorem* stamp duty brings up is enforcement challenges, and the use of it as a technicality for delaying execution. However, these issues have already been covered by commentators and will not be addressed in this contribution.[11] Further, while much ink has been spilled on the issue of stamping of an arbitration agreement,[12] literature

[10] *Hindustan Steel Ltd v M/S. Dalip Construction Company* AIR 1969 SC 1238 ¶ 5.

[11] Raj R. Panchmatia and Peshwan Jehangir, 'The Cost of Justice? Maharashtra's Stamp Duty Shake-Up and its Ripple Effect on Arbitration in India' (*SCC Online*, 20 June 2025) <https://www.scconline.com/blog/post/2025/06/20/maharashtra-stamp-duty-arbitration-impact-india/> accessed 16 August 2025; Yuvraj P. Narvankar, 'A Step in Regression: Stamp Duty on Arbitral Awards in Maharashtra' (*LiveLaw*, 28 May 2025) <https://www.livelaw.in/articles/step-regression-stamp-duty-arbitral-awards-maharashtra-293565> accessed 16 August 2025.

[12] Tejas Karia and Vrinda Pareek, 'Stamping of Arbitration Agreements: An Analysis of the Evolving Arbitration Landscape in India' (2023) III(I) Indian Review of International Arbitration 44; Ansh Goyal, 'The Validity of an Arbitration

on the stamping of arbitral awards has been relatively absent. This contribution argues that stamp duty on arbitral awards is not only a matter of economic and practical inefficiency but also is fundamentally incompatible with our Constitutional foundations. This contribution proceeds in five parts. Part I sets the stage by introducing the subject and outlining the framework of the discussion. Part II traces the historical foundations for the imposition of stamp duty on arbitral awards in India. Part III undertakes a constitutional analysis of this levy, examining its validity and broader implications. Part IV considers the mechanisms within the existing legal framework that may serve to limit the quantum of stamp duty imposed on arbitral awards. Part V

Clause in a Deficiently Stamped Agreement: A Comment on the Seven-Bench Judgment' (2024) 90(4) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 488; Pranav Budihal, 'Stamping Out The Uncertainty – The Supreme Court's Way Forward for A Modern and Efficient Arbitration Regime for India' (*Kluwer Arbitration Blog*, 18 February 2024) <https://legalblogs.wolterskluwer.com/arbitration-blog/stamping-out-the-uncertainty-the-supreme-courts-way-forward-for-a-modern-and-efficient-arbitration-regime-for-india/> accessed 16 August, 2025; Swarnendu Chatterjee and Shreya Mittal, 'Part – 1: Case Note: In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899' (*CBCL NLIU*, 12 July 2024) <https://cbcl.nliu.ac.in/contract-law/part-1-case-note-in-re-interplay-between-arbitration-agreements-under-the-arbitration-and-conciliation-act-1996-and-the-indian-stamp-act-1899/> accessed 16 August, 2025; Swarnendu Chatterjee and Shreya Mittal, 'Part – 2: Case Note: In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899' (*CBCL NLIU*, 12 July 2024) <https://cbcl.nliu.ac.in/contract-law/part-2-case-note-in-re-interplay-between-arbitration-agreements-under-the-arbitration-and-conciliation-act-1996-and-the-indian-stamp-act-1899/> accessed 16 August, 2025.

concludes by synthesizing the foregoing analysis and offering closing observations.

II. WHY DO ARBITRAL AWARDS ATTRACT STAMP DUTY?

A. Origins

Stamp duty on arbitral awards originated as a colonial method of revenue collection and was introduced vide the Indian Stamp Act, 1899 by the British.[13] Interestingly, such an imposition of stamp duty for arbitral awards did not exist in England at that time, nor did they ever go ahead with such an imposition. In the author's opinion, while the British avoided imposing such costs on arbitral awards in their own country, they enforced them in the colony solely to extract revenue, with no regard for the colony's interests or benefit. However, even during the times of colonial rule, only nominal and minimal stamp duty was charged on arbitral awards. The Arbitration Act, 1940 introduced a national arbitration regime in India, which under Section 14(2) required the award to be filed in court in order to be treated as a "rule of the court."[14] Such a court-centric approach created a checkpoint for checking the stamping of awards, and under the Arbitration Act, 1940, arbitral awards did not have the same force as a decree of the court.

