

ISSN 2394-997X

# **Lex Revolution**

Periodical Index

Journal of Social & Legal Studies

Volume-XI (2) Apr-Jun 2025



Published by  
Dr. V. B. Pandey  
[www.lexrevolution.in](http://www.lexrevolution.in)

Volume-XI

Issue-2

Apr-Jun 2025

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*“A right of an Advocate to appear for a party and to practise in the courts is coupled with the duty to remain present in the court at the time of hearing, and to participate and conduct the proceedings diligently, sincerely, honestly and to the best of his ability. Rights and duties are two sides of the same coin, and they are inherently connected with each other.”*

Bela M. Trivedi, J. in

*Supreme Court Bar Assn. v. State of Uttar Pradesh,*

(2025) 6 SCC 447, Para 19

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Periodical Indexed Peer-reviewed Journal of Social & Legal Studies

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### ***Published by***

Dr. Vijay Bahadur Pandey

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CIN U85300BR2023NPL061509

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## BALANCING FREEDOM OF RELIGION AND FREEDOM OF EXPRESSION: REVIEW OF THE BLASPHEMY LAWS IN NIGERIA

- Sophia Chima\*

### *Abstract*

*The relationship between freedom of religion and regulated speech raises essential questions about balancing individual rights for societal harmony. The Universal Declaration of Human Rights and Nigeria's Constitution guarantee the freedom to believe and express religious views. Still, this broad protection may conflict with the need to limit speech that could be offensive or harmful. This paper explores the laws regulating offensive religious speech and their coexistence with the constitutional right to freedom of speech and freedom of expression in Nigeria. It examines whether regulations on free speech can protect society without undermining the core values of religious freedom, relying on legal sources such as the Nigerian constitution, the penal code, and the criminal code to explore the relationships between these rights. This paper argues that regulations on offensive religious speech can protect societal harmony without undermining core religious freedoms, provided they are consistent with constitutional principles and human rights laws. Part I discusses the Nigerian case of Deborah Yakubu and the impact of having an unbalanced application of blasphemy law. It also analyses the operation of blasphemy law in various regions in Nigeria. Part II overviews International laws guaranteeing freedom of speech and religion and discusses Nigeria's obligations under international law. Part IV deals with the US perspective and global trends concerning blasphemy laws as well as the perspective of other European countries; Part V argues for the need for a balance between both rights, citing that one right should not be sacrificed at the detriment of another, Part VI urges the need for urgent reform of the current Laws on Blasphemy citing that they should be more precise leaving no room for speculations as to the extent and scope which it covers. Part VII concludes by recommending a robust application of Nigeria's Right to freedom of religion and expression.*

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**Keywords:** *Fundamental Rights, UDHR, Blasphemy Law, Religious Freedom, Nigerian Constitution.*

## INTRODUCTION

Freedom of Religion has been a complex issue from time immemorial, and religious persecution in Nigeria is of significant concern Nationally and Internationally.<sup>1</sup> On December 12, 2023, Congressman Christopher H. Smith of New Jersey addressed the House of Representatives, urging that Nigeria be promptly designated as a Country of Particular Concern (CPC) under the International Religious Freedom Act (IRFA) of 1998<sup>2</sup>. His remarks referenced a letter sent to Capitol Hill by religious freedom advocates, which documents severe and systematic religious persecution in Nigeria.<sup>3</sup>

Before the colonial era, traditional African religion existed, and beliefs, practices, and worship were tied to communities. During this era, religious practices and governance existed side by side. Traditional rulers often played the role of religious and political leaders.

After the colonial era, the society generally acknowledged three main religions in Nigeria<sup>4</sup>: African Traditional Religion, Christianity, and Islamic religion. Concerning the Islamic religion, English laws were applied to criminal matters in the North, while Islamic laws governed non-criminal or personal issues.<sup>5</sup> Upon gaining independence in 1960, the constitution made express provisions for certain fundamental human rights, including the right to freedom of thought, conscience, and religion, including freedom to change one's religion or belief and freedom, either alone or in community with others, and in public or in private to manifest and propagate his religion or belief in worship, teaching, practice, and observance.<sup>6</sup> Nigeria is a secular state, as evidenced by its constitutional provisions guaranteeing freedom of religion; there are no provisions in the constitution for adopting any

<sup>1</sup> International Christian Concern, “ICC Releases Report on Concerning Religious Persecution Trends in Nigeria”, available at: <https://www.persecution.org/2024/07/10/icc-releases-report-on-concerning-religious-persecution-trends-in-nigeria/> (last visited on: 05.01.2025).

<sup>2</sup> 169 Cong. Rec. E1207, 1 (2023).

<sup>3</sup> *Ibid.*

<sup>4</sup> Kingsley Pardung & G. S. Chukwuemeka, “The History of Religion in Nigeria” in G. S. Chukwuemeka, *Religion and Society* 71 (2023) available at: <https://dymsb.com/index.php/DJHSM/article/view/13/83> (last visited on: 05.06.2025).

<sup>5</sup> Mamman Lawan, “Islamic Law and Legal Hybridity in Nigeria”, 58 *J. Afr. Law* 303 (2014), available at: <http://www.jstor.org/stable/24735218> (last visited on: 10.07.2025).

<sup>6</sup> 1960 Constitution of Nigeria, Centre for Laws of the Federation (Nov. 11, 2020), <https://lawnigeria.com/2020/11/11/1960-constitution-of-nigeria/.a> (last visited on 05.01.2025).

state religion<sup>7</sup>. However, in 1999, 12 out of 36 states in Nigeria adopted Sharia law as the law governing Muslims within the Northern Jurisdiction.<sup>8</sup> In addition, Nigeria became a member of the Organization of Islamic Cooperation (OIC)<sup>9</sup> This further sparked off controversies around Nigeria's alleged secularity<sup>10</sup> given the fact that most members are Islamic states.

## **SUBJECTIVITY, ABUSE, AND THE CASE OF DEBORAH YAKUBU**

In analysing how blasphemy law operates in Nigeria, the recent case of Deborah Yakubu<sup>11</sup> is worth mentioning. A Student of the Shehu Shagari College of Education, Sokoto, a college located in the northwestern part of Nigeria, was brutally murdered by an angry mob of students. She was accused of posting a blasphemous statement about Prophet Mohammed in her class group. This incident caused an uproar within Nigeria and internationally. Police in the vicinity were unable or unwilling to quell the unrest, and authorities reportedly limited charges against two alleged perpetrators to "conspiracy and inciting public disturbance."<sup>12</sup> From the foregoing, it is evident that Blasphemy laws, as currently applied in Nigeria, appear to do more harm than good. Their vague and subjective nature makes them ripe for abuse,

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<sup>7</sup> *Ibid.*

<sup>8</sup> Rasheed Oyewole Olaniyi, "Hisbah and Sharia Law Enforcement in Metropolitan Kano", 57 (4) Africa Today 71 (2011), available at: <https://doi.org/10.2979/africatoday.57.4.71> (last visited on: 05.06.2025). Shortly after the 1999 constitution came into force, various state governments in northern Nigeria embarked on a process of reforms designed to restore Sharia to the position of pre-eminence it had enjoyed within their territories in precolonial times (Iwobi 2004:111). The debate goes beyond constitutional matters to include such political questions as expression of marginalization. Many Muslims felt aggrieved that Sharia had been unduly marginalized within the Nigerian legal order.

<sup>9</sup> Member States, Org. of Islamic Cooperation, available at: <https://www.oic-oci.org/states/?lan=en> (last visited on: 05.06.2025). The OIC is an intergovernmental Organization established in 1969 to fosters unity and cooperation among its member states, advocating for the protection and promotion of Islamic values and principles and Nigeria became a member in 1985.

<sup>10</sup> Katrin Gänslner, "Nigeria Looks Back on 20 Years of Sharia Law in the North", DW (Oct. 27, 2019), <https://www.dw.com/en/nigeria-looks-back-on-20-years-of-sharia-law-in-the-north/a-51010292>. (last visited on: 05.06.2025). In the name of democracy and the spread of its dividends, Zamfara State government and later governments of other eleven northern states (Jigawa, Kaduna, Kano, Katsina, Kebbi, Sokoto, Niger, Bauchi, Bornu, Yobe, Gombe) respectively enacted, repealed and amended certain laws in order to pave way for the smooth enforcement of the criminal aspects of Sharia law in their various enclaves. While Sharia Court Laws were enacted to establish Sharia Courts, Sharia Court of Appeal (Amendment) Laws were made to add criminal causes to the jurisdiction and the supervisory roles of the Sharia Courts of Appeal of the relevant states. In the same vein, while the Area Courts (Repeal) Laws were enacted with a view to replacing Area Courts with the new Sharia Courts, the Sharia Penal Code Laws were passed to codify the Sharia offences.

<sup>11</sup> Stephanie Busari, "Nigerian Female Student Killed for Alleged Blasphemy", CNN (May 13, 2022), available at: <https://www.cnn.com/2022/05/13/africa/female-student-blasphemy-attack-intl/index.html> (last visited on: 05.06.2025).

<sup>12</sup> *Ibid.*

empowering individuals or groups to suppress dissenting views and enforce their religious beliefs on others.

This is just one of the many human rights and religious freedom violations that occur in Nigeria. The International Christian Concern (ICC),<sup>13</sup> describes Nigeria as one of the scariest places to be a Christian, and further reports by the ICC show that no less than 896 civilians were killed in violent attacks in Nigeria during the first three months of 2022.<sup>14</sup> In most cases, the perpetrators are never brought to the book, and this creates a society where mob violence and lynching thrive.

According to Isa Sanusi, Director of Amnesty International Nigeria,<sup>15</sup> the menace of mob violence is perhaps one of the biggest threats to the right to life in Nigeria. The fact that these killings have been happening for a long time, with few cases investigated and prosecuted, highlights the failure of the Governmental structures to uphold and fulfill their obligation to protect people from harm and violence.<sup>16</sup> Blasphemous offences must be brought before and adjudicated in courts of law rather than left to the whims of mob justice. When this is done, it allows the courts to play a critical role in striking a delicate balance between freedom of expression and religion based on the facts and circumstances of each case. This would enable Nigerian courts to establish precedents that promote tolerance, protect individual rights, and ensure that religious sensitivities are respected without infringing on free speech.

### ***How Blasphemy Laws Operate under the Nigerian Penal and Criminal Code***

The application of Blasphemy laws in Nigeria is quite sketchy, as none are applicable nationwide. The Criminal Code governs the prosecution of the offence of blasphemy in the southern part of Nigeria, while the Penal Code operates in the North. It is noteworthy that neither of the codes makes explicit mention of the term '*blasphemy*', but they both address the issue using a similar term: '*insult to religion and wounding religious feelings*'.

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<sup>13</sup> Christian Solidarity Worldwide, “Nigeria: The World’s Scariest Country for Christians” (May 14, 2022), available at: <https://www.persecution.org/2022/05/14/nigeria-worlds-scariest-country-christian/> (last visited on: 05.06.2025)

<sup>14</sup> *Ibid.*

<sup>15</sup> “Escalation of Mob Violence Emboldens Impunity”, Amnesty International, Nigeria (Oct. 2024), available at: <https://www.amnesty.org/en/latest/news/2024/10/nigeria-escalation-of-mob-violence-emboldens-impunity/> (last visited on: 05.06.2025)

<sup>16</sup> *Ibid.*

Section 204 of the Criminal Code<sup>17</sup> provides, “*Any person who does an act which any class of persons considers as a public insult on their religion, with the intention that they should consider the act such an insult, and any person who does an unlawful act with the knowledge that any class of persons will consider it such an insult, is guilty of a misdemeanour and is liable to imprisonment for two years*”.<sup>18</sup>

From the wording of the provisions of the criminal code, the test is subjective as it places the determination of whether an act is blasphemous on the perception of the affected group. This means that the focus is on how the act is perceived by the religious group rather than on an objective standard. This is problematic because it gives room for potential abuse, as religious groups or individuals may claim that specific actions are an insult to their religion. Moreover, this approach tends to fuel religious intolerance by empowering one group to impose its standards of what is considered an insult to others.

A similar provision exists under the Penal Code Section 210,<sup>19</sup> as ‘Insulting Religion or Wounding Religious Feelings.’ “*Whoever to wound the religious feelings of any person, utters or writes any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places any object in the sight of that person, shall be punished with imprisonment for a term which may extend to two years or with fine or with both.*”<sup>20</sup>

Again, this provision is vague and highly subjective; the term ‘wounding religious feelings’ could mean different things to different people; religious extremists would often take advantage of vague languages like this to prosecute individuals or suppress free speech, claiming that certain words, actions, or gestures “wounds” their religious feelings, even when no harm was intended. The criminal and penal code provisions aim to protect religious beliefs and practices from intentional verbal, written, or symbolic insults. It also seeks to protect the sanctity and peacefulness of religious gatherings from disruptions and intentional disregard for one’s religious beliefs, but in practice, the Penal Code is applied selectively. Ordinarily, it ought to apply in all criminal cases in the North, but since the adoption of Sharia law by 12 Northern states, the effect of this provision in the Penal Code has been watered down. Sharia

<sup>17</sup> Criminal Code Act (Nigeria), sec. 204 (1990).

<sup>18</sup> *Ibid.*

<sup>19</sup> Penal Code Act (Nigeria), sec. 210 (1990).

<sup>20</sup> *Ibid.*

Law is often resorted to in cases of religious offenses because it provides stricter punishments than those provided for in the penal code. For example, insulting religious feelings under the penal code carries a two-year penalty, fine, or both. Still, under Sharia law, the punishment is more severe, and this includes the death penalty. Blasphemy, in its simplest form, refers to the act of showing disrespect toward a deity or sacred beliefs.<sup>21</sup>

In Nigeria, various regions have prohibitions against blasphemy, which vary in strictness. At the same time, some religions have enforced strict measures against insult to religion and wounding religious feelings, while others have adopted a more moderate approach.

### ***Constitutional Protection for Freedom of Religion in Nigeria***

Section 38 of the *Constitution of the Federal Republic of Nigeria*<sup>22</sup> (1999, as amended) provides that, “*Every person shall be entitled to freedom of thought, conscience, and religion, including the freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice, and observance*”.

A close examination of the wording of the above provision reveals the use of the term “shall”, which positively guarantees the freedom of thought, conscience, and religion for every person, including the right to express criticism of the beliefs of others freely. The courts in Nigeria have held in many cases that the word ‘shall’ when used in statutes implies an obligation<sup>23</sup>. There is no doubt that freedom of religion is fundamental, and hence, it is a very sensitive issue in Nigeria. Respect for each other’s beliefs and opinions is the recipe for individual and societal harmony and peaceful co-existence.<sup>24</sup>

Freedom of religion is fundamental in secular states as it is necessary to prevent the dominance of any religion over another.<sup>25</sup> Religious freedom strengthens democracy by ensuring that different beliefs, religions, and manifestations are respected and that individuals

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<sup>21</sup> Merriam-Webster, *Blasphemies*, Merriam-Webster.com Dictionary, available at: <https://www.merriam-webster.com/dictionary/blasphemies> (last visited on: 30.11.2024).

<sup>22</sup> Nigerian Constitution (1999), sec. 38 (1-4).

<sup>23</sup> *Bamaiyi V A.G. OF FED* 2001 90 LRCN 2738

<sup>24</sup> Ikenga K. E. Oraegbunam, “Islamic Law, Religious Freedom and Human Rights in Nigeria”, 2 *Sacha J. Hum. Rts.* 1 (2012).

<sup>25</sup> Ikenga K. E. Oraegbunam, “Sharia Criminal Law and State Secularity Principle in Nigeria: Implications of Section 10 of the 1999 Constitution (as Amended)”, 28 *J. L. Pol'y & Globalization* 39 (2014), available at: <https://www.iiste.org/Journals/index.php/JLPG/article/viewFile/14978/15751> (last visited on: 10.07.2025)

can live according to their convictions without fear of persecution or discrimination<sup>26</sup>. In states where religious freedom is not safeguarded, there are higher chances of minority persecution.<sup>27</sup>

Jeperone<sup>28</sup> argues that there should be a balance between the right to freedom of expression and the right to protect religious sentiments. He asserts that, historically, blasphemy laws have been employed by dominant religions to safeguard religious feelings<sup>29</sup>. He contends that religion was traditionally perceived as the root of society's political and moral behavior, and blasphemy poses a challenge to the very fabric of society, warranting severe punishment.<sup>30</sup>

He distinguishes the operation of blasphemy laws in Islamic states, noting that these laws are not considered obsolete; instead, they remain actively enforced. Through a comparative legal survey, Jeperone concludes that in some jurisdictions, the protection of religion serves as a basis for restricting fundamental human rights, particularly freedom of expression.<sup>31</sup> I agree with Jeperone's position because both rights are essential, and neither should come at the expense of the other because neither is absolute.

## **NIGERIA'S OBLIGATION UNDER INTERNATIONAL LAW AND THE QUESTION OF ABSOLUTE RIGHTS**

The Federal Republic of Nigeria was admitted as a member state of the United Nations on 7 October 1960, having gained independence on 1 October the same year.<sup>32</sup> Nigeria, as a Member of the UN, has various obligations under the International Bill of Rights, which includes the Universal Declaration of Human Rights (UDHR), the International Covenant on

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<sup>26</sup> Gray Group International, "Freedom of Religion: Upholding Belief and Expression", (Oct. 1, 2024) available at: <https://www.graygroupintl.com/blog/freedom-of-religion> (last visited on: 22.12.2024).

<sup>27</sup> Stanley Carlson-Thies, "Religious Liberty in the States: 2024 Report Highlights Surprising Rankings and Key Trends", *Christian Public Justice* (2024), available at: <https://cpjustice.org/religious-liberty-in-the-states-2024-report-highlights-surprising-rankings-and-key-trends/> (last visited on: 05.06.2025)

<sup>28</sup> Jeroen Temperman, "Blasphemy, Defamation of Religions & Human Rights Law", 26 (4) *Netherlands Quarterly of Human Rights* 517 (2008), available at: <https://ssrn.com/abstract=2041292> (last visited on: 05.06.2025)

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> UN, "About the United Nations in Nigeria", available at: <https://nigeria.un.org/en/about/about-the-un> (last visited on: 16.11.2024).

Civil and Political Rights (ICCPR), which was ratified by Nigeria in 1993, and African Charter on Human and Peoples' Rights.<sup>33</sup>

The Supreme Court of Nigeria in *Abacha v Fawehinmi*<sup>34</sup> held that when international law is ratified and incorporated into domestic law, it is superior to all domestic laws except the Constitution<sup>35</sup> Considering that both rights rank equally under Nigerian Laws, should one of these rights be interpreted to have more weight than the other? Is the freedom of expression an absolute right? Reference shall be made to the relevant international laws for a broader understanding.

### ***International Laws***

1. **UDHR:** Article 19 of the Universal Declaration of Human right establishes the right to freedom of opinion and expression, stating:

*'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media, regardless of frontiers. The exercise of this right carries with it special duties and responsibilities. It may, therefore, be subject to certain restrictions, such as for respect of the rights or reputations of others, for the protection of national security or public order, or the protection of public health or morals'*<sup>36</sup>

2. **International Covenant on Civil and Political Rights (ICCPR):** The ICCPR, adopted by the United Nations in 1966, also guarantees the right to freedom of speech. Article 19(3)<sup>37</sup> of the ICCPR asserts that everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media regardless of frontiers. It further provides that the exercise of this right carries with it

<sup>33</sup> African Charter on Human and Peoples' Rights, available at: <https://www.african-court.org/wpafc/wp-content/uploads/2020/04/AFRICAN-BANJUL-CHARTER-ON-HUMAN-AND-PEOPLES-RIGHTS.pdf> (last visited on: 05.06.2025)

<sup>34</sup> *General Sanni Abacha v. Chief Gani Fawehinmi*, 2000 SCC OnLine SCN 1

<sup>35</sup> *Ibid.*

<sup>36</sup> United Nations, "Universal Declaration of Human Rights", available at: <https://www.ohchr.org/en/human-rights/universal-declaration/translations/english> (last visited on: 19.10.2024).

<sup>37</sup> United Nations, "International Covenant on Civil and Political Rights, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> (last visited on: 19.10.2024).

special duties and responsibilities; it may, therefore, be subject to certain restrictions, such as for respect of the rights or reputations of others, for the protection of national security or public order, or the protection of public health or morals.”<sup>38</sup>

From the foregoing, the right to express oneself is not without constraints; the laws allow for limitations on various grounds, including the protection of national security, public order, health, morals, and the rights of others. The restrictions on these rights must, therefore, be necessary and proportionate to the goal they seek to achieve.<sup>39</sup>

### **Case Laws**

In the case of *Otto-Preminger-Institut v. Austria*,<sup>40</sup> the court reasoned that those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of doctrines hostile to their faith<sup>41</sup>. However, the way religious beliefs and even doctrines are opposed or denied is a matter that may be the state’s responsibility. The international courts, when faced with cases of freedom of religion and belief, approach the case by a 3-test measure<sup>42</sup>

1. Whether there is an interference that the law has prescribed,
2. Whether the interference had a legitimate aim, and
3. Whether the acts by the government are necessary in a democratic society

On July 29<sup>th</sup> 2011, the UN Human Rights Committee published General Comment No. 34<sup>43</sup>, which provides an authoritative interpretation of the right to freedom of opinion and expression under Article 19 of the International Covenant on Civil and Political Rights

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<sup>38</sup> *Ibid.*

<sup>39</sup> Centre for Law and Democracy, “Freedom of Expression: Briefing Notes” (Feb. 2015), available at: <https://www.law-democracy.org/live/wp-content/uploads/2015/02/foe-briefingnotes-2.pdf> (last visited on: 05.06.2025)

<sup>40</sup> *Otto-Preminger-Institut v. Austria*, 11/1993/406/485 , Council of Europe: European Court of Human Rights (ECtHR), 23 August 1994, available at: <https://www.refworld.org/jurisprudence/caselaw/echr/1994/en/94253> [last visited on: 05.06.2025]

<sup>41</sup> *Ibid.*

<sup>42</sup> U.N. Human Rights Comm, “General Comment No. 34 on Article 19: Freedoms of Opinion and Expression”, CCPR/C/GC/34, (July 29, 2011) available at: <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no34-article-19-freedoms-opinion-and> (last visited on: 05.06.2025).

<sup>43</sup> *Ibid.*

(ICCPR). This comment clarifies that blasphemy laws are generally incompatible with the Covenant, except in specific circumstances outlined in Article 20, paragraph 2, which prohibits any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence.<sup>44</sup>

In *Kokkinakis v. Greece*<sup>6</sup> the European Court of Human Rights stated, “*Freedom of speech was not an absolute right, but a right subject to various duties and responsibilities, which include an obligation not to use expressions which are offensive to others and amount to infringement of other people’s religious rights.*”

This means that there must be a balance between freedom of speech and religiously offensive words and conduct.<sup>45</sup> Rabbi Jarrod Grover<sup>46</sup> argues that, although freedom of expression is sometimes hurtful, it’s the price we pay for living in a vibrant and prosperous democracy that allows our most cherished values to be questioned<sup>47</sup>. As one of the first generation of rights guaranteed by the constitution of the Federal Republic of Nigeria, it allows people to make choices of the faith they would like to practice or even choose to follow no faith at all<sup>48</sup>. It even includes the freedom to change one’s belief.<sup>49</sup> This same protection is offered under the right to free speech; it enables a person to speak, write, publish, and communicate freely without any form of interference.<sup>50</sup>

The right to freedom of speech is, however, subject to certain restrictions; Article 29(3) of the Universal Declaration of Human Rights provides,<sup>51</sup> “*In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely*

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<sup>44</sup> *Ibid.*

<sup>45</sup> Diana Swift, “Freedom of Expression vs. Religious Sensibilities: What’s the Balance?”, *Anglican Journal*, available at: <https://anglicanjournal.com/freedom-of-expression-vs-religious-sensibilities-what-s-the-balance/> (last visited on: 22.12.2024).

<sup>46</sup> Beth Tikvah Synagogue, Clergy & Staff, available at: <https://www.bethtikvaontario.org/clergy--staff.html> (last visited on: 05.06.2025). Rabbi Jarrod Grover is a prominent promoter of religious freedom, actively advocating for interfaith dialogue and community engagement. In addition to his leadership role at Beth Tikvah Synagogue, he serves as Vice-President of the Toronto Board of Rabbis and is a member of the Toronto Police Chief’s Jewish Community Consultative Committee, reflecting his commitment to fostering religious tolerance and cooperation across diverse faith communities. His work emphasizes the importance of religious liberty, social justice, and mutual respect within both the Jewish and broader communities.

<sup>47</sup> *Ibid.*

<sup>48</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at: <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (last visited on: 05.06.2025)

<sup>49</sup> *Ibid.*

<sup>50</sup> Nigerian Constitution, *Chapter 4, Section 39*:

<sup>51</sup> Universal Declaration of Human Rights art. 29, para 2, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

*to secure due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in a democratic society.”*

This means that the limitations on the right to free speech must be prescribed by law and cannot be arbitrarily left to the discretion of any individual or group.

## **GLOBAL AND US PERSPECTIVE**

### ***Early American Practices.***

As antiquated as it may sound, about 84 countries currently have laws criminalising blasphemy<sup>52</sup>. In earlier times, the United States even had laws on blasphemy, which were enacted by various states, including Massachusetts, New Hampshire, and New Jersey, even though their respective constitutions protected religious freedom.<sup>53</sup> In the case of *Updegraph v. Commonwealth*,<sup>54</sup> the court reasoned that blasphemous statements - when spoken with wilful premeditation to call the truth of Christianity into question in the presence of community members - are an indictable offence under Pennsylvania common law. Also, the Maryland Toleration Act of 1649, which promoted the “free exercise” of Christianity, simultaneously imposed the death penalty or forfeiture of land for non-Christians guilty of blasphemy, showing the historical misuse of religious laws.<sup>55</sup>

However, the United States changed its position in the case of *Joseph Burstyn, Inc. v. Wilson*,<sup>56</sup>. The case arose after the New York State Board of Regents revoked the license to exhibit *The Miracle*. This film had been deemed “sacrilegious.” Joseph Burstyn appealed the decision, arguing that the censorship violates the First Amendment’s protections for freedom of speech and the press. The Supreme Court’s decision in *Burstyn* overruled its earlier decision in the case of *Mutual Film Corp. v. Industrial Commission of Ohio*<sup>57</sup>, which

<sup>52</sup> USCIRF, “Violating Rights: Enforcing the World’s Blasphemy Laws” (2020), available at: <https://www.uscirf.gov/publication/violating-rights-enforcing-worlds-blasphemy-laws> (last visited on: 05.06.2025).

<sup>53</sup> Anna Price, “A History of Blasphemy Laws in the United States”, *Library of Congress Blogs* (Dec. 2023), available at: <https://blogs.loc.gov/law/2023/12/a-history-of-blasphemy-laws-in-the-united-states/>. (last visited on: 05.06.2025).

<sup>54</sup> *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394 (Pa. 1824).

<sup>55</sup> Maryland Toleration Act of 1649, ch. 22, 1649 Md. Laws 72, available at: <https://oll.libertyfund.org/pages/1649-maryland-toleration-act> (last visited on: 05.06.2025)

<sup>56</sup> *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

<sup>57</sup> *Mutual Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230 (1915).

allowed film censorship based on the government's content assessment. The Court held that motion pictures were a form of expression and that the censorship of the film, based on its perceived sacrilegious content, was unconstitutional because it infringed upon freedom of speech and the press<sup>58</sup>.

In the United States case of *State of Maryland v. Irving K. West*,<sup>59</sup> the court ruled that the Maryland blasphemy statute, which criminalised blasphemous utterances, violated the First Amendment's Establishment and Free Exercise Clauses. The law was seen as a governmental effort to protect and perpetuate Christianity, which contravenes the constitutional mandate for governmental neutrality toward religion<sup>60</sup>. The court held that the states should not use their power to support one religion or restrict religious freedoms; thus, the statute was unconstitutional. The laws on blasphemy are being regarded as outdated and inappropriate in many countries<sup>61</sup>

### **Global Trends**

In Western Europe, many countries have retained blasphemy and related laws, while in some other countries, they have never been enforced, although there have been prosecutions in recent years, including Austria, Finland, Germany, Greece, Switzerland, and Turkey.<sup>62</sup> The offense of Blasphemy was officially abolished in England and Wales in May 2008 by Section 79 of the Criminal Justice and Immigration Act 2008.<sup>63</sup>

A democratic state must guard the constitutional right of free speech since religion can be used to promote peace or be abused by extremists to cause unrest. Still, blasphemy law can respond to a public moral vision<sup>64</sup> Hence, both rights must be balanced. The big question is whether blasphemy laws can serve any legitimate purpose insofar as human rights law is concerned.<sup>65</sup> The justification of Blasphemy law is often hinged on upholding public moral

<sup>58</sup> *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

<sup>59</sup> *State of Maryland v. Irving K. West*, 9 Md. App. 270, 263 A.2d 602 (Md. Ct. Spec. App. 1970).

<sup>60</sup> *Ibid.*

<sup>61</sup> Ismail Misbahu, "Discussing Blasphemy in the Context of Nigeria: Does It Target Minority Groups?", 7 *Polac Int'l J. of Humanities & Sec. Stud.* 189 (2023).

<sup>62</sup> Blasphemy Law, LIBR. OF CONG., available at: <https://www.loc.gov/law/help/blasphemy/index.php>. (last visited on: 05.06.2025)

<sup>63</sup> Erica Howard, "Freedom of Expression, Blasphemy and Religious Hatred: A View from the UK", 17 *Ecclesiastical L.J.* 191 (2015).

<sup>64</sup> Neville Cox, "Justifying Blasphemy Laws: Freedom of Expression, Public Morals, and International Human Rights Law", 35 *J.L. & Religion* 1 (2020).

<sup>65</sup> *Ibid.*

standards and criminalising certain religious offences. This can help maintain societal stability by creating an environment where one is free to profess or practice their religion and belief without fear of ridicule. The laws on blasphemy seek to serve as a preventive measure against violence and social unrest, which inflammatory speeches may cause. Criminalizing blasphemy is believed to mitigate risk and promote peaceful existence amongst different religious groups. While blasphemy law does not operate effectively in some countries, it is a potent weapon in some other countries to combat unguarded utterances against one religion or personage by another.<sup>66</sup>

## **BALANCING FREEDOM OF EXPRESSION AND BLASPHEMY LAWS IN NIGERIA**

According to The Economist<sup>67</sup>, Freedom of speech includes the right to defame religion. If limitations are allowed, governments may use such laws to suppress dissent, target minority viewpoints, or protect certain ideologies over others<sup>68</sup>. Dr. Evan Harris,<sup>69</sup> argues that the law on blasphemy has a ‘chilling effect’ because it could mean that people might avoid showing, publishing, or printing material that might be blasphemous because they might be subject to criminal sanctions.<sup>70</sup> Protecting the freedom of speech and expression is one way in which the equal dignity of all individuals can be protected. Granting A the effective right to determine the limits of B’s speech simply because A finds it offensive is a clear *prima facie* violation of freedom of expression, no matter how large a group is represented by A, even if B is a solitary individual. Restricting speech based on religious sentiments undermines the fundamental right to free expression. At the same time, imposing limits on free speech to protect religious beliefs can similarly infringe upon the core principles of freedom of expression. Therefore, Protecting religious feelings should be balanced with the fundamental right to free expression and freedom of speech.

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<sup>66</sup> Aliu Jimoh & Abdulwahab Shittu, “The Nigerian Criminal Justice and the Belligerence of Blasphemy: Societal, Judicial and Islamic Law Perspectives”, 13 (1) *Jurnal Hukum Novelty* 81-97 (2022), available at: <https://doi.org/10.26555/novelty.v13i1.a23582> (last visited on: 11.07.2025)

<sup>67</sup> The Meaning of Freedom, The Economist (Apr. 2, 2009), available at: <https://www.economist.com/leaders/2009/04/02/the-meaning-of-freedom>. (last visited on: 05.06.2025)

<sup>68</sup> *Ibid.*

<sup>69</sup> Dr. Evan Harris, former Member of Parliament for Oxford West and Abingdon, Liberal Democrat, and advocate for the abolition of blasphemy laws, tabled an amendment to abolish the offences of blasphemy and blasphemous libel during the Report stage of the Criminal Justice and Immigration Bill 2007-08.

<sup>70</sup> Carl Wellman, “Freedom of Religion and Freedom of Expression: Religiously Offensive Speech and International Human Rights”, 20 *Human Rights Quarterly* 82 (1998).

In a multi-religious society like Nigeria, the absence of a balance between both rights can result in mob violence incited by extremists who use these blasphemy laws or free speech to perpetuate unrest. A notable example of the need for a balance between freedom of religion and regulated speech in Nigeria is the case of Sharif-Aminu, a Nigerian musician arrested by authorities in March 2020. Sharif-Aminu, a follower of the Sufi Tijaniyya Order, faced widespread backlash after audio messages he shared via WhatsApp praised an imam from the Tijaniyya Muslim Brotherhood, Ibrahim Niasse, to the extent of elevating him above the Prophet Muhammad. The messages triggered significant controversy, and Sharif-Aminu went into hiding after protestors burned down his family home. He was eventually arrested and charged with insulting religious creed under Section 382(6) of the Kano State Sharia Penal Code Law, 2000.<sup>71</sup>

From the foregoing, it is evident that while protecting religious sentiments, it is also imperative to acknowledge that freedom of speech is a universal and fundamental right. The laws on blasphemy, when unchecked, create a dangerous precedent in limiting speech. Another critical case that highlights the harmful effects of unbalanced blasphemy laws, especially in terms of proportionality, is the imprisonment of Humanist Association of Nigeria President Mubarak Bala for 24 years on the grounds of insulting religion with the intent to break the peace.<sup>72</sup>

The above cases highlight the urgent need for Nigeria to re-evaluate its laws on Blasphemy and ensure that they align with international human rights standards. The severity of the punishments meted out in these instances suggests that there is the potential for these laws to be used disproportionately, infringing on the freedoms of expression and speech. Jeperone believes that there is no abstract conflict between freedom of expression and freedom of religion and belief.<sup>73</sup> He argues that proceeding along the lines of tension between both rights would not only be at the detriment of the fundamental right of freedom of expression but too broad a right to freedom of religion or belief as a right to respect for one's religion also jeopardizes the right to freedom of religion or belief itself<sup>74</sup>. I agree with the opinion of Jeperone on grounds that when a right to respect for one's faith is interpreted too

<sup>71</sup> Yahaya Sharif-Aminu is detained for his religious expression. *available at:* <https://www.uscirf.gov/religious-prisoners-conscience/forb-victims-database/yahaya-sharif-aminu> (last visited on: 19.10.2024).

<sup>72</sup> Ishaq Khalid, "Nigeria's Christian and Muslim Leaders Unite to Combat Religious Violence" *BBC News* (Mar. 3, 2022), *available at:* <https://www.bbc.com/news/world-africa-60997606> (last visited on: 05.06.2025)

<sup>73</sup> *Supra* note 28.

<sup>74</sup> *Ibid.*

expansively, it can lead to restrictions on the free expression of differing opinions. An overextension of one right can inadvertently infringe on the other, so both rights must be respected and balanced.

Without a balance, blasphemy laws tend to deviate from the principles of Legality and proportionality as they are often broad and their penalties overly harsh; as seen in the Nigerian cases cited above, they act as a de facto censure of religious dialogue and criticism, they afford different levels of protection to various religious groups and are generally regarded as inconsistent with universal human rights standards.<sup>75</sup>

## NEED FOR URGENT REFORMS

To effectively balance the fundamental rights of freedom of expression and freedom of religion, Nigeria needs comprehensive legal, institutional, and societal reforms. While the international communities have condemned mob violence and killings associated with blasphemy, there is no clear strategy by the Nigerian government to put an end to it. In the case of *Inspector General of Police v. ANPP*<sup>76</sup>, the Nigerian Court of Appeal held that the right to freedom of expression is one of the citizens' most fundamental rights, which must be guarded jealously because it is the backbone of any democratic government.

Reforms can only be possible with the combined efforts of all three arms of government in Nigeria. While there is advocacy for legislative reforms in the laws relating to blasphemy, this would not be meaningful if the judiciary and the executive continue to take on a side role in interpreting and enforcing the right to free speech, particularly in Northern Nigeria. One of the significant duties of the judiciary in every democratic society is to ensure that the rights of citizens are protected and to balance any competing interests. Societies where free speech is not guaranteed are heading for tyranny or dictatorship.

In a religious context, if people cannot criticize a particular religion or religious belief, it creates a situation of fear and tension. Suppose the three arms of government fail to promote religious freedom. In that case, it makes a slippery slope where state governments can use the laws of blasphemy to target a particular religious group or ethnic group. Without assurances

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<sup>75</sup> Spotlight on Blasphemy Laws, "The George Washington University International Law and Policy Brief" (Dec. 5, 2022), available at: <https://studentbriefs.law.gwu.edu/ilpb/2022/12/05/spotlight-on-blasphemy-laws> (last visited on: 05.06.2025)

<sup>76</sup> *Inspector General of Police v. All Nigerian Peoples Party & Ors.*, 2007 AHRLR 179 (Ng. CA 2007).

from the judiciary and the executive branch, any legislative action by the lawmakers would be merely aspirational and could not yield the intended reform.

Religious intolerance is a menace that has eaten very deeply into the fabric of Nigerian society. In the first half of 2004, hundreds of people were killed in inter-communal fighting between Muslims and Christians in and around the town of Yelwa and the southern part of Plateau State, central Nigeria, bringing the total number of victims of the violence in Plateau State since 2001 to between 2,000 and 3,000.<sup>77</sup> One of the most troubling aspects of these violent episodes is the lack of accountability. Nobody was brought to the book, which tends to create an environment that enables the recurrence of disastrous consequences.

To adequately address this issue, the Nigerian government must take active steps to ensure that the constitutional right to freedom of speech, expression, religion, and belief is upheld and protected.

1. *More precise Legislation on Blasphemy:* The Legislative arm of government should provide more accurate and specific definitions of blasphemy and the scope of speech protected under the constitutional right to freedom of expression. The judiciary must also strive to offer interpretations that balance both rights. This would ensure that restrictions on speech are precise rather than vague or overly broad, which could lead to arbitrary enforcement. The Nigerian Government needs to do more to recognize and uphold the freedom of expression as a fundamental pillar of democracy, applicable even to expressions that may offend, annoy, or disturb. Open debate on religion and beliefs should be encouraged, as this is essential to a democratic society, provided it does not incite violence or discrimination. The Government should encourage religious groups to tolerate public debate and critical statements about their beliefs and teachings. Non-members ‘ discussions about a particular religion should not be considered intentional insults unless they incite violence or cause public disturbance. The Nigerian Government should encourage religious groups to work hand in hand to foster respect for cultural and religious diversity, ensuring ongoing dialogue that helps avoid friction. There must be an intentional effort by government,

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<sup>77</sup> Human Rights Watch, “Revenge in the Name of Religion: A Cycle of Violence in Plateau and Kano States” (May 25, 2005), available at: <https://www.hrw.org/report/2005/05/25/revenge-name-religion/cycle-violence-plateau-and-kano-states>. (last visited on: 05.06.2025).

religious institutions, and private persons to promote respect for individuals regardless of their spiritual orientation.

2. *Abolishing or Reforming the Death Penalty for Blasphemy:* In states where blasphemy laws carry severe penalties such as the death penalty, the legislature should consider abolishing such penalties or substituting them with lesser, non-violent forms of punishment, as prescribed by international human rights norms. International bodies such as the United Nations Human Rights Committee have criticized the use of capital punishment for blasphemy-related offenses, urging countries to reconsider these practices. While the courts can condemn insults to religious beliefs and practices, the state must be cautious when issuing excessive sanctions. It is the state's responsibility to determine what qualifies as a criminal offense, ensuring that penalties are not excessive, especially concerning issues of religion. For example, the death penalty for blasphemy is not commensurate. The state must be seen to take a standpoint of religious tolerance.
3. *Education for Tolerance:* The Government must prioritize education that boosts understanding among individuals of different religions. Teaching about other religious beliefs at primary, secondary, and university levels would help drastically reduce ignorance and the likelihood of religious insults. It would also go a long way toward improving tolerance. There is a dire need to be more intentional about curriculum development and review law and religion issues within the Nigerian framework. In line with this, Nigeria should have an International Center for Law and Religion to promote religious dialogue and tolerance.

## CONCLUSION

The tragic case of Deborah Yakubu and other cases and statutes cited above highlight Nigeria's ongoing challenges in balancing the fundamental rights to freedom of expression and religion. While both rights are enshrined in Nigeria's constitution and international human rights treaties, the country's legal system and law enforcement have struggled to effectively protect these rights, especially in sensitive cases involving blasphemy. Both rights can coexist, but to effectively address these challenges faced in upholding the right to freedom of expression or religion, the government must take proactive measures by clarifying blasphemy laws, promoting public awareness of human rights, and ensuring a fully

independent judiciary. By doing so, Nigeria can better uphold the delicate balance between these rights, providing both freedom of expression and religious liberty, which are protected in a manner that is necessary, proportional, and in line with international standards.

## ALGORITHMIC ACCOUNTABILITY IN CORPORATE DECISION-MAKING: RECONSTRUCTING LIABILITY FRAMEWORKS FOR AI-DRIVEN GOVERNANCE

- Lakshya Kaushish\* & Deepanshi Tiwari\*\*

### *Abstract*

*The integration of Artificial Intelligence (AI) in business decisions, including strategic planning, hiring, and firing, has resulted in a significant accountability gap. Self-driving algorithm perpetrators are incapable of being held accountable by conventional legal systems, which are predicated on the actions and intentions of individuals. This doctrinal impasse exposes businesses to new risks and leaves the most vulnerable members of society, namely, the victims of biased or flawed AI, without any form of assistance. This paper suggests a liability framework for corporate governance that is AI-driven. The paper suggests a novel theoretical standard that is divided into two components. The initial prong establishes a new standard for the corporate duty of care by mandating Algorithmic Impact Assessments, independent “criterion” audits, and robust Explainable AI (XAI). The second section proposes a tiered liability system, expands product liability categories, and adds algorithmic oversight to fiduciary responsibilities. This research emphasises the “downtrodden concerns” of algorithmic bias victims to show how to ensure that technological advances are consistent with corporate responsibility, justice, and fairness.*

**Keywords:** Algorithmic Accountability, Corporate Governance, AI Liability, Legal Personhood, Algorithmic Bias, Product Liability, and Explainable AI.

### INTRODUCTION

The integration of Artificial Intelligence (AI) into the core of corporate governance is a big change in how organisations make decisions.<sup>1</sup> AI systems have evolved from automating

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basic tasks to now playing a significant role in strategic planning, financial analysis, and even tasks that were previously performed by human corporate officers.<sup>2</sup> Companies utilise AI to optimise supply chains, check creditworthiness for loans, and sort through résumés during the hiring process, thereby promising unparalleled efficiency and data-driven insight.<sup>3</sup> Nevertheless, this technological advancement has surpassed the development of commensurate legal and ethical guardrails, creating a profound accountability vacuum.<sup>4</sup>

The primary inquiry that motivates this investigation is the reason why conventional law fails to address the harm caused by AI. When an autonomous algorithm persists in discriminating against job applicants, denying a loan based on biased data, or causing substantial financial losses, the conventional methods of assigning legal responsibility are rendered obsolete.<sup>5</sup> The complex, multi-actor ecosystem of AI development and deployment presents a challenge for our legal system, which is predicated on centuries of precedent regarding human agency, intent (*mens rea*), and foreseeability.<sup>6</sup> It is difficult to identify a responsible party in this environment. This is not merely a minor legal discrepancy that can be rectified.<sup>7</sup>

The resolution of this lack of accountability necessitates a meticulous and comprehensive reconstruction of the regulations that impose accountability on businesses. It is impossible to effectuate this type of transformation through incremental, independent reforms. Rather, it necessitates a multilayered strategy that integrates new substantive liability regulations with proactive procedural obligations. We can establish a governance framework that ensures that companies are accountable for the technologies they employ, that innovation is consistent with fundamental rights, and that individuals who are harmed have a genuine avenue to receive assistance.

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<sup>1</sup> S. van der Zande, *et.al.*, “Artificial Intelligence in Corporate Governance: A Triptych”, 13 *Erasmus Law Review* 1 (2020).

<sup>2</sup> R. Abbott, *The Reasonable Robot: Artificial Intelligence and the Law* (Cambridge University Press, Cambridge, 2020).

<sup>3</sup> See Michael L. Rich, “Machine Learning, Automated Suspicion Algorithms, and the Fourth Amendment”, 164 *University of Pennsylvania Law Review* 871 (2016); M. Timmons, *et.al.*, “The Implications of AI in Corporate Governance”, 178 *Journal of Business Ethics* 327 (2023).