[13] Shrimoyee Ghosh, 'Of Truth and Taxes: A Material History of Early Stamp't Paper' in Aparna Balachandran, Rashmi Pant and Bhavani Raman (eds), *Iterations of Law: Legal Histories from India* (Oxford University Press 2017).
[14] The Arbitration Act, 1940 (10 of 1940) s 14(2).

After independence, the right to determine stamp duty was passed on to the States.[15] Subsequently, the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "**Arbitration Act**") was passed, which, after the Amendment in 2015, requires an arbitral award to be treated as a court decree.[16] It is pertinent to note that the Statement of Objects and Reasons in the original 1996 draft of the Arbitration Act provided that one of the aims of the statute was to ensure that every arbitral award is enforced in the same manner as a decree of the court.[17] The Arbitration Act's language should have ended stamp duty on awards, as court decrees are exempt. However, the practice continued unchecked.

B. Statutory Imposition

As the Delhi High Court had opined, the Arbitration Act does not, in itself, impose any obligation to pay stamp duty on an arbitral award nor does it require the arbitrator to ensure that the award is printed on appropriate stamp paper.[18] Instead, any requirement for stamp duty on such awards arises under the provisions of the Stamp Act, leaving the disputant parties to deal with stamp duty on their copies of the award.[19] The Stamp Act was instituted as a fiscal statute to replace the Stamp

[15] The Constitution of India, 1950, art 246.
[16] The Arbitration and Conciliation Act, 1996 (26 of 1996) s 36.
[17] The Arbitration and Conciliation Act, 1996 (26 of 1996).
[18] *Mohini Electricals Ltd. v Delhi Jal Board* (2021) SCC OnLine Del 3506 ¶ 31.
[19] ibid.

Act of 1869 and other subsequent enactments serving similar functions. Under Section 3, specific categories of documents are identified as chargeable with stamp duty, with Schedule I outlining the applicable rates for each type. To ensure compliance, Section 35 of the Stamp Act stipulates that any instrument not bearing the required stamp is inadmissible as evidence. Additionally, if an unstamped instrument is presented before an authority authorized to admit evidence, that instrument is subject to impoundment under Section 33. The Stamp Act further specifies the procedural requirements following impoundment of an instrument. Notably, the duty applicable to instruments liable to stamp duty, as defined in Schedule 1, has been revised by individual states to facilitate jurisdiction-specific implementation and enforcement. For example, the Maharashtra Stamp Act, which levies stamp duty on awards via Schedule I, Article 12 (post-amendment)[20] is provided below:

DESCRIPTION OF INSTRUMENT	PROPER STAMP DUTY
"AWARD, that is to say, any decision in writing by an arbitrator or umpire, on a reference made otherwise than by an order of the Court in the course of a suit, being an award made as a result of a written	

[20] Maharashtra Stamp (Amendment) Ordinance, 2024.

agreement to submit present or future differences to arbitration but not being an award directing partition,-	
(a) relating to immovable property;	*The same duty as is leviable on a conveyance under clause (b) of article 25.*
(b) relating to movable property,-	
(i) where the amount granted in the award, does not exceed rupees fifty lakhs;	*0.75 per cent. of the amount granted in the award.*
(ii) where the amount granted in the award, exceeds rupees fifty lakhs but does not exceed rupees five crores;	*Rupees thirty seven thousand five hundred plus 0.5 per cent. of the amount granted in the award.*
(iii) where the amount granted in the award, exceeds rupees five crores;	*Two lakhs sixty two thousand five hundred rupees plus 0.25 per cent. of the amount granted in the award."*

III. UNCONSTITUTIONALITY OF STAMP DUTY ON DOMESTIC ARBITRAL AWARDS

Applying stamp duty on awards itself is a problematic concept. Dr. Rab and Mr. Joshi have argued that such a practice should be done away with since litigants do not have to pay stamp duty for enforcing decrees of ordinary courts; so why should this barrier be placed on arbitral awards, which function as a decree of the court?[21] However, the current legal regime treats arbitral awards as instruments that require the payment of stamp duty for enforcement. This piece will *first* focus on the Constitutional irregularity with the imposition of stamp duty on arbitral awards and *second*, will undertake the enquiry as to what remedies exist for litigants within the current system. This section will analyse the imposition of stamp duty from the Constitutional lenses of (a) challenges to fiscal statutes; (b) conflict between Central and State laws; (c) right to equality, and (d) discrimination between inter-State commerce.

A. Chapeau – Constitutional Challenges to Fiscal Statutes

Constitutional challenges to fiscal statutes are subject to slightly distinct standards of review.[22] The Indian Stamp Act and the

[21] Ajar Rab and Shubham Joshi, 'Stamping Arbitral Awards: An Illogical Fallacy?' (*NLS BLR Blog*, 22 February 2022) <https://forum.nls.ac.in/nlsblr-blog-post/stamping-arbitral-awards-an-illogical-fallacy/> accessed 16 August 2025.

[22] Tarun Jain, 'Fiscal Incentives and Exemptions: Reflections on the New Interpretation Standard' (2018) V(II) NLUJ Law Review 1; Tarun Jain, 'Tax Discrimination: Exploring the Limits of "Permissible Classification" of Taxpayers' (*SCC Online Times*, 28 October 2025) <https://www.scconline.com/blog/post/2025/10/28/tax-discrimination-limits-of-permissible-classification-of-taxpayers/> accessed 19 November 2025; Tarun Jain, 'Role of Equitable Doctrines in Fiscal Laws' (*SCC Online Times*, 2 January 2021)

Maharashtra Amendment, being fiscal statutes, must be looked through the lens of such standards. This sub-section will serve as a *chapeau* for the following specific sub-sections for the distinctive, though not unfettered, standards for review evolved by the Supreme Court concerning fiscal statutes. The Supreme Court in *Gujarat Ambuja Cements Ltd. v. Union of India*,[23] held that fiscal statutes are given a larger latitude in terms of classification due to the "inherent complexity of fiscal adjustments".[24] Since fiscal legislation involves complex policy choices and the adjustment of diverse economic considerations, the legislature is accorded wider discretion both in deciding what to tax and in determining how such taxation should be structured. Courts, therefore, are likely to only intervene where the statute reflects clear perversity, irrationality, or such gross disparity that it crosses the boundaries of permissible legislative judgment.[25]

B. Article 254–Conflict Between the Arbitration Act (Central Statute) and the Maharashtra Stamp Act (State Statute)

A primary Constitutional issue which arises from the conflict between the Arbitration Act and the Maharashtra Amendment (as well as the original statute) is the difference in classification of awards under these

<https://www.scconline.com/blog/post/2021/01/02/role-of-equitable-doctrines-in-fiscal-laws/> accessed 19 November 2025.

[23] *Gujarat Ambuja Cements Ltd. v Union of India* (2005) 4 SCC 214.

[24] ibid ¶¶ 40, 42.

[25] ibid.

statutes. The Arbitration Act confers an award with the same status as a decree of the court in terms of enforcement.[26] On the other hand, the Maharashtra Amendment classifies an award as an "instrument" which cannot be executed without the payment of *ad valorem* stamp duty. Since stamp duty is made payable for the enforcement of arbitral awards,[27] the State classification under the Maharashtra Amendment seems to prevail, while it should be the Central classification which prevails per the doctrine of repugnancy under Article 254.