<sup>4</sup> R. Abbott and B. Marchant, “The Reasonable Computer: Disrupting the Paradigm of Tort Law”, 86 *George Washington Law Review* 1 (2018).

<sup>5</sup> Ryan Calo, “Artificial Intelligence Policy: A Primer and Roadmap”, 51 U.C. *Davis Law Review* 399 (2017).

<sup>6</sup> Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Harvard University Press, Cambridge, MA, 2015).

<sup>7</sup> M. E. Kaminski, “The Right to Explanation, Explained”, 34 *Berkeley Technology Law Journal* 189 (2019).

## THE DOCTRINAL IMPASSE: THE REASONS OLD LIABILITY RULES ARE INEFFECTIVE

The independence, lack of transparency, and lack of human nature of modern AI systems have resulted in the testing of long-standing legal doctrines in ways that they were not intended to handle.<sup>8</sup> The attempt to incorporate the new wine of AI into the old bottles of tort, contract, and corporate law demonstrates that these doctrines are fundamentally incompatible, resulting in a doctrinal impasse that systematically fails to assign responsibility for algorithmic harm.

### A. The Breakdown of Corporate Law Analogies

Throughout history, corporate law has employed the concepts of fiduciary duty and personhood to ensure that individuals are held accountable. Both pillars collapse when autonomous AI is introduced.

#### 1. A Digital Scapegoat for the Fiction of Legal Personhood

Legal systems grant corporations “*legal personhood*,” which enables them to own property, sign contracts, and, most importantly, be held accountable in court. This is possible because corporations are ultimately managed and controlled by accountable human agents, despite not being individuals. It is doctrinally incoherent and perilous to propose that AI should be accorded the same rights and responsibilities as a human, such as “*electronic personhood*.<sup>9</sup> AI systems lack the subjective agency, intent (*mens rea*), and moral capacity that are essential for the existence of legal rights and obligations.<sup>10</sup> They operate on a data-driven logic that is devoid of the ethical reasoning that is associated with human accountability. For instance, AI is perceived as a legally incapacitated individual who is not subject to criminal liability in both Iranian and Saudi Arabian law.<sup>11</sup>

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<sup>8</sup> *Ibid.* at 192.

<sup>9</sup> See, European Parliament, Resolution of 20 October 2020 with recommendations to the Commission on a framework of ethical aspects of Artificial Intelligence, Robotics and related technologies, Res. 2020/2012(INL) (Oct. 20, 2020).

<sup>10</sup> S. Chopra and L. White, *A Legal Theory for Autonomous Artificial Agents* (University of Michigan Press, Ann Arbor, 2011).

<sup>11</sup> A. Al-Ghamdi and M. Al-Shehri, “Criminal Liability of Artificial Intelligence: A Comparative Study of Iranian and Saudi Arabian Law”, 12 *Journal of Intelligent Systems and Control Engineering* 24 (2024).

Consequently, the business analogy is no longer useful. An accountability shield would be established by granting AI personhood, allowing human creators and corporate deployers to transfer blame to a “*digital scapegoat with no assets, no morals, and no consequences.*”<sup>12</sup> This would not address the accountability gap; rather, it would render it a permanent feature, providing individuals with a means to evade regulation rather than a means to obtain justice. The absence of legal personhood for AI is not a deficiency that necessitates closure; it is a simple fact. The individuals and organisations that develop, implement, and capitalise on these systems must be held accountable.<sup>13</sup>

## **2. The Fiduciary Duty Crisis: A Brief Overview of a Breached Trust**

The most critical aspect of corporate governance is the fiduciary duty that officers and directors have to the corporation and its shareholders. This encompasses the obligations of loyalty and care.<sup>14</sup> The duty of care requires directors to exercise the same degree of caution as a reasonable individual in a comparable position, while the duty of loyalty requires them to act in the corporation’s best interests without any conflicts of interest. These obligations are directly contradicted by the delegation of significant decision-making authority to AI systems.

In contrast to a human, an AI is incapable of employing ethical considerations or reasoned judgement; it is limited to adhering to its programming in accordance with the data it was trained on.<sup>15</sup> If the data is biased or the algorithm is flawed, the AI may make a negligent decision, but it did not violate a duty. A duty of loyalty requires loyalty, which an AI cannot provide. This results in a crisis: Can a board of directors fulfil its fiduciary duties by relying on a flawed system? In automated governance, assigning such responsibility to an inanimate entity requires redefining fiduciary duties. This contradicts the corporate integrity-promoting philosophy of “*encapsulated trust*”.<sup>16</sup>

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<sup>12</sup> Robert Casey, “AI’s Leaps Forward Force Talks About Legal Personhood for Tech”, Bloomberg Law, May 28, 2025, available at: <https://news.bloomberglaw.com/artificial-intelligence/ais-leaps-forward-force-talks-about-legal-personhood-for-tech> (last visited on: 27.06.2025).

<sup>13</sup> Michael Ryan, “The Future of AI in Corporate Governance: The Role of the Board”, 2021 *Journal of Business Law* 1 (2021).

<sup>14</sup> S. M. Siebecker, “Trust & Truth: Corporate Responsibility in the Age of AI”, 81 *Fordham Law Review* 2315 (2020).

<sup>15</sup> M. Dastani and A. Yazdanpanah, “AI in Corporate Governance: Legal, Ethical, and Fiduciary Challenges”, *International Journal of Law and Social Sciences* (In Press, 2025).

<sup>16</sup> *Supra* note 14 at 2320.

## B. The Issue of Negligence: Torts Without Tortfeasors

The primary method of obtaining compensation for harm that is not covered by a contract is through tort law, particularly the doctrine of negligence. But the primary components of it-duty, breach, causation, and damages-do not align well with the structure and operation of AI systems.<sup>17</sup>

### 1. The Missing Elements in Negligence

In order to establish negligence, a plaintiff must demonstrate that the defendant violated a duty of care owed to them, which resulted in their injury. This chain of responsibility is disrupted in an AI-related case.<sup>18</sup> In the event that an AI-powered medical diagnostic tool makes a poor recommendation that causes harm to a patient, who is responsible for violating the law? The algorithm was created by the developer, implemented by the hospital (integrator), utilised by the doctor (user), or trained on biased data provided by an individual. It is frequently difficult to identify the individual who is responsible for liabilities that are shared by multiple parties.<sup>19</sup>

The law was established on the premise that humans make mistakes, not that machines are unrestrained in their actions. Consequently, there are “*torts without tortfeasors*,” which refers to a situation in which there is evident harm but no single individual can be identified as having committed a clear breach under conventional standards.<sup>20</sup> Due to its capability to learn and function autonomously, AI creates a legal barrier that obscures its human decisions and errors and makes it difficult to identify the perpetrator.

### 2. The “*Black Box*” and the Difficulty of Establishing Causation

The plaintiff faces significant challenges in establishing causation, even if a duty and breach can be demonstrated. The inner workings of intricate machine learning models are frequently a “*black box*,” even to the individuals who developed them.<sup>21</sup> A plaintiff who wishes to establish that a specific design flaw was the cause of their injury would require access to

<sup>17</sup> *Supra* note 7 at 195.

<sup>18</sup> Ethos Risk Services, “AI Liability and Negligence Cases: Who’s Responsible?”, available at: <https://ethosrisk.com/blog/ai-liability-and-negligence-cases-whos-responsible/> (last visited on: 27.06.2025).

<sup>19</sup> *Ibid.*

<sup>20</sup> *Supra* note 5 at 410.

<sup>21</sup> *Supra* note 6 at 8.

proprietary code, training data, and model parameters-assets that companies safeguard as trade secrets.<sup>22</sup>

The plaintiff successfully argued in *Wickersham v. Ford* that a delay in deployment was caused by a poorly designed airbag algorithm.<sup>23</sup> Exceptions like this uphold the rule. This algorithm was simple and deterministic, and the plaintiff's expert had worked with it before. Contemporary, non-deterministic neural networks that transform as they process new data make it difficult to identify a single flaw that caused a specific harmful output from a technical and legal perspective. This effectively transfers the responsibility for justice to the victim, who possesses the least information and resources, necessitating that they deconstruct and demonstrate the flaws in a complex system that is owned by a powerful corporation. This is not merely a procedural issue; it is also a structural issue that complicates the process of obtaining justice.

### C. Contract Law in the Era of Artificial Intelligence That Executes Actions

The emergence of “*agentic*” AI-systems that can act autonomously to achieve objectives on behalf of a user-has placed a strain on contract law, which regulates enforceable agreements.<sup>24</sup> In the United States, electronic transaction laws, such as the Uniform Electronic Transactions Act (UETA) and the federal E-SIGN Act, stipulate that contracts executed by “electronic agents” are valid. Nevertheless, these laws were formulated with the intention of governing simpler, automated systems.<sup>25</sup> They were intended for systems that adhere to pre-programmed rules, rather than AI that can “*adjust to new information, find better ways to get things done, or make choices based on probabilities.*”<sup>26</sup>

This raises new questions regarding accountability. If an AI assistant is instructed to acquire a specific item but “*hallucinates*” and executes an entirely unintended contract, who is accountable? Conventional contract law presupposes that individuals reach a consensus on a

<sup>22</sup> K. Yeung, “Algorithmic regulation: A critical interrogation”, 12 Regulation & Governance 1 (2018).

<sup>23</sup> *Wickersham v. Ford Motor Company*, 194 F. Supp. 3d 434 (S.D. Tex. 2016). See also Zachary Muller, “Liability for a defectively designed algorithm: Wickersham v. Ford”, 53 *Columbia Journal of Law & Social Problems* 149 (2019).

<sup>24</sup> Proskauer Rose LLP, “Contract Law in the Age of Agentic AI: Who’s Really Clicking ‘Accept’?”, Proskauer on Privacy, available at: <https://www.proskaueronprivacy.com/2025/05/contract-law-in-the-age-of-agentic-ai/> (last visited on: 27.06.2025).

<sup>25</sup> G. Smith, *et.al.*, Liability for Harms from AI Systems: The Application of U.S. Tort Law and Liability to Harms from Artificial Intelligence Systems (RAND Corporation, Santa Monica, CA, 2024).

<sup>26</sup> *Supra* note 12.

matter based on their intentions and behaviors. However, in the case of agentic AI, there may not be a distinct human “*actor*” to hold accountable in the event of a deal’s failure; rather, there may only be a machine making decisions that were not predetermined.<sup>27</sup> Lack of clarity increases risk and makes business transaction prediction difficult. Implementing existing laws as a patchwork solution without significant changes is inadequate and worsens the situation. Small businesses and startups lack the legal resources to navigate a fragmented and unpredictable environment, making it worse for them. It also lacks explicit victim protections.<sup>28</sup>

## **AN EXAMINATION OF THE RESPONSES OF VARIOUS COUNTRIES TO GLOBAL REGULATIONS**

Nations have developed three AI governance approaches to address the above issues. Regulation differs greatly in the EU, US, and India. The EU uses a rights-based, comprehensive model, the US a market-driven patchwork, and India a light-touch, innovative strategy.

### **A. The European Union’s Rights-Based, Risk-Tiered Model**

The EU has established itself as a global leader in the establishment of AI regulation standards by adopting a comprehensive, rights-based approach that prioritises safety and fundamental rights through a proactive, ex-ante framework.<sup>29</sup>

#### **1. The AI Act: A Risk-Based Architecture**

The AI Act is the most critical component of this approach. It establishes a classification system that is based on risk.<sup>30</sup> AI applications are classified according to their potential for causing harm:

- *Unacceptable Risk*: Systems that are evidently detrimental to safety, employment, and rights are prohibited. Biometric identification in public places in real time (with a few

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<sup>27</sup> *Ibid.*

<sup>28</sup> See, M. C. Elish, “The limits of liability in the age of AI”, *The New York Times*, Nov. 1, 2023; J. Cobbe, “Administrative Law and the Machines of Government: Judicial Review of Automated Public-Sector Decision-Making”, *37 Legal Studies* 445 (2017).

<sup>29</sup> C. Cath, “Governing artificial intelligence: ethical, legal and technical challenges and opportunities”, *376 Philosophical Transactions of the Royal Society A* 20180080 (2018).

<sup>30</sup> European Commission, “Proposal for a Regulation on a framework for Artificial Intelligence (Artificial Intelligence Act)”, COM (2021) 206 final.

exceptions), governments scoring people's social lives, and AI that alters how people act to circumvent free will (such as voice-activated toys that encourage dangerous behavior).<sup>31</sup>

- *High-Risk*: Safety or basic rights-compromising systems are high-risk. Before being sold, these systems must undergo conformity assessments, have high-quality data governance to reduce bias, have detailed technical documentation, and be designed for effective human oversight. They are used in hiring and managing workers, running critical infrastructure, education, law enforcement, and accessing vital services.<sup>32</sup>
- *Low Risk*: Chatbots and similar systems are required to adhere to basic transparency standards, which ensures that users are aware they are conversing with a machine.<sup>33</sup>
- *Minimal Risk*: The Act does not impose any additional legal obligations on the majority of AI systems, which fall under this category.<sup>34</sup>

## 2. Modernizing Liability: The PLD and the Deferred AILD

The EU can directly address liability through the Revised Product Liability Directive (PLD). This directive is a significant modification in that it clarifies the definition of “*product*” by incorporating software and AI systems.<sup>35</sup> It also updates the concept of a “*defect*” to encompass harms caused by an AI’s ability to learn on its own or by security holes, and it holds manufacturers and suppliers accountable for data loss-related damages. This implies that liability may continue to be applicable even if a product causes harm after it has been used, as it undergoes changes over time.<sup>36</sup>

However, the EU’s objectives have been compromised by a clear conflict between innovation and regulation. The most effective illustration of this is the AI Liability Directive (AILD) that has been proposed. The AILD was intended to collaborate with the AI Act and PLD to

<sup>31</sup> The European Union AI Act, 2024, art. 5.

<sup>32</sup> *Ibid.*, art. 6. See also European Parliament, “Report on the proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts” (A9-0188/2023).

<sup>33</sup> The European Union AI Act, 2024, art. 52.

<sup>34</sup> *Ibid.*, art. 4.

<sup>35</sup> European Commission, “Proposal for a Directive on liability for defective products”, COM(2022) 495 final.

<sup>36</sup> Clifford Chance, “The EU introduces new rules on AI liability”, available at: <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2025/01/the-eu-introduces-new-rules-on-ai-liability.pdf> (last visited on: 27.06.2025).

facilitate the process of establishing a case for victims of AI-related harm.<sup>37</sup> The burden of proof in fault-based claims would have been shifted, requiring AI providers to demonstrate that they were adhering to their duty of care, as a result of its primary features, a “*disclosure obligation*” and a “*rebuttable presumption of causality*.<sup>38</sup> In late 2024, the AILD was suspended in a significant policy change, which was perceived by many as a concession to industry pressure and a desire to remain competitive with the United States and China.<sup>39</sup> The EU’s system for redress is significantly weakened by the death of the AILD, demonstrating the difficulty of maintaining a balance between robust citizen protection and economic requirements.

### B. The Market-Driven Patchwork of the United States

The EU’s regulatory system is more centralised, while the US has a more fragmented, market-driven approach that mostly uses existing laws and gives more power to sectoral regulators.<sup>40</sup> As a result, there is now a “*patchwork*” of laws and court decisions that don’t give businesses legal certainty or consistent protection for consumers.<sup>41</sup> Most of the time, people who are hurt by AI sue under traditional tort and contract law, but this isn’t always the best way to do it, and the results vary a lot from place to place.<sup>42</sup> Section 230 of the Communications Decency Act is a big legal problem because courts have said that it protects online platforms from being held responsible for harm caused by algorithmically recommended third-party content. This makes it hard to hold people accountable in the digital world.<sup>43</sup>

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<sup>37</sup> European Parliament, “Briefing EU Legislation in Progress: Artificial intelligence liability directive”, available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/739342/EPRS\\_BRI\(2023\)739342\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/739342/EPRS_BRI(2023)739342_EN.pdf) (last visited on: 14.07.2025).

<sup>38</sup> McCann Fitzgerald, “The Artificial Intelligence Liability Directive – Time to catch up”, available at: <https://www.mccannfitzgerald.com/knowledge/data-privacy-and-cyber-risk/the-artificial-intelligence-liability-directive-time-to-catch-up> (last visited on: 27.06.2025).

<sup>39</sup> T. Evas, “The EU’s AI Power Play: Between Deregulation and Innovation”, Carnegie Endowment for International Peace, May 20, 2025.

<sup>40</sup> *Supra* note 29.

<sup>41</sup> *Supra* note 7 at 200.

<sup>42</sup> *Supra* note 25.

<sup>43</sup> J. M. Balkin, “The Three Laws of Robotics in the Age of Big Data”, 78 *Ohio State Law Journal* 1217 (2017). See also, Congressional Research Service, “Legal Liability for Content Recommended by Algorithms”, R47753 (2023).

The primary federal legislative proposal is the Algorithmic Accountability Act (AAA), which was reintroduced in 2023.<sup>44</sup> The AAA is a prime example of the United States' more cautious, ex-post approach. The AAA lacks the extensive pre-market requirements of the EU AI Act. Rather, it emphasises evaluation and transparency. Companies that implement "automated critical decision processes" to determine housing, employment, credit, and other matters would be required to conduct impact assessments and submit them to the Federal Trade Commission (FTC).<sup>45</sup> The bill is a "*targeted response*" that is intended to collect information and grant the FTC additional authority. However, it does not establish new liability regimes or significantly alter substantive law.<sup>46</sup> It demonstrates a preference for addressing established harms rather than regulating potential risks prior to their occurrence.

### C. India's "*Pro-Innovation*" Position

India is adopting a third approach, which is predicated on a "*light-touch*" regulatory philosophy and a "*pro-innovation*" approach.<sup>47</sup> The primary objective is to establish a domestic AI ecosystem and achieve "Sovereign AI"-self-sufficiency in a critical technology-in order to stimulate economic growth.<sup>48</sup> To achieve this, India has opted not to implement binding, prescriptive laws, as is the case in the EU, but rather to rely on a "*patchwork*" of existing laws and non-binding ethical guidelines.<sup>49</sup>

The current landscape is governed by the Information Technology Act of 2000 and the Digital Personal Data Protection Act of 2023, which was recently enacted.<sup>50</sup> AI systems that manage personal data are indirectly impacted by these laws. Governance is primarily founded on policy documents such as the "*Principles for Responsible AI*" of NITI Aayog, which establish ethical standards for transparency, accountability, and fairness. However, these

<sup>44</sup> The Algorithmic Accountability Act of 2023, H.R. 5628, 118th Cong. (2023).

<sup>45</sup> Ron Wyden, "Algorithmic Accountability Act of 2023 Summary", available at: [https://www.wyden.senate.gov/imo/media/doc/algorithmic\\_accountability\\_act\\_of\\_2023\\_summary.pdf](https://www.wyden.senate.gov/imo/media/doc/algorithmic_accountability_act_of_2023_summary.pdf) (last visited on: 27.06.2025).

<sup>46</sup> *Ibid.*

<sup>47</sup> AZoRobotics, "AI Regulation in India: A Pro-Innovation Approach", available at: <https://www.azorobotics.com/Article.aspx?ArticleID=742> (last visited on: 27.06.2025).

<sup>48</sup> ECIPE, "AI and India's National Interest", available at: <https://ecipe.org/publications/ai-and-indias-national-interest/> (last visited on June 27, 2025).

<sup>49</sup> Law.Asia, "India's AI regulation in focus as government seeks unified approach", available at: <https://law.asia/india-ai-regulation-focus-unified-approach/> (last visited on: 27.06.2025).

<sup>50</sup> See The Information Technology Act, 2000 (Act 21 of 2000); The Digital Personal Data Protection Act, 2023 (Act 22 of 2023).

documents lack the authority to enforce them.<sup>51</sup> Instead of prioritising regulatory constraints, this methodology prioritises flexibility and development.

However, the framework of India is undergoing structural changes. The Digital India Act (DIA) is anticipated to be a groundbreaking piece of legislation, as it will introduce the country's first AI-specific provisions.<sup>52</sup> The DIA is expected to address algorithmic accountability, consumer rights, and liability, signalling a potential transition from a purely policy-led approach to a more formalised regulatory regime.<sup>53</sup> This transition will be critical in determining how India balances its ambition for technological leadership with the necessity to safeguard its citizens from algorithmic harm.

**Table 1: A Comparison of AI Liability Frameworks in the EU, US, and India**

Characteristic	India	United States	European Union
<b>Core Philosophy</b>	Pro-Innovation, Developmental, “Light-Touch”	Market-Driven, Reactive, Sectoral	Rights-Based, Precautionary, Comprehensive
<b>Primary Legal Instruments</b>	IT Act of 2000, Digital Personal Data Protection Act of 2023, and the Proposed Digital India Act (DIA)	Common Law (tort, contract), Proposed Algorithmic Accountability Act (AAA)	The AI Act, Revised Product Liability Directive (PLD)
<b>Liability Approach</b>	Emerging/Undefined; Expected in DIA	Primarily Negligence/Product Liability; Varies by State	Tiered (Strict/Fault-Based); Product Liability for Software
<b>Key Procedural Mechanisms</b>	non-binding ethical guidelines, and advisories	post-deployment impact assessments (as proposed in AAA)	Pre-market conformity assessments,

<sup>51</sup> Lawful Legal, “India’s Approach to AI Regulation: Navigating Innovation and Ethics”, available at: <https://lawfullegal.in/indias-approach-to-ai-regulation-navigating-innovation-and-ethics/> (last visited on: 27.06.2025).

<sup>52</sup> NM Law, “AI Regulation in India: A Dawn of Digital Governance”, available at: <https://nmlaw.co.in/ai-regulation-in-india-a-dawn-of-digital-governance/> (last visited on: 27.06.2025).

<sup>53</sup> *Ibid.*

			transparency obligations
<b>Primary Enforcement Body</b>	Ministry of Electronics and Information Technology (MeitY) and the Sectoral Regulators	State Attorneys General and the Federal Trade Commission (FTC)	The European AI Office and the National Authorities
<b>Overall Status</b>	Policy-Led; Key Legislation Developing	Fragmented; Key Legislation Proposed	Enacted and in force (phased implementation)

## PUTTING THE “DOWNTRODDEN” AT THE CENTRE: SYSTEMIC HARM AND ALGORITHMIC BIAS

A liability risk analysis that is solely legal obscures the substantial human cost of algorithmic failure. In order to fulfil the imperative of addressing “*downtrodden concerns*,” it is imperative to transition from abstract legal principles to the concrete, lived experiences of those harmed by biased AI systems.<sup>54</sup> These systems, which are frequently deployed in critical areas of life, do not merely replicate existing societal inequities; they amplify and entrench them on an unprecedented scale, concealed behind a façade of technological objectivity.