In *State of J&K v. M.S. Farooqi*,[28] the Supreme Court had laid down one of the earliest understandings of repugnancy,[29] which recognised that a State law which frustrates or contradicts a Central law operating in the same field is deemed to be repugnant. The Supreme Court had to decide on a conflict between the All India Services (Discipline and Appeal) Rules, 1951, and the Jammu & Kashmir Government Servants Prevention of Corruption) Act, 1962. In that case, a police officer, who was a member of the Indian Police Service, had filed a writ to avoid additional punishment under the State rules and argued that only the punishment laid down in the Central rules should apply to him. Since the State rules provided for additional punishment, the Court first

[26] The Arbitration and Conciliation Act, 1996 (26 of 1996) s 36.
[27] *M. Anasuya Devi v M. Manik Reddy* (2003) 8 SCC 565 ¶ 4.
[28] *State of J&K v M.S. Farooqi* (1972) 1 SCC 872.
[29] Ashwin Vardarajan, 'Should the Doctrine of RepugnancyApply to Delegated Legislation?' (*Indian Constitutional Law and Philosophy*, 2 December 2022) <https://indconlawphil.wordpress.com/2022/12/02/guest-post-should-the-doctrine-of-repugnancy-apply-to-delegated-legislation/> accessed 18 November 2025.

concluded that the two laws cannot co-exist. The Court held that the Parliament had undertaken to "occupy" the whole field of disciplinary action against members of the Indian Police Service, and the State could not make different laws for the same area. Thus, the State law was held to be repugnant to the Central law and declared void.

More recently, in *Gambhirdan K. Gadhvi v. State of Gujarat*,[30] the Supreme Court was dealing with the issue of the procedure for appointment of the Vice-Chancellor of Sardar Patel University.[31] The Government of Gujarat had passed a State law, which allowed for a Search Committee to be set up to lay down the criteria of eligibility for the post of Vice-Chancellor, which was watered down from the eligibility criteria laid down under the UGC Regulations (under the UGC Act, which is a Central statute).[32] The Court noted that the State law did not prescribe any eligibility qualifications whatsoever for the appointment of the Vice-Chancellor, while the UGC Regulations did prescribe criteria like teaching experience.[33] The Court held that the appointment made under the State law must be set aside since it deviated from the procedure laid down in the Central law, and that the Central legislative scheme prevailed over conflicting State laws in a

[30] *Gambhirdan K. Gadhvi v State of Gujarat* (2022) 5 SCC 179.
[31] ibid ¶¶ 1-2.1.
[32] ibid ¶¶ 2.6-3.2.
[33] ibid.

subject in the Concurrent List.[34] In fact, the Court went as far as to state that it hopes that "wiser counsel will prevail" in the future and that States' amend their laws to be in compliance with Central statutes.[35] In a similar vein, in *Sreejith v. Rajasree*,[36] the Supreme Court held that the appointment of a Vice-Chancellor based on eligibility criteria laid down in a State statute is *void ab initio* as the State statute is repugnant to the UGC Regulations and the Central statute prevails under Article 254 as "Education" is a subject in the Concurrent List.[37]

Thus, it follows *a fortiori* that the Arbitration Act's scheme of enforcing an award as a court decree prevails over a state statute giving awards a different classification and making stamp duty payable on the same.

While discussing fiscal federalism, Chowdhury & Chowdhury have noted that the judiciary's role in assessing fiscal measures is intimately tied to the constitutional allocation of taxing powers under the Seventh Schedule, and the legitimacy of a State's fiscal assertion depends on whether the Union has already occupied the field.[38] The Supreme Court, in *Deep Chand v State of U.P.*,[39] and affirmed in *FPCE v State*

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[34] ibid ¶¶ 44-51.
[35] ibid ¶ 52.
[36] *Sreejith P.S. v Rajasree M.S.* (2023) 17 SCC 338.
[37] ibid ¶¶ 20-26.
[38] Sanyukta Chowdhury and Amit Chowdhury, 'The Supreme Court and the Challenges for Fiscal Federalism: Mineral Area Development Authority v Steel Authority of India' (2024) 18(1) National Law School Journal 65.
[39] *Deep Chand v State of U.P.* (1959) SCC OnLine SC 12.