### A. The Mechanism of Algorithmic Bias

The system’s flaw, algorithmic bias, is not a negative thing; it is a result of the data society collects, and the decisions individuals make. It typically infiltrates systems through three primary methods:

- *Biased Training Data:* This is a major issue because an AI trained on decades of biased hiring or lending practices will replicate those patterns. This creates a feedback loop in which biased decisions generate new data that supports the bias, making results increasingly unjust.
- *Poor Algorithmic Design:* When developers unfairly evaluate factors or build models based on unconscious assumptions, bias can be introduced. Lack of diversity in

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<sup>54</sup> *Supra* note 14 at 2316.

development teams can make people with similar backgrounds overlook discriminatory effects.

- *Proxies for Protected Attributes:* This is a highly problematic source of bias. Race may not be a factor that an algorithm can utilise; however, it can utilise related data, such as postal codes or credit history, which serve as effective substitutes for economic status and race. This may result in unjust outcomes.<sup>55</sup>

This feedback loop is detrimental due to the combination of inadequate data and inadequate design. An algorithm that is biased makes a decision (such as declining a loan), which generates additional data that reinforces the original bias, resulting in increasingly unfair outcomes over time.<sup>56</sup>

## B. Case Studies of Algorithmic Harm

This bias has tangible consequences. Creating new, concealed barriers to opportunity, they manifest as genuine harms that disproportionately affect marginalised and vulnerable communities.

- *Discrimination in Employment:* Automated hiring tools, which are currently employed by 99% of Fortune 500 companies, systematically eliminate qualified candidates.<sup>57</sup> Algorithms that are trained on data from a company's existing, non-diverse workforce may penalise applicants from different backgrounds. For instance, a system may learn to favour candidates who played certain sports or attended certain universities, effectively discriminating based on class and gender.<sup>58</sup> Additionally, these tools can penalise individuals with disabilities whose speech patterns or behaviours deviate from the algorithm's "*norm*".<sup>59</sup>

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<sup>55</sup> IBM, "Algorithmic bias", available at: <https://www.ibm.com/think/topics/algorithmic-bias> (last visited on: 27.06.2025).

<sup>56</sup> Law vs., "Legal Implications of Algorithmic Bias in Decision-Making", available at: <https://lawvs.com/articles/legal-implications-of-algorithmic-bias-in-decision-making> (last visited on June 27, 2025).

<sup>57</sup> ACLU, "How Artificial Intelligence Might Prevent You from Getting Hired", available at: <https://www.aclu.org/news/racial-justice/how-artificial-intelligence-might-prevent-you-from-getting-hired> (last visited on: 27.06.2025).

<sup>58</sup> Cathy O'Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (Crown, New York, 2016).

<sup>59</sup> E. P. Goodman and K. E. P. Levy, "New-School Discrimination by Data", 64 *Communications of the ACM* 40 (2021).

- *Bias in Finance and Lending:* In the financial sector, AI-driven systems are establishing a new form of “*digital redlining*.<sup>60</sup> Algorithms used for credit scoring and loan approvals can perpetuate historical discrimination by penalising applicants from minority neighbourhoods or those with non-traditional income patterns. A recent lawsuit alleged that a tenant screening system by SafeRent consistently gave lower scores to Black and Hispanic renters, in part because it failed to properly account for housing vouchers as a legal form of income.<sup>61</sup> This results in entire communities being excluded from housing and financial opportunities.
- *Healthcare and Insurance Inequities:* Healthcare has deadly consequences. A widely used commercial algorithm was found to reduce Black patient healthcare resources. This was because the algorithm used past healthcare spending as a proxy for need, which ignored the fact that Black patients spend less due to systemic barriers to access.<sup>62</sup> Pulse oximeters are less accurate on darker skin, and AI-powered diagnostic tools trained on white patients may misdiagnose and delay treatment for people of colour.<sup>63</sup>
- *Erosion of Consumer and Labour Rights:* In addition to discrete decisions, AI is employed to deploy manipulative “*dark patterns*” that deceive consumers, to implement discriminatory pricing, and to intensify worker surveillance, thereby eroding fundamental rights. The FTC’s enforcement action against Rite Aid, which used a flawed and biased facial recognition system to falsely accuse customers, particularly women and people of colour, of shoplifting, highlights the real-world harm these systems can cause.<sup>64</sup>

The common thread in these cases is that algorithmic systems do not merely reflect societal bias; they magnify it at scale and obscure it from view. A single biased loan officer can cause

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<sup>60</sup> UNT Dallas College of Law, “When Algorithms Judge Your Credit: Understanding AI Bias in Lending Decisions”, available at: <https://www.accessiblelaw.untdallas.edu/post/when-algorithms-judge-your-credit-understanding-ai-bias-in-lending-decisions> (last visited on: 27.06.2025).

<sup>61</sup> AlgorithmWatch, “Racist Technology in Action: AI tenant screening fails the ‘fairness’ test”, Bluesky, June 5, 2025.

<sup>62</sup> ACLU, “Algorithmic Bias in Health Care”, (2022), available at: [https://www.aclu.org/sites/default/files/field\\_document/algo\\_health\\_white\\_paper\\_draft\\_final\\_v4.pdf](https://www.aclu.org/sites/default/files/field_document/algo_health_white_paper_draft_final_v4.pdf) (last visited on: 27.06.2025).

<sup>63</sup> *Ibid.*

<sup>64</sup> FTC, “AI Risk and Consumer Harm”, (January 2025), available at: <https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2025/01/ai-risk-consumer-harm> (last visited on: 27.06.2025).

harm to dozens, while a single biased algorithm can cause harm to millions. This is all done while presenting an illusion of objective, data-driven neutrality. The combination of scale and obscurity renders algorithmic discrimination a uniquely potent and perilous force for the entrenchment of inequality.

## **THEORETICAL STANDARDS FOR RECONSTRUCTING LIABILITY FRAMEWORKS: INNOVATIVE APPROACHES**

The reality of systemic harm and the doctrinal impasse necessitate more than incremental change. A deliberate effort must be made to establish a liability framework that is both fair and robust for AI-driven corporate governance. This necessitates a novel, two-pronged strategy that combines reformed substantive liability rules with mandatory procedural obligations. These two prongs are not independent solutions; they are symbiotic; procedural diligence is incentivised by the threat of substantive liability, and substantive claims are made possible by the evidence generated through procedural compliance.

### **A. Mandating a Corporate Accountability Toolkit: A Triad of Procedural Duties**

In order to incorporate a new standard of technological diligence, the conventional corporate duty of care must be modernised. This entails the integration of a mandatory “*accountability toolkit*” into corporate governance for any high-risk AI system.

#### **1. Algorithmic Impact Assessments (AIAs)**

Before deploying any high-risk AI system that makes critical decisions about individuals, corporations must be legally obligated to conduct and publish an AIA.<sup>65</sup> This proactive process, which is based on established frameworks from the AI Now Institute and the Canadian government, compels a company to evaluate and disclose a system’s purpose, functionality, and potential impacts on fairness, bias, and fundamental rights. This process must include:

- *Pre-acquisition Review*: An assessment of the system prior to the agency’s adoption.
- *Public Disclosure*: Agencies are required to publicly disclose information regarding the system’s purpose, reach, and internal use policies.

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<sup>65</sup> F. Doshi-Velez and M. Kortz, “Accountability of AI under the Law: The Role of Explanation”, arXiv preprint arXiv:1711.01134 (2017).

- *Self-Assessment*: A self-assessment of potential issues, such as bias and inaccuracy, and a plan for mitigation.
- *Public Comment and Challenge*: A significant opportunity for the public and external researchers to interact with, provide feedback on, and, if necessary, contest the agency's assessment.<sup>66</sup>

Companies such as Spotify, which have implemented internal AIAs for over a hundred of their systems, have demonstrated the feasibility and value of such assessments in identifying hotspots for harm and prioritising mitigation efforts.<sup>67</sup>

## 2. Independent “*Criterion*” Audits

Self-assessment is indispensable; however, it is inadequate. In order to guarantee objective verification and prevent “*ethics-washing*,” the legal framework must require consistent audits conducted by independent, accredited third parties.<sup>68</sup> This proposal promotes the implementation of a “*criterion audit*” framework, which is based on the rigour and public trust that are associated with financial auditing.<sup>69</sup> A criterion audit consists of four primary characteristics:

- It is conducted in accordance with standardised, publicly accessible criteria that are derived from regulation.
- Its primary focus is on evaluating adherence to that regulation.
- Auditors are held to high ethical standards, accredited, and professionally trained.
- In order to guarantee transparency, the findings are published in a standardised report.

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<sup>66</sup> D. Reisman, *et.al.*, “Algorithmic Impact Assessments: A Practical Framework for Public Agency Accountability” (AI Now Institute, New York, April 2018). See also Treasury Board of Canada Secretariat, “Algorithmic Impact Assessment”, OECD STIP Compass (2019).

<sup>67</sup> See, Spotify Engineering, “Lessons Learned from Algorithmic Impact Assessments in Practice”, available at: <https://engineering.at spotify.com/2022/09/lessons-learned-from-algorithmic-impact-assessments-in-practice> (last visited on: 27.06.2025); J. Mökander, *et.al.*, “Auditing and Assessing Algorithmic Systems: A Case Study at Spotify”, 1 *Journal of Online Trust and Safety* 1 (2024).

<sup>68</sup> *Supra* note 66.

<sup>69</sup> M. C. Elish, *et.al.*, “The Criterion Audit: A Novel Framework for AI Auditing”, in Proceedings of the 2024 AAAI/ACM Conference on AI, Ethics, and Society 250 (AAAI Press, 2024).

- This establishes a system of external accountability that transitions from voluntary principles to enforceable standards, granting regulators the authority to inspect companies for noncompliance.<sup>70</sup>

### **3. Legal Requirement for Explainable AI (XAI)**

Transparency is not an afterthought; it is a fundamental design principle. XAI techniques, which render the decision-making process of an AI model transparent and auditable, are indispensable for numerous legal purposes.<sup>71</sup> The legal requirement for high-risk systems should be to elevate explainable AI (XAI) from a desirable technical feature to a legal requirement.

- *Fulfilling the Right to Explanation:* They are essential for the “right to explanation” of affected individuals, as acknowledged in regulations such as the GDPR.
- *Facilitating Audits and Assessments:* They are essential for the meaningful audits and impact assessments detailed above.
- *Evidence for Redress:* They furnish the essential evidence required for individuals to pursue redress when they are injured.<sup>72</sup>

The practical application of XAI in high-stakes industries such as finance (explaining loan denials), healthcare (justifying diagnoses), and manufacturing (ensuring quality control) demonstrates its necessity and viability.<sup>73</sup>

### **B. Reforming Substantive Liability: From Legal Fictions to Tangible Responsibility**

A clear and effective path to liability must exist when procedural duties fail, despite their potential to prevent harm. In order to address the accountability gaps that were identified in Part II, it is necessary to reform substantive law.

<sup>70</sup> Ada Lovelace Institute, “A code of conduct for AI? Algorithm audits and the law” (2023), available at: <https://www.adalovelaceinstitute.org/report/code-conduct-ai/> (last visited on: 27.06.2025).

<sup>71</sup> Milvus, “How does Explainable AI impact regulatory and compliance processes?”, available at: <https://milvus.io/ai-quick-reference/how-does-explainable-ai-impact-regulatory-and-compliance-processes> (last visited on: 27.06.2025).

<sup>72</sup> S. Wachter, B. Mittelstadt, and C. Russell, “Counterfactual Explanations Without Opening the Black Box: Automated Decisions and the GDPR”, 31 *Harvard Journal of Law & Technology* 841 (2018).

<sup>73</sup> See, Viso.ai, “Explainable AI (XAI) – The Complete Guide”; Meegle, “Explainable AI in Manufacturing”; Smythos, “Explainable AI Examples: Real-World Applications & Use Cases”, available at the respective company websites (last visited on: 27.06.2025).

## 1. A Tiered Liability Regime

A traditional fault-based negligence standard can be maintained for standard, low-risk AI. The law should adopt a tiered approach to liability that aligns with the risk-based framework of the AI. Nevertheless, the liability standard must be adjusted for AI systems that are specifically designated as “*high-risk*” (e.g., in the areas of credit, hiring, and justice). The corporate deployer would be required to demonstrate that they exercised all due care or that the harm was not caused by their system in the event that a high-risk system causes harm. Alternatively, the framework could impose strict liability or, at the very least, a rebuttable presumption of fault or causality. This directly addresses the evidentiary imbalance that currently renders victims powerless, thereby transferring the responsibility to the party with the most information and control.

## 2. Extending Product Liability to Software

In order to establish a clear path for redress, legislatures and courts must definitively determine that AI systems and software are “*products*” under product liability law.<sup>74</sup> This reform would permit claims based on design defects and failure to warn. An algorithm that is trained on biased data or designed with discriminatory proxies could be considered to have a design defect. A corporation that deploys a powerful AI tool without adequately disclosing its limitations, potential for error, or biased outputs could be liable for failure to warn. Emerging case law, such as *Garcia v. Character Technologies, Inc.*, in which a court allowed a product liability suit to proceed treating an AI chatbot as a “*product*,” signals a judicial willingness to adapt doctrine to technological reality, a trend that should be codified into law.<sup>75</sup>

## 3. Redefining Fiduciary Duties for the Algorithmic Age

Competent algorithmic oversight must be added to the duty of care. This doctrinal evolution should be accompanied by corporate governance reforms that establish human responsibility. This includes creating roles like an AI Oversight Officer or board committee to understand, monitor, and account for the corporation’s AI systems.<sup>76</sup> This measure eliminates the

<sup>74</sup> *Supra* note 25.

<sup>75</sup> *Garcia v. Character Technologies, Inc.*, Case No. 24-cv-01586-PCP (N.D. Cal. May 20, 2025). See also Verisk, “GenAI Product Liability Cases to Watch”, available at: <https://core.verisk.com/Insights/Emerging-Issues/Articles/2025/May/Week-4/GenAI-Product-Liability-Cases> (last visited on: 27.06.2025).

<sup>76</sup> *Supra* note 14 at 2330.

accountability gap by holding a specific, identifiable human actor in the corporate hierarchy accountable for the deployment and consequences of automated systems.

Reconstructed framework creates virtuous cycle. The threat of substantive liability motivates corporations to invest in and follow AIAs, audits, and XAI procedures. These procedures provide evidence that helps victims and regulators enforce substantive law. We reject the false dichotomy between innovation and regulation. A clear, predictable, and robust liability regime steers innovation towards trustworthy and responsible ends, building public confidence for AI's widespread and equitable adoption.

## SUGGESTIONS AND RECOMMENDATIONS

In order to implement the reconstructed liability framework, it is imperative that key stakeholders collaborate and implement practical measures. The subsequent recommendations demonstrate how to enhance the fairness, utility, and accountability of AI governance.

### 1. For Policymakers and Lawmakers:

- *Adopt Phased and Interoperable Laws:* Rather than attempting to enact a single, comprehensive law, divide it into smaller components. Begin by establishing a body of evidence by enacting laws that mandate AIAs and public registries for high-risk systems, as outlined in the US Algorithmic Accountability Act.<sup>77</sup> Subsequently, modify liability laws to align with significant international frameworks, such as the EU AI Act. For instance, adhering to the EU's high-risk regulations could establish a “*rebuttable presumption of compliance*” with local law, which would facilitate the compliance with both sets of regulations.
- *Establishing Clear Regulatory Jurisdiction & Funding:* Increase the authority of a nodal agency, such as the proposed Digital India Authority, while ensuring that sectoral regulators (such as SEBI for financial AI and IRDAI for insurance) are aware of their specific responsibilities. This will prevent any potential overlap and ensure that all parties are aware of what to anticipate.<sup>78</sup> Ensure that regulators have sufficient

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<sup>77</sup> See, The Algorithmic Accountability Act of 2023, supra note 44. See also Danielle Keats Citron, “Technological Due Process”, 85 *Washington University Law Review* 1249 (2008).

<sup>78</sup> NITI Aayog, “Responsible AI for All: Adopting the Framework” (NITI Aayog, Government of India, New Delhi, 2021).

funding to perform their duties by levying a nominal fee on the revenue of organisations that implement high-risk AI. This will provide them with the necessary funds to employ technical experts and enforce the regulations.

- “*Safe Harbour*” Provisions: In order to motivate individuals to implement optimal practices in good faith, laws should include safe harbour provisions. In the event that companies can demonstrate that they are adhering to mandatory procedures such as AIAs and independent audits in good faith and with strong evidence, they will be shielded from certain punitive damages, even if harm still occurs. This renders it more appealing to adhere to the regulations than to circumvent them.<sup>79</sup>

## 2. For Industry Leaders and Business Owners:

- *Operationalize AI Ethics through Internal Governance*: Establish internal AI review boards or ethics committees that include representatives from various departments, including legal, technical, business, and ethics. These organisations should be granted the authority to supervise and authorise AIAs, evaluate audit findings, and discontinue the implementation of systems that present unacceptable risks.<sup>80</sup>
- *Establish a Mandate and maintain a record of Responsible AI Training*: Stop providing individuals with general ethics training. Establish mandatory training and certification programs for each position that pertains to the management of data, the mitigation of bias, and the development of responsible AI. Ensure that the completion of these programs and the attainment of DEI objectives in technical teams are associated with the compensation and performance evaluations of executives.
- *Creating Sector-Specific Codes of Conduct*: Collaborating with industry associations to establish comprehensive, legally binding regulations for particular sectors, such as AI in healthcare or AI in hiring. These codes, which were developed with the assistance of civil society and regulators, have the capacity to provide more detailed

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<sup>79</sup> Daniel B. Schwarcz, “Regulating AI in Insurance”, 2023 *University of Illinois Law Review* 1335 (2023) (discussing the role of safe harbors in promoting responsible innovation).

<sup>80</sup> See, Timnit Gebru, *et.al.*, “Roles for Computing in Social Change”, in Proceedings of the 2016 ACM Conference on Computers and Society 251 (ACM, 2016); World Economic Forum, “AI Governance: A Holistic Approach to Implement Responsible AI” (WEF, Geneva, 2021).

and practical guidance than a general law, thereby establishing a benchmark for the “*state of the art*.<sup>81</sup>

### 3. For the Courts:

- *Develop specialised curricula and bench books:* Collaborate with the National Judicial Academies and the most prestigious law and technology schools to develop a standardised curriculum and bench book on AI. This resource should address the fundamentals of machine learning, the origins of bias, and emerging issues in evidence law that are related to algorithmic systems.<sup>82</sup>
- *Apply Known Rules to New Facts:* Rather than referring to it as “*dynamic interpretation*,” consider judicial reasoning as the application of enduring legal principles (such as procedural fairness or foreseeability in tort) to novel technological facts. One method of accomplishing this is to substantiate decisions with established case law by utilising examples from existing complex liability systems, such as those for drugs or aeroplanes.
- *Establish a neutral panel of technical experts:* In order to halt the “*battle of the experts*,” courts could be permitted to utilise a pre-vetted, neutral panel of technical experts that is maintained by a national organisation, such as the Ministry of Electronics and Information Technology. These experts could serve as special masters or provide the court with independent reports, thereby enhancing the credibility of the evidentiary process.<sup>83</sup>

### 4. For Academia and Civil Society:

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<sup>81</sup> OECD, “Artificial Intelligence in Society” 145 (OECD Publishing, Paris, 2019) (discussing sector-specific guidance).

<sup>82</sup> See, David Freeman Engstrom, “The New Civil Procedure: From Class Actions to Private Regulatory Process”, 96 *New York University Law Review* 1645 (2021) (discussing the need for judicial education in complex litigation).

<sup>83</sup> Federal Judicial Center, Reference Manual on Scientific Evidence (The National Academies Press, Washington, D.C., 3rd edn., 2011).

- *Establish secure whistleblower platforms:* Establish secure, legally protected locations where technologists and other corporate employees can report concerns regarding AI systems that are unethical or harmful without fear of losing their jobs.<sup>84</sup>
- *Enhance “Bias Bounty” Programs:* Advocate for and assist in the establishment of standardised “bias bounty” programs, which are analogous to cybersecurity bug bounties. These programs would provide independent researchers with financial compensation and public recognition for identifying and responsibly disclosing discriminatory vulnerabilities in artificial intelligence systems that are employed in the business sector.<sup>85</sup>
- *Establish Interdisciplinary Legal-Technical Clinics:* Colleges and universities should establish clinical programs that allow law and computer science students to collaborate to evaluate the compliance, bias, and fairness of real-world algorithms utilised in the public and private sectors. This would simultaneously provide them with practical training and benefit the public.<sup>86</sup>

## CONCLUSION

AI and corporate governance are currently at a critical juncture in their integration. In the past, doctrinal frameworks that were intended for human actors have failed to consider automated decisions. The most vulnerable members of society are disproportionately affected by this failure, which results in tangible harm, systemic discrimination, and the erosion of fundamental rights. Unsustainable and unjust are the legal uncertainty and patchwork of inadequate responses.

Deliberate liability reconstruction is required, as per this article. This proposal suggests a novel framework that combines robust substantive legal reforms with proactive procedural obligations. Corporate duty of care would shift from reactive to proactive through the implementation of legally mandated Explainable AI, independent “*criterion*” audits, and

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<sup>84</sup> See, The Signals Network, “Our Mission”, available at: <https://thesignals.org/> (last visited on: 27.06.2025); See also, Frances Haugen, *The Power of One* (Little, Brown and Company, New York, 2023).

<sup>85</sup> Rumman Chowdhury, “Get Loud: A Call to Action for Responsible Tech”, Harvard Business Review, Nov. 15, 2022, available at: <https://hbr.org/2022/11/get-loud-a-call-to-action-for-responsible-tech> (last visited on: 27.06.2025).

<sup>86</sup> See, e.g., Stanford Law School, “RegLab: Law, Technology, and Policy Clinic”, available at: <https://law.stanford.edu/reglab/> (last visited on: 27.06.2025).

mandatory Algorithmic Impact Assessments. A procedural backbone that is supported by reformed substantive law-a tiered liability regime that shifts the burden of proof for high-risk systems, an expanded product liability doctrine that treats AI as a product, and redefined fiduciary duties that ensure clear human oversight-must be implemented.