of W.B.,[40] has laid down a three-part inquiry for the determination of whether a State statute is repugnant to a Central statute. The first consideration is whether there exists a direct conflict between the two provisions such that obedience to one necessarily results in disobedience to the other.[41] The second is whether Parliament, in enacting the Central legislation, intended to create a complete and exhaustive code on the subject-matter, thereby displacing or superseding the operation of any State law in the same domain.[42] The third inquiry examines whether the Central and State laws occupy the same legislative field, i.e., if they address the same subject matter and operate within the same area of competence, repugnancy is attracted even in the absence of express contradiction.[43] The repugnancy between the Arbitration Act and the Maharashtra Amendment becomes evident when such an inquiry is undertaken to compare the two statutes.

Firstly, there is a direct conflict, because the Arbitration Act mandates that an arbitral award "shall be enforced in the same manner as a decree," whereas the Maharashtra Stamp Act prohibits enforcement unless *ad valorem* stamp duty is paid. A decree requires no stamp duty, while an "instrument" under the State Act does. Compliance with one necessarily breaches the other. *Secondly*, Parliament intended the

[40] *Forum for People's Collective Efforts v State of W.B.* (2021) 8 SCC 599 ¶ 123.
[41] *Deep Chand v State of U.P.* (1959) SCC OnLine SC 12 ¶ 28.
[42] ibid.
[43] ibid.

Arbitration Act to operate as an exhaustive code governing all aspects of arbitration, including the manner and mechanism of enforcement. This intention is reflected in the Statement of Objects and Reasons.[44] The State cannot, by fiscal legislation, reintroduce procedural hurdles that Parliament deliberately removed. *Thirdly*, both statutes occupy the same legislative field at the point of enforcement. Although stamp duty is a fiscal matter, the Maharashtra Amendment substantively regulates the enforceability of arbitral awards.[45] Once the State statute intrudes into this field by imposing a precondition on enforcement, repugnancy arises. Accordingly, each limb of the test is satisfied to the extent of repugnancy, the Central statute must prevail *vis-à-vis* the State law under Article 254.

Further, while the Maharashtra Stamp (Amendment) Act, 2024 was enacted through the normal State legislative procedure, it did not undergo the mandatory constitutional requirement of Article 254(2), i.e. receiving the President's assent. Given that the Amendment creates direct inconsistency with Section 36 of the Arbitration and Conciliation Act, 1996, the absence of Presidential assent renders the Maharashtra Amendment void to the extent of repugnancy under Article 254(1).

C. Article 14–Discrimination Between Domestic and Foreign Awards

[44] The Arbitration and Conciliation Act, 1996 (26 of 1996).
[45] *M. Anasuya Devi v M. Manik Reddy* (2003) 8 SCC 565 ¶ 4.

"To overdo classification is to undo equality."[46]

The Indian Stamp Act effectively only targets domestic awards. As the Supreme Court has held in *Shriram EPC Ltd. v. Rioglass Solar SA*,[47] foreign awards have never attracted stamp duty and thus, foreign awards are enforceable without the payment of stamp duty. The court has reasoned that the Stamp Act originally only referred to awards made in British India, and via the amendment of Section 1(2) of the Stamp Act, it now applies to awards across India.[48] With reference to foreign awards, the court further went on to say that as long as the award does not attract any challenges, it automatically functions as a decree.[49]

It must be noted that Section 36 of the Arbitration Act also states that an award must be enforced in the "same manner as if it were a decree of the court."[50] The Arbitration Act does not place any qualifier that a domestic award only becomes enforceable after payment of stamp duty.

[46] *Roop Chand Adlakha v DDA* (1989) Supp (1) SCC 116.
[47] *Shriram EPC Limited v Rioglass Solar SA* AIR 2018 SC 4539.
[48] ibid ¶ 16.
[49] ibid ¶ 19.
[50] The Arbitration and Conciliation Act, 1996 (26 of 1996) s 36.