This decision is of a normative nature. The cost of progress is inequality, which we can accept by allowing technology to evolve without accountability. Our legal and corporate governance structures can be modified to enable us to master our tools, rather than being mastered by them. We can guarantee responsible corporate innovation by ensuring that liability is in alignment with control and profit. This will guarantee that the many advantages of AI are distributed, and its negative effects are rectified in a fair and effective manner, thereby maintaining corporate accountability and algorithmic age fairness.

## **THE GREEN PARADOX: THE ENVIRONMENTAL IMPLICATIONS OF FDI IN A GLOBALISING WORLD**

- Dhairy Jain\* & Dr Ankit Awasthi\*\*

### ***Abstract***

*The Foreign Direct Investment (FDI) is important for global economic growth, especially in developing nations. It provides important funding. This enables technology transfer and creates jobs. Resource-intensive sectors, such as mining, energy and infrastructure, experience many important ecological consequences from FDI; these consequences have ignited several concerns. This paper examines the conflicting effects of FDI and finds that FDI increases economic growth, but it can also harm the environment and jeopardise sustainability. This paper provides a detailed analysis of how FDI considerably contributes to ecological damage, including pollution, biodiversity loss, resource depletion and deforestation. Therefore, a worsening of ecological conditions leads several host governments, especially in the Global South, to lessen ecological regulations to attract foreign investment. This paper investigates the meaningful effectiveness of analytically important international laws, such as the Convention on Biological Diversity and the Paris Agreement, in substantially reducing the large ecological effects of FDI. This evaluation examines how many national regulations, including Ecological Effect Assessments, permitting and compliance, balance investment and sustainability, and it reveals the complexities of this interaction. The article uses detailed case studies of Costa Rican eco-tourism and Moroccan renewable energy to compare and contrast successful examples of ecologically responsible FDI. It also presents examples of ecological mismanagement, such as oil exploration in Nigeria and deforestation in Indonesia's palm oil industry. As these instances show, investment agreements must incorporate sustainability standards, and stricter laws and incentives for green investments should be developed. Although FDI is crucial for economic development, the paper contends*

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that its long-term viability relies on investment policies aligned with environmental sustainability goals. It necessitates a shift in perspective on green foreign direct investment, more enforcement of environmental rules, and increased global cooperation to ensure that economic progress does not compromise ecological integrity.

**Keywords:** FDI, Deforestation, Palm Oil, Arbitration, Environmental Sustainability Goals.

## INTRODUCTION

FDI has been regarded as a strong engine for economic growth, especially in developing countries, inasmuch as it provides capital inflows, employment opportunities, and transfer of technology and skills<sup>1</sup>. FDI propels industrialisation and is thus seen to be contributing to an improvement in the living standards of people. With the advance toward intensification of competitiveness in a globalising economy, FDI has come to be regarded as the mainstay of national development strategies.

However, the emergence of economic growth through FDI has also been mostly accompanied by severe environmental challenges. The unwarranted high pace of industrialisation and infrastructural development opens ways to deforestation, pollution, depletion of natural resources, and ecological imbalances. In many cases, the developing countries compromise on either having stern environmental laws or failing to implement the existing ones in order to attract foreign investment, and hence further aggravate the impact on natural ecosystems. The tension between economic development and environmental sustainability is central to a range of ongoing global debates, particularly in light of the Sustainable Development Goals adopted by the United Nations.

Interrelated with all these challenges are the Sustainable Development Goals adopted by the United Nations in 2015. Of particular relevance, Goal 8 calls for promoting sustained, inclusive, and sustainable economic growth and decent work for all<sup>2</sup>, while Goal 13 urges taking urgent action to combat climate change and its impacts<sup>3</sup>. These intentions underline

<sup>1</sup> Xinxin Wang, et al. "Foreign direct investment and economic growth: a dynamic study of measurement approaches and results", 35 (1) *Economic Research-Ekonomska Istraživanja* 1011-1034 (2021) available at: <https://doi.org/10.1080/1331677X.2021.1952090> (last visited on: 14.07.2025)

<sup>2</sup> Goal 8, Department of Economic and Social Affairs.

<sup>3</sup> Goal 13, Department of Economic and Social Affairs.

the priority of balancing economic development with environmental concerns, which is increasingly becoming complicated by resource depletions, environmental degradations, and climate risks associated with FDI-intensive sectors in energy, mining, and infrastructure<sup>4</sup>.

This paper promotes a balance between the growing tension between economic development and environmental sustainability with respect to FDI. It critically analyses the legal and regulatory regimes governing FDI, evaluates the environmental risks associated with different industries, and builds on policy measures that can foster environmentally responsible investment. In so doing, the paper joins the growing body of literature directed at aligning FDI with wider goals of sustainable development to ensure economic growth and environmental integrity for generations yet unborn.

## **FDI AND ECONOMIC DEVELOPMENT**

### ***FDI as a Catalyst for Growth***

FDI possesses large financial inflows into the host country, which becomes particularly significant to the emerging economies whose economies depend much on domestic savings and finally on limited investment potential. The large-scale infrastructure projects requiring huge capital, the expansion of industry, and technological upgradation provide an avenue for bridging crucial funding gaps that local governments or businesses cannot fulfill.<sup>5</sup> These capital inflows are not only crucial for short-term economic boosts, but also in laying the foundations for more sustained growth through better infrastructure and improved services, and higher levels of productivity and competitiveness.

FDI is also one of the principal vectors of technology and know-how diffusion. MNCs often possess state-of-the-art technologies, new methods of production, and managerial capabilities that can considerably raise the efficiency and international competitiveness of local industries. For instance, MNCs investing in industries such as manufacturing or renewable energy are likely to introduce technologically advanced machinery and processes that local companies will imitate or adopt sooner or later and, therefore, would embark on a path of

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<sup>4</sup> Sofia Caycedo, "Foreign direct investment in developing countries: A blessing or a curse?", *Yale Environment Review* (Jan. 23, 2018).

<sup>5</sup> "The role of FDI in emerging market economies compared to other forms of financing: Past developments and implications for financial stability" - February 2003, (Feb. 28, 2003), available at: <https://www.bis.org/publ/cgfs22buba1.pdf> (last visited on: 11.07.2025).

productivity enhancement.<sup>6</sup> These technologies also further hasten the pace of industrialization in host countries, moving them upwards through the value chain by allowing them to develop new industries which otherwise may fall beyond their grasp.

Besides financial and technological benefits, FDI benefits human capital development immensely. In most cases, foreign investment and especially in labor-intensive industries provides considerable gainful employment to the local population. Most of such cases are invariably followed by training and skill development since every foreign company would need people who can work at global standards.<sup>7</sup> International business practices, advanced technologies, and more efficient managerial techniques raise the productivity and entrepreneurial spirit of local workers by enhancing their skill sets. With this human capital improvement over a period of time, the multiplier effect generates itself as more skilled workers join the domestic market, moving the economy to a better diversified and resilient state.

FDI also integrates host countries into the international market. While investing in developing countries, many multinational firms integrate local companies into their international system of suppliers. It is here that the local companies come in contact with the world market, which for these firms is considered the most valuable means to export goods, expand their customer network, and further improve foreign exchange earnings. Besides, foreign investors contribute to developing the quality and environmental standards of local firms<sup>8</sup> up to international levels, which enables them to become more competitive in the international market. In summation, FDI improves the quality and widens the reach of products, leading to higher economic integration and competitiveness.

### ***Sectoral Analysis: FDI-Intensive Sectors***

While FDI can cause growth to occur in many kinds of industries, some of them, by reason of their size, sophistication, and propensities linked to resource utilisation, are more foreign

<sup>6</sup> Abdelhafidh Dhrifi, “Foreign direct investment, technological innovation and economic growth: empirical evidence using simultaneous equations model”. 62 *Int Rev Econ* 381-400 (2015). available at: <https://doi.org/10.1007/s12232-015-0230-3> (last visited on: 11.07.2025)

<sup>7</sup> Veasna Kheng, Sizhong Sun *et.al.* “Foreign direct investment and human capital in developing countries: A Panel Data Approach” 50 *Econ Change Restruct* 341-365 (2017). available at: <https://doi.org/10.1007/s10644-016-9191-0> (last visited on: 11.07.2025)

<sup>8</sup> “This is how local suppliers can take to the global stage”, World Economic Forum (Feb. 2, 2017). Available at: <https://www.weforum.org/stories/2017/02>this-is-how-local-suppliers-can-take-to-the-global-stage/> (last visited on: 14.07.2025)

capital-intensive. Included within the latter category are mining, energy, and infrastructure, all of which have high intensities of FDI in recent decades.

FDI has the potential to transform the mining sector in ways that might otherwise not be possible, especially for the natural resource-rich countries of the South. In fact, foreign investors are often indispensable in unlocking the value of natural resources, especially large-scale mining projects requiring advanced technologies and substantial capital outlays. Thus, significant FDI flows have been attracted to the mineral extraction industries of Chile<sup>9</sup>, Zambia, and Peru<sup>10</sup>, among others, increasing their exports and leading to greater government revenues. However, mining activities also cause serious environmental risks—thermal destruction, destruction of habitats, and pollution of water bodies—and thus requires stringent regulatory mechanisms to tackle the wide impacts caused.

In the same way, the energy sector has been one of the biggest receivers in FDI, especially in oil, gas, and lately even in renewable energy projects. For a long period of time, countries like Nigeria<sup>11</sup>, Brazil, and Indonesia<sup>12</sup> have depended on foreign investment for their development in fossil fuel industries, that essentially make up the bigger chunk of their export earnings. However, against the backdrop of rising concerns on climate change and energy security issues, FDI has structurally biased itself toward green FDI, with a gradually increasing influx of foreign investments in various renewable energy projects in countries such as Morocco<sup>13</sup>, India, and South Africa<sup>14</sup>. Solar, wind, and hydropower investments, alongside contributing to energy source diversification, help combat climate change. At the

<sup>9</sup> Executive Summary, “2021 Investment Climate Statements – Chile” US Department of State, available at: <https://www.state.gov/reports/2021-investment-climate-statements/chile> (last visited on: 14.07.2025).

<sup>10</sup> KPMG International, Peru - Country mining guide, available at: <https://assets.kpmg.com/content/dam/kpmg/pdf/2015/05/peru-mining-guide.pdf> (last visited on: 14.07.2025)

<sup>11</sup> Aghogho Udi, “Divesting from fossil fuel could reduce Nigeria’s GDP by \$30 billion – Afrexim Bank (2024), available at: <https://nairametrics.com/2024/07/04/divesting-from-fossil-fuel-could-reduce-nigerias-gdp-by-30-billion-afrxivm-bank/> (last visited on: 14.07.2025).

<sup>12</sup> A. Anantha Lakshmi *et. al* “Indonesia tests global carbon credits market linked to energy projects”, *Financial Times*, 28 January 2025, available at: <https://www.ft.com/content/68c82f0a-4588-4d8a-9171-d31954620688> (last visited on: 11.07.2025).

<sup>13</sup> Oumaima Bouarfa & Mohammed Abdellaoui (eds.), *The Impact of Foreign Direct Investments on the Renewable Energy Sector in Morocco: An Empirical Analysis of Their Role as a Lever to Enhance Attractiveness* (Springer Nature, 2024) available at: [https://doi.org/10.1007/978-3-031-68653-5\\_37](https://doi.org/10.1007/978-3-031-68653-5_37) (last visited on: 11.07.2025).

<sup>14</sup> Bashir Muhammad, *et al*. “Impact of foreign direct investment, natural resources, renewable energy consumption, and economic growth on environmental degradation: evidence from BRICS, developing, developed and global countries”, 28 (17) *Environmental Science and Pollution Research*, 21789-21798 (2021), available at: <https://doi.org/10.1007/s11356-020-12084-1> (last visited on: 11.07.2025).

same time, the energy sector is often fraught with issues related to land use, social displacement, and resource management, whether it be in the realm of fossil fuels or renewable resources<sup>15</sup>.

The second very important sector where FDI also plays an important role is infrastructure. In most developing countries, the absence of capital or technical wherewithal to build transport networks, telecommunications systems, and urban infrastructure is a precondition of modern economic activity. When FDI is attracted, large-scale infrastructure projects from highways and railways to airports and ports can be financed. Places like India and Vietnam, foreign investment has greatly modernized critical infrastructure and driven trade, reducing the cost of logistics and increasing their overall economic competitiveness<sup>16</sup>. Infrastructure development creates supports other development sectors such as manufacturing and tourism, but it also starts to have multiplier effects on creating further economic opportunities and improving the quality of life for the local population.

It has, therefore, been an effective catalyst for economic development through providing access to considerable capital, a boost for technology transfer, job creation, and linking local industry with broader international markets. Yet, as welcome as those benefits are, any environmental risk that accompanies FDI-heavy areas of mining, energy, and infrastructure has to be met with awareness. The challenge in this context is how to leverage the economic value of FDI without compromising the environmental goal of such development being cheated of its sustainability.

## **ENVIRONMENTAL RISKS OF FDI**

While FDI is widely recognized as a driver of economic growth and development, it also involves significant environmental risks, particularly in resource-rich developing countries. Economic gains from foreign investments often come at an expensive environmental cost: degrading natural ecosystems and communities through unsustainable industrial practices. It will focus on two of the major environmental risks related to FDI-resource depletion and

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<sup>15</sup> Dan Virah-Sawmy & Bjorn Sturmberg, “Socio-economic and environmental impacts of renewable energy deployments: A Review” 207 *Renewable and Sustainable Energy Reviews* (2025), available at: <https://doi.org/10.1016/j.rser.2024.114956> (last visited on: 14.07.2021).

<sup>16</sup> Shishir Priyadarshi, “A Strategic Gambit: India’s Investment in Vietnam”, *Modern Diplomacy*, 15 Dec. 2024, available at: <https://moderndiplomacy.eu/2024/12/15/a-strategic-gambit-indias-investment-in-vietnam/> (last visited on: 11.07.2025).

pollution, as well as ecological degradation generated by pressures of industrialization and urbanization.

### ***Resource Depletion***

The most visible environmental issue about FDI is observed as that of depletion of natural resources. This normally happens whenever foreign investors export raw materials to feed their growth in industries.<sup>17</sup> Mining, agriculture, and logging sectors are highly vulnerable to large-scale resource depletion since such industries entail heavy extraction of natural resources like minerals, timber, and water. Whereas these industries can bring vast revenues to the economies of host countries, they often do this at a sacrifice of environmental sustainability.

Among these, the impact of FDI on heavy resource sectors has emerged as one of the most severe consequences: deforestation. FDI-induced investments in large-scale agricultural production and logging have resulted in massive losses of forest cover in countries like Brazil, Indonesia, and the Democratic Republic of Congo, further leading to a loss of biodiversity and disruption within ecosystems. It has also been a significant cause of rainforest clearing, largely by foreign investors in such industries as palm oil and cattle ranching, which are incredibly destructive to wildlife habitats and contribute to climate change through the release of enormous amounts of carbon dioxide stored in trees. Often, the economic gains from FDI in those sectors are outweighed by long-term environmental devastation and the loss of essential natural resources.

Another critical factor is water pollution.<sup>18</sup> FDI activities, including mining, manufacturing, and extraction of fossil fuels, consistently destroy water sources and impair ecosystems and local communities. For example, in Zambia<sup>19</sup> and Peru<sup>20</sup>, rivers and lakes were intentionally subjected to toxic chemicals such as mercury and arsenic from foreign mining companies. This does not only affect the aquatic life but places at risk the livelihood of those

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<sup>17</sup> Farhan Ahmed, *et al.* “The environmental impact of industrialization and foreign direct investment: empirical evidence from Asia-Pacific region”, 29 (20) *Environmental Science and Pollution Research* 29778-29792 (2022), available at: <https://doi.org/10.1007/s11356-021-17560-w> (last visited on: 11.07.2025).

<sup>18</sup> Priscila Martínez & OBELA, “Water pollution in Mining”, available at: <https://www.obela.org/en-analisis/water-pollution-in-mining> (last visited on: 11.06.2025).

<sup>19</sup> R. Mutika, “Review of mining and sanitation waste water management and their contribution to water contamination in Zambia”, 2 (3) *European Journal of Theoretical and Applied Sciences* 745-759 (2024).

<sup>20</sup> *Ibid.*

communities whose survival depends on the use of clean water for agriculture, fishing, and drinking. This reduction in fresh water sources widens social unrest and can further induce foreign corporations into conflicts with the locals.

### ***Pressures from Industrialization & Urbanization***

The development of other key environmental hazards associated with FDI occurs through pressures for industrial and urbanization processes hastened by foreign investments in infrastructure development, manufacturing plants, and urban centers. While these investments provide a means of modernizing economies, they often lead to pollution and ecological degeneration that may be quite challenging to redeem. Industrial FDI has typically been associated with air, water, and soil pollution brought about by the huge number of multinational corporations trying to maximize profits through the utilization of lenient environmental legislation in developing countries.

In most of the countries receiving considerable FDI in their industries, air pollution has also appeared as a severe problem in recent years. For instance, countries like China and India, whose industrialization processes took place or are taking place very fast with foreign investments both in manufacturing and energy production, suffered extreme declines in their air qualities. Burning in large amounts of fossil fuels by power plants, factories, and transport systems emit enormous amounts of greenhouse gases and other pollutants, creating health problems for the local population, while at the same time contributing to global climatic change. In most cases, cities in these countries have been transformed to become centers of industrial pollution; local residents suffer from diseases related to respiration and other health complications emanating from long exposure to poor air quality.

Ecological degradation could be another hazardous effect of large infrastructure projects besides air pollution, financed by FDI. Highways, dams, and urban developments can lead to the devastation of certain key ecosystems, whether wetlands and forests, coastlines, etc. For instance, foreign investment in constructing dams has brought many environmental impacts into existence, especially in countries with the most potential for such dams, such as China and Ethiopia. These include disruption in the ecosystem of the river, displacement, and loss of biodiversity in those areas. Such development projects, while necessary for economic progress and energy development, usually do not consider the cost to the environment; hence,

really causing damage to natural habitats and pushing wild animals out of their homes for good.

Another important factor is that urbanization pressures driven by FDI serve as another key player in ecological degradation. The interest of foreign companies in urban infrastructure and real estate stimulates unprecedented population growth and urban sprawl in the cities of developing countries. Expansion then creates stress on the surrounding ecosystems, since more land is being converted for housing, commercial use, and networks of transportation. Most of the cases involve a lack of structure in cities for handling waste, increasing pollution in rivers, oceans, and countryside areas. Moreover, urban growth can lead to the destruction of agricultural lands, which lowers food security further and puts more burdens on local ecosystems.

The cumulative effect all these industrial and urbanization pressures have is to bring about increased environmental degradation often with long-lasting consequences for ecosystems and sometimes local populations. While FDI may spur economic prosperity, in fact, such investments can place an unsustainable burden on the environment-particularly so for countries lacking adequate regulatory frameworks to enforce environmental protections effectively.

Whereas FDI can give stimuli for economic growth and development, it also imposes serious environmental burdens that ought to be managed with care. Resource depletion, deforestation, water pollution and the pressures of industrialization and urbanization are all long-term results of an unregulated FDI. The balancing act for developing countries therefore lies in being attractive enough to foreign investors, yet ensuring that such investments are not made at the expense of their natural ecosystems. Strong environmental regulations combined with incentives for sustainable investments are significant in the course of mitigating the environmental risks of FDI and hence ensuring that economic development does not come at the cost of environmental sustainability.

## **LEGAL AND REGULATORY FRAMEWORKS**

Legal and regulatory frameworks governing investment activities at the intersection of FDI and environmental sustainability are framed by international environmental agreements and national laws that respectively aim at reducing ecological damages emanating from FDI. This section reflects on the international environmental legal framework, outcomes of the Paris

Agreement and the CBD, among others, and how developing countries make use of domestic regulatory mechanisms such as EIAs, permitting systems, and penalties in an effort to balance economic growth with environmental protection.

### ***International Environmental Law***

International environmental law creates a starting point that can align FDI with international goals of sustainability. The setting of a common standard and commitment by international agreements sets out a framework within which foreign investors have to operate, especially in sensitive sectors of the environment. Two key agreements that help frame the global environmental regulatory landscape are the Paris Agreement and the Convention on Biological Diversity.

#### ***The Paris Agreement***

The Paris Agreement, which was adopted in 2015, is a full commitment by the world community to limit temperature rise well below 2°C, with an aim to restrict it to 1.5°C.<sup>21</sup> Therefore, countries are obliged to present nationally determined contributions showing their plans concerning greenhouse gas emissions reduction and further transitioning toward more sustainable energy systems. Coupled with this, for many countries, such as the emerging economies, FDI has been considered one of the key drivers of the clean energy transition needed to meet these goals.

FDI has been instrumental in financing renewable energy projects, especially in developing countries, which depend on foreign investment to access the capital and technology that are ones for expansion. For example, the aggressive push by India toward solar and wind energy has been supported by an active courting of billions of dollars in foreign investment by multinational corporations wishing to take advantage of its great potential to produce green energy.<sup>22</sup> These countries incentivise foreign investment through policy measures that range from tax breaks for green FDI right up to subsidies in pursuit of renewable energy projects, thereby aligning it with their climate commitments under the Paris Agreement.

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<sup>21</sup> UNFCCC, “Paris Agreement”, available at: [https://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/paris\\_agreement\\_english\\_.pdf](https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf) (last visited on: 11.07.2025).

<sup>22</sup> Press Information Bureau, GoI, “India’s renewable energy sector has received FDI equity investment of \$ 6.1 billion during April 2020 - September 2023: Union Minister for Power and New & Renewable Energy”, available at: <https://www.pib.gov.in/Pressreleaseshare.aspx?PRID=1988293> (last visited on: 11.07.2025).

This can also potentially contribute to the development of financial and physical resources that could help the process of climate adaptation, particularly in the developing world. FDI can be invested in a mix of climate-resilient infrastructure projects, clean energy, and modern and sustainable agriculture. The development is important for growth in an economy and contributes to reducing vulnerability to climate change. The Paris Agreement called for the orientation of global capital flows, especially FDI, towards sustainable development and low-carbon industries.

### ***Convention on Biological Diversity, CBD***

The CBD was signed in 1992, and its basic objectives are conserving biodiversity, ensuring the sustainable use of natural resources, and achieving equitable sharing of benefits that emanate from genetic resources.<sup>23</sup> As a matter of fact, this international treaty has thus far been instrumental in regulating FDI in industries with great potential for affecting ecosystems, especially in agriculture, mining, and forestry.

Countries that are parties to the CBD undertake obligations in respect of domestic policies for biodiversity conservation, especially in areas where their ecosystems are susceptible to enterprising foreign investors. Foreign investors in mining and agriculture, for instance, may be put to an obligation to carry out biodiversity management plans, undertakes proper environmental impact assessments, mitigating actions against perceived damage to any ecosystem. Foreign investments in agriculture alone have led to large-scale deforestation in Brazil<sup>24</sup>, and its government has clamped down and enforced stronger environmental regulations aimed at the protection of the Amazon rainforest and its biodiversity-by the principle set out under CBD.

The CBD also encourages the establishment of protected areas and formulation of legislation that offers incentives towards the use of resources in a sustainable manner. In countries with abundant resources, foreign investors are sometimes compelled either to give a certain percentage to conservation concerns or invest in projects that enhance biodiversity, with the

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<sup>23</sup> Secretariat of the Convention on Biological Diversity Montreal, “Convention on Biological Diversity”, (2011), available at: <https://www.cbd.int/doc/legal/cbd-en.pdf> (last visited on: 11.07.2025).

<sup>24</sup> Cristina MÜLLER, et. al. “Brazil and the Amazon Rainforest - Deforestation, Biodiversity and Cooperation with the EU and International Forums”, European Parliament’s Committee on the Environment, Public Health and Food Safety (2020).

view of ensuring that economic benefits derived do not come at the expense of long-term environmental sustainability.

### ***Environmental Impact Assessments***

EIA is one of the most significant legal mechanisms for evaluating potential environmental impacts that may arise from large projects, including those financed by foreign investors. Indeed, many developing countries have enacted laws on EIAs as conditions for approval of infrastructure, energy, mining, or any other project relating to FDI. To identify, predict, and mitigate the potential environmental impacts of a project to be undertaken before approval, this is what EIAs are meant for.

For example, the Indian Environment Protection Act<sup>25</sup> demands that large industrial projects within which foreign investors are involved shall be submitted to strict environmental scrutiny through EIAs. These EIAs also involve public consultations, wherein interested members of the local community and stakeholders can raise their concerns over the potential impacts of the proposed project on the environment and on society. Within the precincts of African countries, like South Africa<sup>26</sup> and Kenya<sup>27</sup>, EIAs are legally required for foreign-funded projects in sensitive areas like wildlife reserves, forests, and coastal zones. EIAs strengthen environmental aspects at large within the decision-making process, and projects that are not akin to environmental standardisation might be disallowed or delayed.

### ***Permitting and Penalties***

Indeed, permitting systems are another major determinant of domestic environmental regulations. They ensure compliance by foreign investors with the set environmental standards through the issuance of licenses and permits in land use, emission, waste management, and exploitative activities. The processes for permitting are normally sectoral, and high demands are put on industries that easily degrade the environment, for example, mining, energy, and manufacturing.

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<sup>25</sup> The Environment (Protection) Act, 1986. \

<sup>26</sup> Nellie Peyton, “South Africa Passes its first Sweeping Climate Change Law”, (Reuters, 2024), available at: <https://www.reuters.com/world/africa/south-africa-passes-its-first-sweeping-climate-change-law-2024-07-23/> (last visited on: 11.07.2025)

<sup>27</sup> The Environmental (Impact Assessment and Audit) Regulations, Legal Notice 101 of 2003 (2022), available at: <https://archive.gazettes.africa/archive/ke/2003/ke-government-gazette-dated-2003-06-27-no-66.pdf> (last visited on: 11.07.2025).

For instance, South Africa<sup>28</sup> has a rigorous environmental permitting regime in regard to mining activities, thus compelling the foreign company to obtain permits concerning air emissions, water use, and proper waste management. These permits are pegged on certain conditions; the breach of which could lead to serious penalties such as fines, closure of operations, or even the revocation of the license to operate.

In countries such as Brazil<sup>29</sup> and Indonesia<sup>30</sup>, there were also penalty systems introduced in the case of non-compliance with environmental laws. Foreign investors who commit violations through too much emission of gases, water pollution, or degradation of soil would be liable for heavy fines, legal prosecution, or even suspension of business activities. These measures have acted as deterrents to environmental violations and persuade foreign investors to shift toward sustainable practices.

## **BALANCING GROWTH AND SUSTAINABILITY: POLICY APPROACHES**

With an increasing number of countries realizing the need for a trade-off between economic growth and environmental sustainability, especially at this time of FDI, a raft of policy approaches has recently been put forward to mitigate this challenge. Indeed, it is complex for striking a balance between the economic benefits weighing against potential environmental risks of FDI by using well-thought-out regulatory frameworks that provide incentives targeted at sustainable investment and stringent environmental standards. This section now explores three major ways in which this balance might be achieved: promotion of Green FDI, application of EIAs, and insertion of sustainable development provisions in IIAs.

### ***Green FDI: Incentivising Sustainable Investments***

Green FDI means foreign investment taking environmental sustainability into consideration as core elements of action, focusing on renewable energy, energy efficiency, and sustainable agriculture. Such investments would not only foster economic growth but also come closer to

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<sup>28</sup> Generis Global Legal Services, “Navigating Environmental Regulations and Compliance Obligations In South Africa”, available at: <https://generisonline.com/navigating-environmental-regulations-and-compliance-obligations-in-south-africa/> (last visited on: 11.07.2025).

<sup>29</sup> *Ibid.*

<sup>30</sup> Makarim & Taira S, “Regulation Sets Fines of up to IDR3 Billion for Environmental Non-Compliance”, available at: <https://www.makarim.com/news/regulation-sets-fines-of-up-to-idr3-billion-for-environmental-non-compliance> (last visited on: 11.07.2025).

meeting the environmental goals related to carbon emission reduction, protection of biodiversity, and resource efficiency in general<sup>31</sup>.

It is regarding this influence that the role of government becomes crucial in promoting Green FDI through targeted incentives to foreign investors. These could include tax breaks, subsidies, and seamless regulatory processes for projects that go towards advancing the cause of environmental sustainability. The Government of India has instituted a raft of policies to attract foreign investment in renewable energy. By offering a financial incentive and streamlining bureaucratic processes, the Indian government has thus far successfully attracted substantial FDI into its renewable energy sector, with the wider ramifications of helping both lower India's dependence on fossil fuels and creating some economic value<sup>32</sup>.

Similarly, countries can incentivize Green FDI by embedding sustainability in broader national development strategies. For instance, Morocco's<sup>33</sup> renewable energy strategy is enabled by foreign investment, thus enabling it to create large-scale solar and wind energy projects that enhance not only its energy security but also global climate goals.

### ***FDI Screening and Environmental Standards***

The other key actions in the balancing of FDI with sustainability include the introduction of strict mechanisms of environmental screening, accompanied by the application of Environmental Impact Assessments. EIA is an integral appliance that ensures governments are able to analyze and study the probable impact of a certain FDI venture on their environment before the actual granting of such a venture. This would ensure that the government had foreign investments with regard to environmental standards, implying that necessary mitigations had been taken to avert adverse impacts<sup>34</sup>.

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<sup>31</sup> Dhairy Jain, "The Emanation of Green Bonds in India: An Instrument of Sustainable Financing", CBCL NLIU, *available at:* <https://cbcl.nliu.ac.in/capital-markets-and-securities-law/the-emanation-of-green-bonds-in-india-an-instrument-of-sustainable-financing> (last visited on: 11.07.2025).

<sup>32</sup> Melissa Cyrill, "The Scope for Foreign Investment in India's Green Economy", *available at:* <https://www.india-briefing.com/news/the-scope-for-foreign-investment-in-indias-green-economy-30785.html/> (last visited on: 11.07.2025)

<sup>33</sup> Renewable Energy and Morocco's New Green Industries: How Morocco's green energy ecosystem can expand women and youth employment through sustainable development, *available at:* <https://www.mei.edu/publications/renewable-energy-and-moroccos-new-green-industries-how-moroccos-green-energy-ecosystem> (last visited on: 11.07.2025)

<sup>34</sup> Environmental Impact Assessment (EIA), *available at:* <https://www.mygov.scot/eia> (last visited on: 11.07.2025).

EIA have been especially vital in areas that tend to cause maximum environmental damages, such as mining, infrastructure, and energy. Indonesia<sup>35</sup> has made the rules for EIA related to foreign investment more stringent in fields like palm oil and mining. This assessment would not only help to assess the potential environmental risks but can also provide avenues for public consultation and corrective measures thereupon. Large-scale foreign investments can be stopped or their adverse environmental impact can be mitigated or minimized by the government through the enforcement of EIAs.

Besides EIAs, countries may establish FDI screening mechanisms to ensure that only those projects with certain specific environmental criteria are approved. This approach allows governments to give priority to sustainable investments while discouraging projects that could result in environmental degradation. For example, the European Union<sup>36</sup> has devised guidelines that require member states to screen FDI for consistency with economic and environmental goals lest foreign investments fail to align with the sustainability objectives of countries.

### ***Sustainable Development Clauses in Investment Agreements***

Incorporating clauses on sustainable development within BITs and FTAs is another important strategy in endeavouring to strike a balance between FDI and environmental protection. Such provisions essentially address environmental sustainability and an assurance of the host country's right to regulate in the public interest, applicable to, among similar areas, environmental standards<sup>37</sup>.

Sustainable development clauses may require that foreign investments are made in accordance with local environmental laws and in relation to international environmental agreements, such as the Paris Agreement on climate change. For instance, many EU<sup>38</sup> free

<sup>35</sup> InCorp Editorial Team, “Introduction to Environmental Permits with AMDAL Indonesia Indonesia”, available at: <https://www.cekindo.com/blog/environmental-permits-indonesia> (last visited on: 11.07.2025).

<sup>36</sup> Trade and Economic Security, “Investment Screening”, (2025), available at: [https://policy.trade.ec.europa.eu/enforcement-and-protection/investment-screening\\_en](https://policy.trade.ec.europa.eu/enforcement-and-protection/investment-screening_en). (last visited on: 11.07.2025)

<sup>37</sup> J Anthony VanDuzer, “Sustainable Development Provisions in International Trade Treaties: What Lessons for International Investment Agreements?”, in Steffen Hindelang & Markus Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* 142-176 (Oxford, 2016; online edn, Oxford Academic, 21 Apr. 2016), available at: <https://doi.org/10.1093/acprof:oso/9780198738428.003.0008> (last visited on: 11.07.2025).

<sup>38</sup> Jana Titievskaia, “Sustainability Provisions in EU Free Trade Agreements - Review of the European Commission Action Plan” European Parliament, available at:

trade agreements with developing countries have included chapters on environmental protection, requiring that foreign investors respect local environmental laws and contribute to sustainable development. Such clauses would ensure that FDI does not undermine national environmental sustainability achievements.

In addition, these agreements could provide clauses that address environmental cooperation and technology transfer explicitly. Such provisions would encourage foreign investors to share their know-how on environmental sustainability practices, thus building local capacity in environmental management. One good example is the Comprehensive Economic and Trade Agreement between the European Union and Canada<sup>39</sup>, which commits to policies aimed at promoting trade in and investment in environmentally beneficial goods and services while maintaining high environmental standards.

In this aspect, balancing economic growth with environmental sustainability in the context of FDI has to be multi-directional: rights-based integration of green FDI, strict environmental impact assessment, and inclusion of sustainability-related clauses in investment agreements will be the most desirable step in this direction. Changing this, developing countries attract foreign capital in a non-compromising way with their natural resources by applying high environmental standards and embedding sustainability into international trade and investment frameworks. These policy approaches contribute to attaining not only mitigation of environmental risks associated with FDI but also broader sustainable development goals.

## CASE STUDIES

The challenge of balancing between FDI attraction and protecting environmental sustainability is a universal challenge, with many countries facing differing levels of success in the management of such a balance. While some nations have successfully used FDI in pursuit of sustainable growth, many other countries have encountered the negative environmental consequences of their poorly regulated foreign investments. This section highlights two sets of case studies in balancing FDI with environmental protection, while others reveal challenges and failures where FDI has resulted in environmental degradation.

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[https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698799/EPRS\\_BRI\(2021\)698799\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698799/EPRS_BRI(2021)698799_EN.pdf). (last visited on: 11.07.2025).

<sup>39</sup> Government of Canada, “Text of the Comprehensive Economic and Trade Agreement – Chapter twenty-four: Trade and environment”, available at: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/texte-texte/24.aspx?lang=eng> (last visited on: 11.07.2025).

## ***Success stories: Countries that have successfully balanced FDI and environmental protection***

### ***Costa Rica: Ecotourism and Sustainable Development***

FDI goes hand in hand with environmental sustainability in the case of eco-tourism in Costa Rica. On account of its rich biodiversity and increased conservation efforts, major investments in eco-tourism can be encouraged all over Costa Rica.<sup>40</sup> The government of Costa Rica has been fairly strict in following all kinds of environmental regulations and in encouraging ways of sustainable tourism. Hence, capitalizing on the country's natural resources has been achievable without degrading them.<sup>41</sup>

Over 25 percent of the country is incorporated into Costa Rica's national parks and protected areas that have become major attractions for overseas tourists<sup>42</sup>. The government has actively promoted FDI to develop eco-friendly resorts, wildlife sanctuaries, and adventure tourism activities that do not harm the environment. In this way, Costa Rica needs to balance the need to create substantial tourism revenue with the need to preserve its ecosystems. Its stable regulatory environment and commitment to sustainability have made it attractive to foreign investors, hence a model for responsible investment in eco-tourism.

Success in the ecotourism sector of Costa Rica proves how well-liked policies can actually attract foreign investment to drive economic growth while supporting environmental conservation. Their approach also sets the standards of high environmental parameters, which in turn ensure that foreign investors contribute towards the betterment of the local ecosystems rather than exploiting them.

### ***Morocco: Renewable Energy Investments and FDI***

Morocco is very well-positioned today in courtship and is at the frontline as far as the attraction of Green FDI is concerned. The ambitious renewable energy strategy was meant to

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<sup>40</sup> "Costa Rica well placed to attract tourism investment as ESG pressure grows", available at: <https://www.investmentmonitor.ai/sponsored/costa-rica-well-placed-to-attract-tourism-investment-as-esg-pressure-grows/> (last visited on: 11.07.2025).

<sup>41</sup> Katherine Simon, "Ecotourism in Costa Rica", available at: <https://global-studies.shorthandstories.com/ecotourism-in-costa-rica/index.html> (last visited on: 11.07.2025).

<sup>42</sup> Astha Garg, "Costa Rica National Parks: Understanding Their Importance", (Oct. 11, 2022), available at: <https://ticotimes.net/2022/10/11/costa-rica-national-parks-understanding-their-importance> (last visited on: 11.07.2025).

attain 52% of its electricity from renewable sources by the year 2030<sup>43</sup>. This has made the country a magnet for foreign investment in solar and wind power projects. Such investments have helped Morocco reduce dependence on fossil fuels and also become relevant in global efforts toward fighting climate change.

The most crucial work in Morocco is the Ouarzazate Solar Power Station, known more colloquially as Noor Complex, that ranks among the largest concentrated solar power plants in the world. This project has been largely funded by foreign investors and international finance institutions, among which are the World Bank and the European Investment Bank<sup>44</sup>. By doing so, Morocco sent a message to the world regarding how FDI can be utilized in major ways to achieve sustainable energy production, low carbon emissions, and employment opportunities within green industries.

Success here by Morocco in attracting FDI in renewable energy also testifies to what well-thought-out government policy can achieve in sustainability investment. It has been able to take front-line positions in the energy transition thanks to financial incentives, international funding of projects, and friendly regulatory frameworks<sup>45</sup>.

### ***Challenges of FDI: Environmental Degradation in Places Where FDI Has Taken Place***

#### ***Oil Exploration and Environmental Damage in Nigeria***

The Nigerian case, where FDI investments exist within its oil industry, depicts the potential environmental hazards when foreign investments are not well-regulated. The Niger Delta is one of the richest oil regions in the world and has received high levels of FDI from multinational oil firms such as Shell, Chevron, and ExxonMobil. While these investments

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<sup>43</sup> “Morocco Country Commercial Guide”, available at: <https://www.trade.gov/country-commercial-guides/morocco-energy> (last visited on: 11.07.2025).

<sup>44</sup> “Morocco: European Investment Bank funds one of the biggest solar power complexes in the world, EU Neighbours”, available at: <https://south.euneighbours.eu/news/morocco-european-investment-bank-funds-one-biggest-solar-power-complexes/> (last visited on: 11.07.2025).

<sup>45</sup> “Engie And Morocco’s OCP Renewables Deal Worth Billions”, (Reuters), available at: [https://www.reuters.com/markets/deals/engie-moroccos-ocp-renewables-deal-worth-billions-says-source-2024-10-29.](https://www.reuters.com/markets/deals/engie-moroccos-ocp-renewables-deal-worth-billions-says-source-2024-10-29/) (last visited on: 11.07.2025).

have generated tremendous levels of revenue for the Nigerian government, they have also resulted in severe environmental degradation-e.g., oil spills, gas flaring, and deforestation.<sup>46</sup>

The resultant effect of oil exploration is the spoiling of water bodies, soil, and air in the region of the Niger-Delta. This leads to the destruction of the ecosystem and ways in which communities have survived through agriculture and fishing. Criticism has most times been directed at the Nigerian regulatory framework for failing to apply its environmental laws<sup>47</sup> and failure to monitor foreign oil companies or holding them responsible as they have tended to act with impunity. Despite international pressure and even public outcry for environmental remediation, efforts have been slow; thus, the region has suffered lasting ecological damage.

The case of Nigeria, therefore, reveals the importance of effective environmental governance in managing FDI, especially those resource-extractive ones. Without good regulation and enforcement, for example, FDI might cause unsustainable exploitation of natural resources and inflict long-term detrimental damage on the environment and local people.

### ***Indonesia: Palm Oil and Deforestation***

Indonesia's palm oil industry is yet another example of the environmental challenges associated with FDI. The country is the world's largest producer of palm oil, and this industry has been a target of vast foreign investment by companies desirous to make hay from the growing global demand for the commodity.<sup>48</sup> Its expansion has come hand in glove with widespread deforestation, adding significantly to the destruction of tropical rainforest and loss of biodiversity.

The deforestation of Indonesia, brought about by both internal and external investment in the palm oil industry, has meant a host of disastrous environmental consequences: the release of carbon dioxide,<sup>49</sup> which had hitherto been stored in the forest ecosystem, the loss of crucial

<sup>46</sup> Philip Agbonifo, "Risk management and regulatory failure in the oil and gas industry in Nigeria: Reflections on the impact of environmental degradation in the Niger Delta region," 9 (4) *Journal of Sustainable Development*, 1 (2016), available at: <https://doi.org/10.5539/jsd.v9n4p1> (last visited on: 11.07.2025).

<sup>47</sup> Kato Gogo Kingston, "The Dilemma of Minerals Dependent Economy: The case of Foreign Direct Investment and Pollution in Nigeria", 1 (1) *African Journal of Social Sciences*, 1-14 (2011), available at: [https://mpra.ub.uni-muenchen.de/29046/2/K\\_Kingston\\_pollution\\_AJSS.pdf](https://mpra.ub.uni-muenchen.de/29046/2/K_Kingston_pollution_AJSS.pdf) (last visited on: 11.07.2025).

<sup>48</sup> Jason Jon Benedict and Robert Heilmayr, "Trase: Indonesian Palm Oil Exports and Deforestation", available at: <https://www.sei.org/features/indonesian-palm-oil-exports-and-deforestation/> (last visited on: 11.07.2025).

<sup>49</sup> "Deforestation and Deregulation - Indonesia's Policies and Implications for its Palm Oil sector", available at: <https://eia-international.org/report/deforestation-and-deregulation-indonisas-policies-and-implications-for-its-palm-oil-sector/> (last visited on: 11.07.2025).

habitats for vital fauna, and increased vulnerability to forest fires. The government's regulatory framework has been considered too weak in terms of tussling with illegal logging and imposing sustainable practices on the palm oil industry.

Despite efforts to enhance the uptake of sustainable palm oil, for example, through the Roundtable on Sustainable Palm Oil, the environmental destruction based on FDI in Indonesia's palm oil sector remains a concern. This case confirms the need for more stringent environmental standards and better mechanisms of enforcement that will ensure FDI cannot result in irreparable ecological damage.

## KAMAKHYA: THE CRADLE OF TANTRA IN NORTHEAST INDIA

- Dr Keshav Jha\*

### *Abstract*

*Kamakhya Devi temple (located on the top of Nilachal hills, Guwahati, Assam), happens to be one of the most respected and revered “Shakti Peethas” in India and is supposed to be the embodiment of fertility and feminine power. Known for its tantric practices, it draws an enormous number of devotees from all over the country. Its significance lies not only in being a great place of worship but also in the spiritual, cultural and mystical value. Visitors come to experience the divine energy of this place. “Ambubachi Mela”, which happens to be an annual Hindu festival symbolising goddess Kamakhya undergoing menstrual cycle, is considered the greatest “tantric fertility festival” as it symbolises the fertility of the earth.*

**Keywords:** Kamakhya, Yogini tantra, Shaktipeeth, Ambubachi Mela, Sadhak.

### **INTRODUCTION**

The Kamakhya temple is not just a “shaktipeeth” but also the most important centre and focal point of cryptic yoginis (64 manifestations of Shakti) and tantric powers.

The “chausath yogini” temple, which happens to be a part of the Kamakhya temple complex, symbolises the womb of Shakti. The two worlds-“material” and “astral”- are supposed to be separated by a realm and dimension that is guarded by these “yoginis”. There have been multiple testimonies of tantric sadhakas who have asserted that the “yoginis” provide mantras of a secret nature and various tantras to those who are sincere in their endeavours.

The tantric legacy of the Kamakhya temple is being guarded by these yoginis who remain potent, vital and enigmatic forces in this regard. “Ambubachi” mela is celebrated annually to symbolise goddess Kamakhya’s menstrual cycle and celebrate creation and fertility.

Kamakhya temple is a key centre of Hindu Tantra. Ambubachi mela is organised in the summer month of Asadh (June-July). This time coincides with the advent of monsoon and

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cooling rains, thereby after the scorching heat of the summers (a symbol and reflection of the goddess's blessings to her devotees and grace to the earth).