Such a distinction between domestic and foreign awards, which even the Arbitration Act does not contemplate, is a clear violation of the guarantee of equal treatment provided under Article 14. While, not a fiscal statute, a parallel can be drawn to the Prohibition era Bombay High Court judgement in *Fram Balsara v. State of Bombay*, wherein a full bench of the court held that the exemption given to foreigners to consume alcohol, while the Indian citizen in Bombay was not permitted to do the same, was a violation of right to equality.[51] Specifically, from the lens of a fiscal statute, the Supreme Court had held in *Union of India v. N.S. Rathnam and Sons*,[52] that Article 14 provides for equal treatment, both in privileges conferred and liabilities imposed. In this case, two tax exemption notices were challenged, which excluded a class of importers who were subject to lower customs duty.[53] The Supreme Court held that while the State possesses the authority to classify persons for legitimate purposes, such classification withstands Article 14 scrutiny only if it treats equally those who belong to the same class and rests on a reasonable basis.[54] The Court emphasised that although the difference warranting classification need not be large, it must nonetheless be real, substantial, and germane to the purpose of the legislation.[55] Further, once an exemption or benefit is granted to a defined class, it must be extended uniformly to all similarly situated

[51] *Fram Balsara v State of Bombay* AIR 1951 Bom 210.
[52] *Union of India v N.S. Rathnam and Sons* (2015) 10 SCC 681 ¶ 13.
[53] ibid ¶ 1-12.
[54] ibid ¶ 13.
[55] ibid ¶ 14.

individuals.[56] Applying these principles, the Court ultimately directed that the same benefits be granted to both parties before it, recognising them as identically placed for the purposes of the statutory scheme.[57]

Article 14 provides a guarantee of non-arbitrariness and reasonableness in face of any actions by the State, requiring reasonable classification.[58] As Justice Fazal Ali has noted, quoting Professor Willis, "The guarantee of the equal protection of laws means the protection of equal laws. It forbids class legislation but does not forbid classification which rests upon reasonable grounds of distinction."[59] It is a trite law that every classification needs to meet the twin test of (a) intelligible differentia and (b) rational nexus.[60] The differential classification of domestic and foreign awards for the purposes of stamp duty does not meet either of these tests.

[56] ibid ¶¶ 9,12.

[57] ibid ¶ 21.

[58] *Shayara Bano v Union of India* (2017) 9 SCC 1; *State of Punjab v Khan Chand* (1974) 1 SCC 549; *EP Royappa v State of Tamil Nadu* (1974) 4 SCC 3; *Ajay Hasia v Khalid Mujib Sehravardi* (1981) 1 SCC 722; Jahnavi Sindhu and Vikram Aditya Narayan, 'Reasonable Classification versus Equality under the Indian Constitution' (2023) 17(2) National Law School Journal 4.

[59] *Chiranjit Lal Chowdhary v Union of India* AIR 1951 SC 41 ¶ 8.

[60] *Ram Krishna Dalmia v Delhi Administration* AIR 1958 SC 538; *State of W.B. v Anwar Ali Sarkar* (1952) 1 SCC 1; *Budhan v State of Bihar* AIR 1955 SC 191; *Harakchand v Union of India* AIR 1970 SC 1453; *Vikram Cement & Anr v State Of M.P. & Ors* AIR 2015 SC 2397; *Union of India v N.S. Rathnam and Sons* (2015) 10 SCC 681 ¶ 14.

First, with regard to intelligible differentia, the State may argue that it can only charge stamp duty on awards within its territory. However, that practical limitation cannot justify the selective disadvantage on domestic awards. In fact, it produces an absurd incentive for Indian parties to arbitrate abroad (more likely outside Maharashtra and States that charge *ad valorem* stamp duty on arbitral awards) to avoid the stamp duty. Second, with regard to rational nexus, the place of arbitration (domestic v. foreign) is an irrational basis to impose a financial burden, especially when it penalises parties who choose domestic arbitration over a foreign seat. If the State objective is revenue, why are foreign awards exempt from this objective? There is no rational nexus for only targeting domestic awards for stamp duty.