During the period of menses, for three days, a white piece of cloth is placed inside the temple, and the temple doors are closed, and during these three days, not even a single pilgrim is allowed inside the temple. On the fourth day, when the doors of the temple are opened, red pieces of cloth, which represent the fertility and vitality of goddess Kamakhya, are distributed to the pilgrims, representing the "nirmalya" of the goddess's flow, i.e. offering's sacred remains.

Another noteworthy thing worth mentioning is the system of "sacrifice", which can be seen as the ritualistic counterpart of the "Ambubachi" celebration. As per the "Kalika Purana", sacrifice constitutes an important aspect of goddess worship. Just as the power of vitality and fertility flows from the goddess to earth via her menstruation, in the same manner, the power flows back to her via the sacrifices made by the devotees.

One of the most important and noteworthy things to be taken into consideration is that the sacrifices made here are quite different from the rituals and sacrifices as prescribed in the "Vedas" and "Brahmanas" and these reflect the local tribal ritualistic components and elements of the North Eastern region as there are many offerings made here which are non-vedic in nature and many of them are expressly rejected by the Brahmanas on account of being impure and dangerous.

There is a special section in society and intellectuals that oppose the practice of sacrifice vehemently, and this still remains the most important and deepest fault-line in efforts to convert and transform the whole celebration into a global tourist attraction.

## **CONCLUSION**

As a religious institution, Kamakhya has always been a prominent place in the narrative history of not only Assam but the whole of North-East and the Indian subcontinent since the ancient period.

The vitality of Kamakhya and its tantric system/cult can hardly be ignored by anyone who has any sort of taste in the given subject.

Kamakhya temple and “Ambubachi mela” both are representatives of the cultural heritage, and proper care should be taken so that by merging into the tourism sector and experience industry elements and specific aspects of religion might not become just figments of tantalising and alluring stuff fit for consumeristic purposes only. Care needs to be taken that the essence of this great cultural heritage remains intact and no dilution takes place in its originality.

Kamakhya represents not only the spiritual journey of the devotees but also the deep-rooted mystical world of tantra. It's a symbol of the divine feminine. Its sacredness, rich mythology and peaceful surroundings make it easier for the devotees to connect with the divine power of Shakti and leave all with a deep sense of serenity and peace.

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## AVATARS IN THE EYES OF THE LAW RE-IMAGINING INTELLECTUAL PROPERTY FOR FICTIONAL CHARACTERS IN INDIA'S DIGITAL AGE

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### *Abstract*

*In India, fictional characters are important cultural and economic assets, but it's not clear how to protect them legally. This article looks at how India's current intellectual property system isn't good enough because it doesn't give fictional characters a specific legal right. It answers the research question, to what extent does this legal gap hurt creators and transformative fan communities, and how might a *sui generis* 'copymark' system help? This paper uses a doctrinal, socio-legal, and comparative approach to argue that the current system, which relies on judicial tests from other countries that are not always applied consistently, makes business uncertain. This lack of clarity also stops fan communities from talking about their cultures, because India's strict "fair dealing" doctrine, as defined in Section 52 of the Copyright Act, 1957, wrongly classifies their creative works as infringement. Additionally, the rise of generative AI makes current legal tests for infringement useless, requiring a shift in the way things are done. This article ends by suggesting a hybrid 'copymark' right, which is a registered right that lasts for a set amount of time and protects a character's whole persona. This *sui generis* solution would make things clearer for creators, give non-commercial fan works a safe place to live, and set up a strong framework that can handle future technological problems.*

**Keywords:** Fictional Characters, Intellectual Property, Copyright Law, Sui Generis Right, Generative AI, Transformative Works, Copyright.

### **INTRODUCTION**

Fictional characters are what modern creative industries are all about. In India, they are cultural and economic giants, living in a world that includes movies, comic books, and more.<sup>1</sup>

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Gabbar Singh from the movie masterpiece is one of these icons. *Sholay*, the superhero Nagraj<sup>2</sup>, and the beloved cartoon duo Boban and Molly<sup>3</sup> are more than just story elements; they are valuable intellectual assets that drive billion-dollar merchandising industries and form deep, lasting connections with the public. Yet, a profound paradox lies at the heart of their existence: their immense commercial value is built upon a foundation of profound legal ambiguity.<sup>4</sup> These characters, capable of transcending their original narratives to lead independent lives, exist in a doctrinal no-man's-land within Indian intellectual property (IP) law.

The Indian legal system for protecting these valuable works is a shaky patchwork made up of borrowed ideas from other countries' legal systems and statutory categories that were never meant to include them. The Indian Copyright Act of 1957 does not clearly define "fictional characters" as a separate class of protectable work, which means that creators and courts have to go through a complicated process of fitting these complex, multi-faceted entities into the pre-existing categories of "literary" or "artistic" works.<sup>5</sup> This lack of clarity has created a doctrinal mess, forcing the courts to borrow and adapt legal tests from the United States<sup>6</sup>, resulting in an inconsistent and unpredictable legal system that does not serve the interests of creators or the public.

The main point of this article is that this ad-hoc system is not good enough for the digital age. Its problems go beyond uncertainty in business. It has a clear chilling effect on the legitimate cultural expression of transformative fan communities<sup>7</sup>- one of the main "downtrodden concerns" where creative engagement with beloved characters is often miscategorized as mere infringement instead of being celebrated as cultural dialogue.<sup>8</sup> Furthermore, the current framework is not ready for the disruptive challenges posed by generative artificial

<sup>1</sup> Leslie A. Kurtz, "The Independent Legal Lives of Fictional Characters", 1986 *Wis. L. Rev.* 429 (1986).

<sup>2</sup> *Raja Pocket Books v. Radha Pocket Books*, 1997 (40) DRJ 791.

<sup>3</sup> *Arbaaz Khan v. North Star Entertainment*, (2016) SCC OnLine Bom 1812.

<sup>4</sup> *Supra* note 1.

<sup>5</sup> The Copyright Act, 1957, s. 13.

<sup>6</sup> Amanda Schreyer, "An Overview of Legal Protection for Fictional Characters: Balancing Public and Private Interests", 6 *Cybaris* 51 (2015).

<sup>7</sup> "Copyright Law and Fanfiction: Navigating the Intersection of Creativity and Intellectual Property", Intepat IP (Feb. 4, 2025), available at: <https://www.intepat.com/blog/copyright-law-and-fanfiction-navigating-the-intersection-of-creativity-and-intellectual-property/> (last visited on: 27.06.2025).

<sup>8</sup> "The Fandom Chronicles: An Analysis of the Copyright Conundrum in Fan-Fiction & Fan-Art", DNLU Student Law Journal, available at: <https://dnluslj.in/the-fandom-chronicles-an-analysis-of-the-copyright-conundrum-in-fan-fiction-fan-art/> (last visited on:27.06.2025).

intelligence (AI), which threatens to shatter the very concepts of authorship and infringement upon which the law is built.<sup>9</sup>

This study tries to answer an important research question: How much does the lack of a unique legal right for fictional characters in India cause legal uncertainty that hurts both original creators and fan communities that change the characters? And how could a mixed ‘copymark’ system be a better and more stable solution?

This article uses a doctrinal method that is heavily influenced by social and legal factors as well as comparisons to answer this question.

- Part I breaks down India’s current legal system, showing how doctrinal confusion comes from the lack of clear rules and the inconsistent use of borrowed judicial tests. It will show that trying to use other systems, like trademark law, to solve problems makes them worse.
- Part II moves on to a socio-legal analysis, looking at how this legal uncertainty hurts fan culture and making the case that India’s strict “fair dealing” doctrine doesn’t protect this important way for people to participate in culture.
- Part III looks at the new and serious problems that generative AI brings up and says that this technology makes old legal tests useless and requires a change in how we think about character rights.
- Finally, Part IV goes from criticism to construction by suggesting a comprehensive legislative reform in the form of a unique ‘copymark’ right. This proposed solution aims to make things clear for creators, give fan communities a safe place to be, and create a strong framework that can handle the technological challenges of the future.

## **THE DOCTRINAL QUAGMIRE: FINDING CHARACTERS IN INDIAN COPYRIGHT LAW**

India’s legal protection of fictional characters is not a clear doctrine but a patchwork of rules that have come about because of a lack of clear laws and the need for judges to make

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<sup>9</sup> “Rights of Fictional Characters: Copyright, Trademark and the Challenge of A.I.”, ESYA Centre (Jan. 3, 2025), available at: <https://www.esyacentre.org/perspectives/2025/1/3/rights-of-fictional-characters-copyright-trademark-and-the-challenge-of-ai> (last visited on. 27.06.2025).

decisions.<sup>10</sup> Since, there is no clear legislative mandate, Indian courts have had to take on a quasi-legislative role, selectively using and applying foreign legal tests to disputes over these valuable intangible assets. This ad-hoc approach has led to a body of case law that is often contradictory and does not provide the predictability that creators, investors, and the public need. The systemic inefficiency that comes from this legislative inaction is not just an academic curiosity; it costs real money in the form of long legal battles and a lack of investment across the entire creative ecosystem.<sup>11</sup>

### *The Statutory Silence and the Difference Between Ideas and Expressions*

The main problem with protecting fictional characters in India is that its main IP law has a big hole in it. Section 13 of the Indian Copyright Act, 1957 (the “Act”), lists the types of works that are protected by copyright: original literary, dramatic, musical, and artistic works, as well as films and sound recordings. There is no mention of “fictional characters” as a separate category of protectable subject matter. This lack of mention is the original sin of character protection in India, forcing stakeholders and courts to try to fit these unique creations into existing categories like “literary work” of Section 2(o),<sup>12</sup> “artistic work” under Section 2(c),<sup>13</sup> or “dramatic work” under Section 2(h) of the Act. This lack of action by the law immediately brings to mind one of the most important ideas in copyright law: the idea-expression dichotomy. The Supreme Court of India confirmed this idea in *R.G. Anand v. Delux Films*.<sup>14</sup> It is a widely accepted idea that copyright protects the unique, original expression of an idea, but not the idea itself.<sup>15</sup>

This difference is important for keeping the right balance between encouraging creativity and keeping a strong public domain for future creators to use. In the case of fictional characters, the general idea of a character—a brilliant but strange detective, a superhero with superhuman strength, or a star-crossed lover—is not protected. However, the specific, detailed embodiment

<sup>10</sup> “A Comparative Analysis of Copyright Laws in India and the United States”, Lawful Legal, *available at:* <https://lawfullegal.in/a-comparative-analysis-of-copyright-laws-in-india-and-the-united-states/> (last visited on: 27.06.2025).

<sup>11</sup> *Supra* note 9.

<sup>12</sup> The Copyright Act, 1957, sec. 2 (o).

<sup>13</sup> *Ibid*, sec. 2 (c).

<sup>14</sup> AIR 1978 SC 1613.

<sup>15</sup> “Hand Book of Copyright Law”, Copyright Office, Government of India, *available at:* <https://copyright.gov.in/documents/handbook.html> (last visited on: 27.06.2025).

of that idea—the character of Sherlock Holmes with his deerstalker hat and Baker Street address, or Superman with his specific costume and origin story—is protected.

Because of this, the idea-expression split is the main issue in infringement cases. The main legal issue is whether the person who is accused of copying an abstract idea of a character that cannot be protected or the developed expression of that character that can be protected. This is a very hard distinction to make because it requires a court to decide where on the spectrum from abstract idea to concrete expression a character falls. As Judge Learnt Hand famously said, the line between idea and expression will always be *ad hoc*.<sup>16</sup> This subjectivity, along with the fact that there is no clear legal guidance in India, has led to a legal system that is full of uncertainty and inconsistency.

#### *Judicial Bricolage: Bringing in and using US tests*

Because there is no Indian law, the Indian judiciary has turned to foreign law, mostly American law, for help. This process of borrowing legal ideas, which was necessary, has led to a patchwork and often uncritical use of tests that were made in a different legal and cultural setting.

The “*Character Delineation*” test, which comes from Judge Learnt Hand’s famous opinion in *Nichols v. Universal Pictures Corp.*<sup>17</sup>, is the most important of these imported doctrines. This test asks whether a character is “*sufficiently and distinctively delineated*” to be protected as an expression rather than just an idea. Judge Hand stated the main point: “*the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for making them too indistinct.*” Indian courts have often, though not always, used this standard.

The Delhi High Court protected the comic book character “Nagraj” from the infringing “Nagesh” in the case of *Raja Pocket Books v. Radha Pocket Books*<sup>18</sup>. The court’s detailed comparison of the characters’ looks, origin stories, and powers, though not explicitly naming the delineation test, was a clear application of its principles, finding that Nagraj was a well-defined expression that had been substantially copied.

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<sup>16</sup> 45 F.2d 119 (2d Cir. 1930).

<sup>17</sup> *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930)

<sup>18</sup> *Arbaaz Khan Production Private Limited v. Northstar Entertainment Pvt. Ltd.* 1997 (40) DRJ791. See also, *DC Comics v. Towle*, 802 F.3d 1012 (9<sup>th</sup> Cir. 2015).

Similarly, while looking at the character of “*Chulbul Pandey*” from the Dabangg movie series in the case of *Arbaaz Khan v. North Star Entertainment*<sup>19</sup>, the Bombay High Court agreed that a character that is “*unique and the portrayal of that character as also the ‘writing up’ of that character*” is able to be protected.<sup>20</sup> This reasoning is in line with the delineation standard, which focusses on the character’s uniqueness and development.

The “*Story Being Told*” test<sup>21</sup>, which the Ninth Circuit came up with in Warner Bros., is a second, stricter standard in US law. *Pictures v. Columbia Broadcasting System*<sup>22</sup>. This test only protects a character if they “constitute the story being told” and are not just a “chess man in the game of telling the story.” This sets the bar very high, implying that the plot must be completely subordinate to the character. Some US courts have used this test, but it has been widely criticised as unworkable for most literary and cinematic works. Indian courts have wisely been cautious about using it, generally preferring the more flexible delineation approach.

More recently, US law has moved towards a combined “*Especially Distinctive*” test, as shown in cases like *DC Comics v. Towle*.<sup>23</sup> This three-part test says that a character must (1) have both physical and conceptual traits, (2) be “sufficiently delineated” to be recognised in different works, and (3) be “especially distinctive” with unique ways of expressing themselves. This new approach effectively combines the delineation standard with a higher standard of originality and consistency. While this is the current state of American law, blindly adopting it in India would only continue the pattern of reactive borrowing without addressing the need for a unique Indian solution.

#### Parameters Different Court Tests for Copyrighting Characters

- Name of Test
- Test for Character Delineation
- Test for Telling a Story
- Test that is very different

<sup>19</sup> Notice of Motion (L) No. 1049 of 2016 in Suit (L) No. 301 of 2016

<sup>20</sup> The Trade Marks Act, 1999, s. 2 (1) (zb).

<sup>21</sup> *Warner Bros. Pictures v. Columbia Broadcasting System*, 216 F.2d 945 (9<sup>th</sup> Cir. 1954).

<sup>22</sup> *Star India Private Limited v. Leo Burnett (India) Private Limited*, 2003 (27) PTC 81 (Bom)

<sup>23</sup> *DC Comics v. Towle*, 802 F.3d 1012 (9th Cir. 2015); “A Comparative Analysis Of Intellectual Property Rights Of Fictional Characters In India And The USA”, Legal Service India, available at: <https://www.legalserviceindia.com/legal/article-10610-a-comparative-analysis-of-intellectual-property-rights-of-fictional-characters-in-india-and-the-usa.html> (last visited on: 27.06.2025).

### *How other protections don't work well enough*

Creators have turned to other IP systems, mostly trademark and, more recently, personality rights, because it is hard to fit characters into copyright law. But these solutions don't fit well and cause their own problems with ideas and policies.

Trademark law can protect a character, but only if it gets a “secondary meaning” that goes beyond its artistic origins and becomes a way for people to find it in the market. The Trademarks Act of 1999 says that a character’s name, image, or other traits can be registered as a trademark if they can be shown graphically and set one company’s goods or services apart from another’s.<sup>24</sup> The Bombay High Court in *Star India* case recognised this principle, saying that a character must have “achieved a form of an independent life and public recognition for itself” in order to be sold.<sup>25</sup> This idea is useful for characters that are commercially successful, but it is not correct in theory. Trademark law is not meant to give someone a monopoly over a creative work; its main purpose is to protect goodwill and keep consumers from getting confused. When trademark law is used to protect the core expressive parts of a character, it creates a dangerous paradox: copyright protection is limited and meant to eventually benefit the public domain, while trademark protection can last as long as the mark is used in commerce. This means that rights holders can get a de facto perpetual copyright through trademark law, which fundamentally undermines the policy balance of the copyright system.<sup>26</sup>

It is even more troubling that people are trying to compare the rights of fictional characters to the rights of real people. The court used the *Anil Kapoor v. Simply Life India* case as a guide in the Neela Film Productions case about characters from “*Taarak Mehta Ka Ooltah Chashmah*.” This case protected a living celebrity’s personality rights from being misused.<sup>27</sup> This comparison is very wrong. The right to privacy and dignity, which are basic human rights, are the basis for personality and publicity rights.

<sup>24</sup> See *Anil Kapoor v. Simply Life India & Ors.*, CS (COMM) 652/2023; *Neela Film Productions Private Limited v. Taarakmehtakaooltahchashmah.com & Ors.* CS(COMM) 690/2024, discussed in “Beyond the Ooltah Chashmah: Rethinking Copyright for Fictional Characters”, S.S. Rana & Co. Advocates, available at: <https://ssrana.in/articles/beyond-the-ooltah-chashmah-rethinking-copyright-for-fictional-characters/> (last visited on: 27.06.2025).

<sup>25</sup> *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

<sup>26</sup> *Icc Development (International) Ltd. v. Arvee Enterprises*, 2003 (26) PTC 245 (DEL).

<sup>27</sup> “Writings of an Aficionado: Fan Fiction and Copyright”, Centre for Studies in IP Rights, NLIU, available at: <https://csipr.nliu.ac.in/copyright/writings-of-an-aficionado-fan-fiction-and-copyright/> (last visited on: 27.06.2025).

*Justice K.S. Puttaswamy v. Union of India*<sup>28</sup>, and the right of an individual to control the commercial exploitation of their identity. Fictional characters, being non-living entities, do not have any of these human traits. The Delhi High Court in *Icc Development (International) Ltd. v. Arvee Enterprises*<sup>29</sup> said that personality rights are only for people. Giving these rights to fictional characters is a legal fiction that could lead to a conflict between the rights of the creator and the actor who plays the character, and it could also lead to monopolisation and stifle creativity, as courts have warned before.

## **THE SOCIOCULTURAL DIVIDE: FAN CULTURE AND THE LIMITS OF FAIR DEALING**

The legal uncertainty surrounding fictional characters doesn't just affect the law; it has major social and legal effects as well. One of the most important is that it has an unfairly negative effect on fan communities. These groups, which make transformative works like fan fiction and fan art, are an important and lively part of modern culture.<sup>30</sup> However, under Indian law, they are often in a grey area of possible infringement, with their creative works not being legally protected and vulnerable. This situation shows a major “downtrodden concern” where the law, by not adapting, stifles a legitimate form of cultural expression.<sup>31</sup>

### *Fan works as a way to Transformative Cultural Dialogue*

It is a basic mistake to only look at fan-made works through the lens of infringement. Fan fiction, fan art, and other derivative works are not usually substitutes for the original works in the market; instead, they are a way for fans to talk about the original works.<sup>32</sup> These works come from appreciation and critical engagement, letting fans explore untold backstories, critique narrative choices, subvert character tropes, and build communities around a shared passion. In this way, fan works are inherently transformative; they add new meaning, new perspectives, and new expression to the source material.

Most of this activity is non-commercial. Fan creators are not trying to make money; they just want to express themselves and be part of a community. This is often made clear through disclaimers that say they don't own the original characters and aren't making any money,

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<sup>28</sup> *Supra* note 25.

<sup>29</sup> *Supra* note 26.

<sup>30</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

<sup>31</sup> *Supra* note 27.

<sup>32</sup> *Supra* note 7.

which shows that they respect the original creator's commercial rights. From a social and legal point of view, this participatory culture is not a threat but a benefit to the creative ecosystem. It gets people more involved, makes them more loyal to the brand, and can even be a form of unpaid research and development, testing out new storylines and character pairings that rights holders might later use. The law's failure to recognise and allow this valuable cultural activity is a big economic blind spot. The legal framework only looks at the negative effects of fan culture on the main intellectual property, which shows that it doesn't understand how culture is made and used in the digital age.

### *The “Fair Dealing” Cage That Limits*

The Copyright Act of 1957, Section 52, lays out the main legal protection for fan creators in India, which is called “fair dealing.” However, this protection is very weak. A close comparison shows that India’s fair dealing doctrine is much stricter than the “fair use” doctrine in US law.<sup>33</sup>

The US fair use law is an open-ended, fair defence that looks at four things: the purpose and character of the use (especially whether it is transformative), the nature of the copyrighted work, the amount and substantiality of the part used, and the effect on the potential market for the original. This flexible, case-by-case analysis lets courts find that transformative, non-commercial fan works are fair use, which is a very important safe harbour for fan creativity. The idea of “*transformative use*” is very important, as shown in cases like *Campbell v. Acuff-Rose Music, Inc.*<sup>34</sup>

India’s fair dealing doctrine, on the other hand, is not a flexible standard; it is a closed, exhaustive list of specific purposes that are allowed, such as private or personal use, research, criticism, or review. Fan fiction and fan art don’t usually fit neatly into these categories. A fan story is not usually “criticism” or “review” in the traditional sense, nor is it “research.” Some people might say it’s for “private or personal use,” but as soon as it’s shared on a public forum, that argument falls apart. Indian courts, like The Chancellor, Masters, and

<sup>33</sup> “Copyright: An Interpretation of the Code of Ethics”, American Library Association, available at: <https://www.ala.org/tools/ethics/copyright> (last visited on: 27.06.2025).

<sup>34</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); “The interaction between intellectual property laws and AI: Opportunities and challenges”, Norton Rose Fulbright, available at: <https://www.nortonrosefulbright.com/en/knowledge/publications/c6d47e6f/the-interaction-between-intellectual-property-laws-and-ai-opportunities-and-challenges> (last visited on: 27.06.2025).