Further, there is a clear lack of legislative competence as the State may classify persons for legitimate purposes, but Article 14 is violated when equal protection is denied to those belonging to the same class. The classification must rest on a real and substantial distinction, one that is rationally connected to the object of the legislation. Here, once domestic and foreign awards are recognised as part of the same class for purposes of enforcement, any fiscal burden imposed on only one subset is constitutionally impermissible, because benefits and liabilities must extend uniformly to all similarly situated persons. The State may argue that foreign awards cannot practically be subjected to stamp duty and therefore domestic awards form a separate taxable group. But practical limitations cannot constitute an intelligible differentia, nor do they bear any rational relation to the fiscal purpose of the statute; they merely create arbitrary inequality within a single class that Article 14 forbids. As the Supreme Court held in *Union of India v. N.S. Rathnam and Sons* with reference to tax exemption notifications, where two parties are identically situated, they must receive the same treatment.[61] Since the State's distinction fails both the differentia and nexus requirements, the legislative classification runs constitutionally afoul of Article 14.

D. Article 304(a)–Discrimination Between Interstate Commerce

The Supreme Court in *U.P. Asbestos Ltd. v. State of Rajasthan*,[62] as recently as September 2025, was faced with an issue on discrimination of tax imposed between imported goods vis-à-vis locally manufactured goods. Crucially, the Court clarified that discrimination under Article 304(a) is not merely a matter of form but of substance, requiring courts to examine whether the fiscal architecture produces a tariff wall or economic barrier that impedes inter-State trade, even if the rate structure appears neutral.[63] Although the Court also acknowledged that States may, in limited circumstances, grant selective exemptions or incentives for a distinct class of industries, provided such differentiation is justified, time-bound, and prompted by extraordinary circumstances, it expressly warned that this narrow exception cannot

[61] *Union of India v N.S. Rathnam and Sons* (2015) 10 SCC 681 ¶ 21.
[62] *U.P. Asbestos Ltd. v State of Rajasthan* (2025) 147 GSTR 122.
[63] ibid ¶¶ 12.18.2-12.18.3.

be expanded in a manner that "eats up the main provision" of Article 304(a).[64] The Court further stressed that the weapon of taxation cannot be used to discriminate against goods imported from outside the State, and that even indirect fiscal disadvantages against out-of-State goods violate Article 304(a).[65]

The obvious counter-argument, which the State will raise is that the judgment does not prevent a State from levying additional tax on local, i.e. State goods or documents, and that its primary holding was that the State cannot weaponize tax exemptions to prefer local products. While at first blush such an argument does seem attractive, a perusal of Article 304(a) shows that the provision states, "…as not to discriminate between goods so imported and goods so manufactured or produced."[66] Nowhere does it provide that the only discrimination against out-of-state goods or documents is prohibited. Thus, the principles articulated by the Supreme Court apply equally in the reverse direction. The prohibition is symmetric: just as States cannot use exemptions to create a fiscal advantage for local goods, they also cannot use additional taxation to create a fiscal disadvantage for goods, transactions, or economic activity originating within their borders. Accordingly, the Maharashtra Amendment violates Article 304(a) because it imposes a differential fiscal burden that produces an unfavourable bias against awards tied to economic activity inside the State.

[64] ibid, ¶¶ 12.18.4-12.18.6.
[65] ibid ¶12.18.5.
[66] The Constitution of India, 1950, art 304(a).

IV. WHAT CAN BE DONE IN THE MEANWHILE? PREVENTING IMPOSITION OF STAMP DUTY ON MONEY AWARDS FOR DAMAGES

While this contribution asserts that stamp duty on arbitral awards should be abolished in its entirety, what can be done till then, within the current legal regime? The Karnataka High Court has taken an interesting interpretation of awards concerning monetary claims.[67] The Court has held that per Schedule I, Article 11 of the Karnataka Stamp Act, 1957, an award which does not deal with movable and immovable property does not attract stamp duty, i.e. an award dealing with pure damages claims, which is an actionable claim, does not lead to the levy of stamp duty.[68] The Court further has held that money awards for damages will not attract stamp duty since there is no provision in the Karnataka Stamp Act which levies duties on awards not dealing with movable or immovable property. Indeed, the language of Schedule I, Article 11 of the Karnataka Stamp Act is extremely similar to that of the Maharashtra Stamp Act, limiting the levy of stamp duty to deal with awards on movable and immovable property.[69]

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[67] *Karnataka State Highways Improvement Project (KSHIP-II) v KMC - VDB(JV)* MANU/KA/3902/2023.

[68] ibid ¶ 7-9.

[69] Karnataka Stamp Act, 1957 (34 of 1957) sch I, art 11; The Maharashtra Stamp Act, 1958 (60 of 1958) sch I, art 12.

At this juncture, it is essential to provide a point of clarification concerning the nature of monetary awards. At first blush, one might be attracted to the idea that an arbitral award granting pure damages cannot be exempted from stamp duty on the basis that it constitutes an "actionable claim," for an award is not a claim to an unsecured debt but a crystallised adjudication, and therefore does not fall within the meaning of "actionable claim" under Section 3 of the Transfer of Property Act, 1882. However, the Karnataka High Court has held that money awards do not attract stamp duty for an entirely different reason: the charging provision of the Stamp Act imposes duty only on awards relating to movable or immovable property, and a pure damages award does not fall within either category. This is a strict construction of the charging section, consistent with settled principles that fiscal statutes must be interpreted narrowly/strictly.[70]

While the judgements of the Karnataka High Court are not binding on the Bombay High Court, they do have persuasive value,[71] especially since the language of the two Acts is almost identical and in the same context of interpretation. Further, the Bombay High Court can take up its own interpretation based on the language of Schedule I, Article 12 of the Maharashtra Stamp Act and rule that money awards for damages do not attract stamp duty.

[70] *Hiralal Rattanlal v State of U.P.* (1973) 1 SCC 216 ¶ 28-29.

[71] *Valliamma Champaka Pillai v Sivathanu Pillai And Ors* AIR 1979 SC 1937.

Thus, while the levy of stamp duty continues to be applicable on movable and immovable property, various High Courts can take up an interpretation that prevents the levy of Stamp Duty on money awards on damages. Such an interpretation will bolster the arbitration regime in India and take India closer to achieving the status of an arbitration hub.

V. CONCLUSION

Arbitration is a dispute resolution mechanism chosen by disputants not only because it is a speedy alternative to litigation, but also for sustaining lower costs than litigation. While this comment proposes an interpretation of law to avoid attracting stamp duty on money awards for damages, the same should not be imposed on any awards. Further, it runs afoul of Constitutional safeguards and the Arbitration Act. Specifically, the Maharashtra Amendment stands in conflict with the Arbitration Act under Article 254, as the State cannot classify awards in a manner contrary to Parliament's scheme. It also violates Article 304(a) by imposing a fiscal barrier on economic activity related to arbitration within Maharashtra. If a court decree does not incur stamp duty, neither should an award which fulfils the same purpose. The major objective of the Maharashtra Amendment was to increase government revenue. However, it will probably result in the opposite, especially with litigants asserting claims of limited pecuniary value preferring to avoid arbitration. Moreover, the Maharashtra Amendment represents an unconstitutional exercise of legislative competence under Article 14, imposing arbitrary burdens on domestic awards.

Considering the current trend, wherein both the executive and judiciary are actively promoting institutional arbitration, it is imperative to acknowledge the rising costs associated with the process. Litigants are already burdened with substantial institutional fees, and the imposition of excessive stamp duty at the stage of award enforcement only compounds this financial strain. Such developments undermine the very premise of arbitration as a cost-effective and efficient alternative to conventional litigation.

At the end of the day, the aim of any judicial or quasi-judicial body is to deliver justice, and while justice should ideally be free from financial burdens, more often than not, it is accompanied by costs. It is hoped that both the legislature and judiciary take meaningful steps to reduce these costs, thereby encouraging arbitration and cost-effective justice.