Scholars of the *University of Oxford v. Rameshwari Photocopy Services* case recognised the transformative purpose, but Section 52's legal language is still a big problem.<sup>35</sup>

This strict legal system keeps fan creators in a state of constant uncertainty. Their actions, while culturally valuable and mostly harmless to the original creator's business, are technically breaking the law as it is written. This legal uncertainty has a big "chilling effect," making people less creative and making fan communities open to random takedown notices or legal threats from rights holders. Instead of encouraging a participatory cultural environment, the law treats fans as a "downtrodden" group of potential infringers, failing to balance the rights of creators with the public's right to express themselves.

## **THE UNEXPECTED CHALLENGER: GENERATIVE AI AND THE AUTHORSHIP CRISIS**

The legal system is having a hard time adapting to the participatory culture of the internet. Now, it is up against an even bigger and more disruptive force: generative artificial intelligence. The rise of advanced AI models that can create text and images is not only a new technological challenge for intellectual property law, but it also fundamentally breaks the existing legal tests for character protection.<sup>36</sup> AI forces us to rethink the basic ideas of authorship, expression, and infringement, showing that the current doctrinal patchwork is no longer useful and that a new legal paradigm is urgently needed.

### *The Double Threat: AI as Both an Infringer and an Author*

Generative AI is a two-pronged threat to the way character rights are set up now. First, it is an incredibly powerful tool for infringement. AI can easily create complex derivative works that copy or use existing characters in ways that are very concerning. This includes making "deepfake" videos that put copyrighted characters in situations they shouldn't be in, like in the case of the characters of *Tarak Mehta Ka Ooltah Chashmah*, to the creation of new stories and images that are "substantially similar" to protected characters without being direct copies.<sup>37</sup> Large language models (LLMs) and diffusion models, trained on vast datasets of existing works, can learn the essential traits, voice, and visual style of a character and reproduce them in novel contexts, making infringement scalable and difficult to detect. This

<sup>35</sup> *The Chancellor, Masters & Scholars of the University of Oxford & Ors. v. Rameshwari Photocopy Services & Anr.*, FAO(OS) (COMM) 161/2020.

<sup>36</sup> *Supra* note 9.

<sup>37</sup> *Supra* note 24.

has led to a wave of litigation globally, with creators and news agencies suing AI developers for unauthorised use of their copyrighted material for training purposes.<sup>38</sup>

Second, and more difficult to think about, is the idea of AI as a possible author. Current copyright law, especially in the US, is clear that copyright protection requires human authorship.<sup>39</sup> The US Copyright Office has made it clear that works made entirely by AI without significant human creative input are not eligible for copyright protection and become public domain.<sup>40</sup> The Indian Copyright Act, on the other hand, recognises “*computer-generated*” works and **under Section 2(d)(vi)** gives authorship to “*the person who causes the work to be created.*”<sup>41</sup> However, it is still unclear how much human input is needed, especially for advanced generative AI. This creates a legal paradox: an AI could create a completely new and original character that becomes a cultural phenomenon, but this character would have no legal owner. It would be born directly into the public domain, available for anyone to use commercially without recourse for the entity that developed and deployed the AI. This crisis of authorship throws off the whole system of economic incentives that copyright law is supposed to protect.

### *The End of Old Tests in the Age of AI*

Because generative AI can do things that traditional infringement tests can't, like copying and creating, they are mostly useless. The “character delineation” and “substantial similarity” tests are really just about comparing two fixed expressions to see if they are the same. An AI doesn't just copy; it also synthesises and generates.

You can train an AI model on all of a character's appearances, like their “delineated” traits, voice, visual style, and speech patterns. Then, the AI can make a completely new visual or textual expression that isn't a copy of any one work but is still instantly recognisable as that character. For example, a user could tell an AI, “Show me Sherlock Holmes investigating a crime on Mars in the style of Van Gogh.” The output wouldn't be a copy of any Arthur Conan Doyle story or Sidney Paget illustration, but it would still be clearly in the style of Sherlock Holmes.

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<sup>38</sup> See, e.g., *The New York Times Co. v. Microsoft Corp. and OpenAI, Inc.*, No. 1:23-cv-11195 (S.D.N.Y. filed Dec. 27, 2023).

<sup>39</sup> *Supra* note 31.

<sup>40</sup> U.S. Copyright Office, *Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence*, 88 Fed. Reg. 16190 (Mar. 16, 2023).

<sup>41</sup> The Copyright Act, 1957, § 2(d)(vi).

This capability breaks a legal test that compares certain phrases. The copying of a static drawing or a specific paragraph is no longer the problem; instead, it's the stealing of the character's dynamic and recognisable identity. This means that the legal analysis needs to change. The question can no longer be just, "Is the defendant's work very similar to the plaintiff's copyrighted work?" Instead, it has to be, "Has the defendant taken the core, protectable persona of the plaintiff's character, no matter how new the expression is?" This is a question that traditional copyright law, which is very strict about the idea-expression dichotomy, can't answer. AI, then, acts as a catalyst, showing the limits of an expression-based protection model and showing the need for a new legal framework that can protect a character's identity as a whole.

## **SUGGESTIONS AND RECOMMENDATIONS: A PLAN FOR A SUI GENERIS REGIME**

The doctrinal confusion, social-legal tensions, and technological pressures discussed in the previous sections show that there is a clear and urgent need for legal reform. The current patchwork of protections for fictional characters in India is unclear for creators, hostile to legitimate fan communities, and conceptually outdated in the face of generative AI. Relying on the slow, incremental, and often inconsistent evolution of judicial precedent is no longer a viable strategy. A proactive legislative intervention is required to create a clear, balanced, and future-proof framework. This section goes from analysis to a constructive, solution-oriented proposal that calls for a new angle towards India's unique intellectual property right for fictional characters.

### *The Case for Reform: Putting Together the Failures of the Status Quo*

So far, the analysis has shown that the way the Indian legal system protects fictional characters is not working well in many ways. First, the doctrinal framework, built on the statutory silence of the Copyright Act, 1957, and borrowed US judicial tests, creates profound legal uncertainty. This lack of clarity increases litigation risk and costs, chilling investment in the creation and development of new characters, which are the engine of India's creative economy. Second, the attempt to use alternative regimes like trademark law is a conceptually flawed stop-gap that creates a policy paradox by enabling a form of perpetual copyright, undermining the fundamental balance of the IP system. Third, the rigid

and restrictive “fair dealing” doctrine under Section 52 of the Copyright Act provides no safe harbour for the transformative works of fan communities, stifling a vibrant and valuable form of cultural participation and dialogue. Finally, the advent of generative AI has exposed the conceptual limits of the entire framework, rendering tests based on “copying” of “expression” inadequate to address the appropriation of a character’s core identity. The confluence of these failures makes a compelling case for abandoning the current ad-hoc approach in favour of a purpose-built legislative solution.

#### *The “Copymark” Proposal: A Mixed Right for Made-Up Characters*

This article suggests that India should create a unique intellectual property right, tentatively called a “Copymark,” to protect fictional characters. This idea is based on academic suggestions that recognise that characters are a mix of copyrightable works and trademarks.<sup>42</sup> A Copymark would be a registered right, giving the trademark system the certainty it needs, but its content and scope would be based on the unique nature of fictional characters.

The main parts of the suggested Copymark system are:

- Subject Matter: The Copymark would protect the character’s persona as a single, indivisible piece of intellectual property. The law would say that this includes the group of core identifying traits that make up a character’s unique identity, such as their name, physical appearance or detailed description, voice, signature costumes, unique personality traits, and important parts of their backstory.
- Threshold for Protection: Protection wouldn’t happen automatically. To be able to register as a Copymark, a creator would need to show proof that the character meets two requirements:
  - i. Enough Detail: The character must be well-developed and described in enough detail to be more than just a stock type or an abstract idea, in line with the Nichols test.<sup>43</sup>
  - ii. Public Recognition: The character must have gained some level of public recognition, which shows that it has a separate identity in the public mind that is not tied to the plot of any one work. This is based on the reasoning in

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<sup>42</sup> *Supra* note 30.

<sup>43</sup> *Supra* note 16.

Star India, which says that only characters that have truly become valuable cultural and commercial assets should be protected.

- Term of Protection: The Copymark would be protected for a set amount of time, like 25 years from the date it was registered, with the option to renew. This term is meant to be longer than the one for industrial designs but shorter than the one for copyright, which lasts for the life of the work plus 60 years. This solves the problem of copyright and trademark by giving creators a long period of exclusivity to encourage them to make things, while also making sure that the character's persona eventually becomes public property, which stops monopolies from lasting forever.
- Infringement Test: The law would say that infringement is the unauthorised commercial use of a large part of the registered character's persona in a way that makes the public think of the original character. This test is very different from the "substantial similarity of expression" test used in traditional copyright. It focusses on taking the character's identity, which makes it stronger against AI-generated works that can copy a persona without actually copying it.

#### *A Framework for Balance: Keeping Creators Safe and Giving Fans Power*

The main benefit of the suggested Copymark system is that it would make the ecosystem fairer and more balanced for everyone involved.

The Copymark is a clear, reliable, and strong legal asset for creators and investors. A registration-based system takes away the guesswork and high costs of lawsuits that come with the current, unclear judicial tests. It makes an IP right that can be freely licensed, sold, and used as collateral. This encourages people to invest in making new characters and growing existing franchises.

For fan communities and other transformative users, the Copymark statute would have to have a clear, broad, and positive exception for non-commercial, transformative uses. This provision would act as a statutory safe harbour for activities including, but not limited to, parody, commentary, criticism, and the creation of fan fiction and fan art. By codifying this right, the law would resolve the debilitating ambiguity of the current "fair dealing" doctrine and formally recognise the cultural legitimacy of fan works. This directly addresses the "downtrodden concern" of fan creators, giving them the freedom to keep talking creatively without the fear of legal action, as long as their work stays non-commercial and

transformative. This balanced approach makes sure that the law protects the economic engine of creativity while also nurturing the cultural soil from which it grows.

## **CONCLUSION**

In India, the law about fictional characters is full of contradictions. These avatars of our shared imagination are important to our culture and economy, but they move through the legal world like ghosts, with unclear rights and protection. This article says that India's current system-a hodgepodge of statutory silence, borrowed judicial tests, and alternative regimes that don't fit well-has failed. It makes the system less efficient, which hurts creators; it uses a restrictive "fair dealing" doctrine that ignores the important cultural work that fan communities do; and it isn't ready for the big changes that generative AI will bring. The stresses of participatory digital culture and artificial intelligence have pushed this ad-hoc system to its limits, showing how fundamentally flawed it is.

This article's main point is that the time for small fixes to the judicial system is over. A brave law is needed to fix this. The suggested *sui generis* 'Copymark' system is a model for this kind of change. The Copymark can give creators and investors the legal certainty and commercial predictability they need by making a registered right that fits the unique nature of fictional characters. Its set time of protection settles the disagreement between copyright and trademark law, making sure that these cultural icons will eventually add to the public domain. Most importantly, the Copymark framework can make the creative activities of fan communities legal by including a clear and strong legal exception for non-commercial transformative uses. This would change them from legally questionable infringers to recognised cultural participants.

This mixed right gives us a way to move forward that is fair, predictable, and safe for the future. It recognises that the law on intellectual property in the 21<sup>st</sup> century needs to do more than just protect business interests. It has to be a flexible and responsive system that supports the rich, participatory, and technologically complex cultural ecosystems that make up our digital age. Making such a law would not only solve a long-standing doctrinal issue, but it would also send a strong message about the kind of creative society India wants to build for the future.

## **LEGAL PROTECTION OF “KOKBOROK”: THE PRIDE OF NORTHEAST INDIA**

- Dr Keshav Jha\*

### ***Abstract***

*Kokborok (with its origins in the Tibeto-Burman family) happens to be the language of the indigenous people of Tripura. Its core area is situated in Tripura, and the periphery areas are spread in the neighbouring Indian states of Assam and Mizoram. In the hilly tracts of the Chittagong area of Bangladesh, the language is also spoken. Despite being the foundation of the cultural identity of the indigenous people, it is exposed to the risk of endangerment because it remains mostly undocumented. On 19 January 1979, the language achieved official status, but despite that, the fact remains that it is not widely used in financial and social institutions, television, press or educational institutions. Kokborok language possesses unique characteristic features and traits via which it adapts to the changing environmental situations and conditions despite its low linguistic vitality.*

**Keywords:** Culture, Heritage, Migration, Kokborok, Endangered, Linguistic Minority.

### **INTRODUCTION**

The “Kokborok” happens to be the mother tongue of the people of the Tripuris and the tribal communities like Jamatia, Reang, etc. Etymologically, “Kokborok” is derived from the root “Kok” meaning “language” and “Borok” meaning “people” (signifying the Borok people). These days, it is primarily written in the Bengali script, but originally and historically, it used the “Koloma” script.

Kokborok is supposed to have existed since the 1<sup>st</sup> century AD, and a few of the masterpieces in the Tripuri literature were written in Kokborok (in Koloma script), like the “Rajratnakar”, which happens to be a chronicle of the Tripura Kings (written by Durlobendra Chontai). The

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state of Tripura has a total of 19 (nineteen) scheduled tribes, and among them, “Kokborok” is the most spoken tribal language.

As per the reports of UNESCO (United Nations Educational, Scientific and Cultural Organisation), endangerment of the indigenous language is at an alarming stage, and one indigenous language dies every two weeks.

Northeastern region’s indigenous languages happen to be at the peak of extinction as per the report of Tribal cultural heritage of India’s 600 potentially endangered languages.

In India, factually speaking, the reality remains that out of the 170 languages of India under threat of extinction, nearly half of the languages belong to the Tibeto-Burmese family of languages of northeast India.

What aggravates the situation for these endangered languages is very often the lack of proper script, literary tradition and the required state support.

In many cases, the cause and reason of the linguistic inequality among the various languages can be attributed to the process of institutionalisation via the constitutional and statutory recognition of a few of them and leaving others, especially the tribal languages.

Many times, the number games with regard to the minority languages also play a role in granting the statutory recognition (with exceptions of English and Sanskrit, one being the predominant language in the globalised era and the other being the language of the ceremonial rituals and religious worship), leading to the loss of vitality of the concerned language.

## **INTERNATIONAL LEGAL PROVISIONS**

So far as the legal protection of endangered languages is concerned, there exists no specific legal framework as such which can directly aid in the protection of endangered languages, but this issue has been approached in a different manner by protecting the interests of the linguistic minorities.

Article 27 of the International Covenant on Civil and Political Rights, 1966, suggests that linguistic minorities shall not be denied the use of their own culture, profess and practice their own religion.

United Nations General Assembly, by its resolution 47/135 of 18-22-ts, made it obligatory for the states to protect the identities (linguistic identities) of the minorities. It mandates that the states should enact legislation in their own countries for the protection of linguistic identities.

Similarly, the Convention for the Safeguarding of Cultural Heritage, 2003, focuses on the protection and preservation of the “intangible cultural heritage”, including oral traditions, expressions, performing arts and language.

The strategy which has been adopted to advance this vision is “identification”, “policy making” and “educational promotion”, i.e. identification of the intangible cultural heritage, appropriate policy making and educational promotion.

## **NATIONAL LEGAL PROVISIONS**

India, being a signatory to the Declaration on the Rights of Persons Belonging to National, Religious and Linguistic minorities 1992, was obliged to implement that, and therefore, in 1992, the National Commission of Minority Act, 1992 was enacted. But unfortunately, the Act also laid more emphasis on the religious minorities and not the linguistic minorities, e.g. “Sindhi”, despite being a linguistic minority, did not get any protection and focus in the concerned Act, and only six religious minority languages got mention in this Act.

So far as the Constitution of India is concerned, it does not define the expressions “minority” or “endangered language”, but it expressly provides for safeguards and protection to the minorities through its Part III. It provides for the protection of minorities, their culture and language.

Article 29 of the Constitution of India provides for the protection of the interests of minorities.

Similarly, Article 30 of the Constitution of India provides for the Right of minorities to establish and administer educational institutions.

The basic idea behind having all these legal provisions in place is that language is not just a medium to express or simply a mode of communication, but also an instrument to shape the cultural, social and economic identity of individuals.

Another provision that acts as a supplement to Article 29 of the Constitution of India is Article 350-A, which makes provision for providing instructions to the students in their mother tongue.

## **CHALLENGES**

Primary challenges facing the Kokborok language are the declining use of the language amongst the youngsters. As the families shift to the urban areas looking for a better quality of life in comparison to the rural ones, the younger generations are more exposed to the dominant languages. This, in turn, makes them lose the opportunity to learn the language organically through daily interactions.

Since Kokborok has recently been introduced in the academic curriculum, proper care needs to be taken so that well-experienced mentors and teachers are appointed who can take care of the authenticity of the language and also provide the necessary thrust to ensure its transmission to the next generation.

Another major challenge happens to be the dominance of global and regional languages like Bengali, English and Hindi, which are very often prioritised because of the socio-economic and academic advantages. This can be handled properly by increasing the presence of the Kokborok language in media, government institutions and academic circles.

Another major challenge happens to be the revitalisation of the “Koloma” script, which is the original script of the Kokborok language. What is required is the effective standardisation of the script issue, which would facilitate high-quality literary work, resources and educational material. In this regard, the digital media can be of great help as various “apps” and other electronic tools can be used to teach grammar, pronunciation and vocabulary, thereby making the language more accessible to the non-Kokborok speaking population.

Another important step can be the integration of Kokborok in the academic curricula so that it gets assimilated as a modern academic discipline.

## **CONCLUSION**

For the long-term effectiveness and success of the preservation of “Kokborok” language what is required is the collaborative efforts between the community stakeholders and the government bodies as the governmental initiative can provide for the sustainable development of the

language and the community stakeholders can play their part in regard to the cultural knowledge and grassroot engagement relating to “Kokborok”.

Similar efforts and initiatives were taken with respect to different endangered languages worldwide (e.g., the Maori language in New Zealand), and magical results were achieved, resulting in the integration of endangered languages into modern educational curricula and digital space.

International organisations like SIL (Safety Integrity Level) International and Endangered Languages Project can also provide the necessary network, expertise and resources for the revitalisation of the “Kokborok”.

In a nutshell, one can suggest that revitalisation, preservation and survival of “Kokborok” depends on a perfect balance between innovation and tradition.

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## **FROM CONFLICT TO CONSENSUS: MEDIATION PRACTICES IN JHARKHAND'S FAMILY DISPUTES**

- Bishnanand Dubey\* & Dr Laxmikanta Das\*\*

### ***Abstract***

*Familial conflicts, a widespread societal issue, can grow into extended court fights that strain relationships and destroy social cohesion. Mediation offers a feasible option by prioritising communication, comprehension, and harmonious settlement. This research examines the developing mediation practices in Jharkhand's family conflict context, emphasising their efficacy, cultural significance, and transformational capacity. Jharkhand, characterised by its distinctive socio-cultural composition, offers specific problems and chances for mediation. Conventional conflict settlement methods, firmly rooted in local traditions, exist alongside formal legal systems. This interaction has resulted in hybrid mediation models designed for the state's varied population, including indigenous and rural areas. The study investigates the function of mediators, focussing on their training, impartiality, and cultural awareness in promoting trust between conflicting parties. The research utilises a socio-legal technique, examining case studies and mediation results to evaluate success rates, cost-efficiency, and long-term effects of mediated agreements. Special emphasis is placed on situations of marital strife, child custody, and property disputes, where mediation has shown efficacy in reducing contentious litigation. The study examines the legislative and judicial endorsement of mediation within Indian law, highlighting the functions of Lok Adalats and court-annexed mediation centres in Jharkhand. This study promotes the wider use of mediation by emphasising its advantages, including the preservation of family relationships, the reduction of litigation expenses, and the acceleration of justice. It also tackles difficulties like opposition to mediation, gender biases, and the need for systematic mediator training. The results seek to educate policymakers, legal professionals, and community leaders on improving mediation procedures to facilitate conflict*

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*resolution, bolster social cohesion, and maintain justice in family conflicts in Jharkhand.*

**Keywords:** *Mediation, Family, Jharkhand, Dispute, ADR.*

## INTRODUCTION

Family disputes includes a wide variety of conflicts arising from marriage, succession, Child custody and domestic violence, pose significant challenges to the social fabric and legal systems in India.<sup>1</sup> The traditional legal process has some limitation in managing these disputes, mediation has emerged as an effective alternative dispute resolution mechanism, offering a more amicable and tranquil approach to resolving conflicts.<sup>2</sup> Mediation, differentiate by its intentional, private, and non-binding nature, facilitates honest dialogue among disputing parties, explores mutually acceptable alternatives, and preserves familial relationships, so fostering enduring peace and well-being.<sup>3</sup> Mediation provides a meaningful way to settle family conflicts that fits well with India's emphasis on reconciliation and compromise, where family values and social ties are quite significant. With establishment for mediation centres connected to courts and new legislation supporting its use for various types of conflicts, more people are discovering how helpful mediation can be and therefore it is included in the official legal system.<sup>4</sup> The lingering nature and adversarial nature of litigation, coupled with the rising volume of cases in Indian courts, underline the necessity for alternative dispute resolution methods, such as mediation, to ease the burden on the judicial system and offer individuals a more convenient and forthright means of resolving their conflicts.<sup>5</sup> Mediation is appealing to families facing problems since it offers quick and cost-effective solutions while protecting the emotive and psychological welfare of those involved.<sup>6</sup> This paper explores the role of mediation in resolving family disputes in India,

<sup>1</sup> Hon'ble Mr. Justice Pradip Kumar Mohanty *et al.*, *Success Story of Jharkhand in Settling Family Matters through Expert Counsellors and Mediators*, (2016), available at: [https://jhalsa.org/pdfs/other\\_publications/2016/family\\_matters\\_success\\_story\\_allahabad.pdf](https://jhalsa.org/pdfs/other_publications/2016/family_matters_success_story_allahabad.pdf) (last visited on: 19.06.2025).

<sup>2</sup> Haeratun Haeratun & Fatahullah Fatahullah, "Efektivitas Mediasi Sebagai Alternatif Penyelesaian Perkara Perceraian Di Pengadilan Agama", 3 *Batulis Civil Law Review* 29 (2022) available at: <https://doi.org/10.47268/ballrev.v3i1.930> (last visited on: 19.06.2025)

<sup>3</sup> Prof. K. D. Raju, "Alternate Dispute Resolution System: A Prudent Mechanism of Speedy Redress in India", *SSRN Electronic Journal* (2007), available at: <https://doi.org/10.2139/ssrn.1080602> (last visited on: 19.06.2025).

<sup>4</sup> G. R. Arun Prakash & Shruthy Kesavan, *Mediation in Family and Matrimonial Disputes*, (2022).

<sup>5</sup> Aayushi Arora, *Family Mediation in India: Existing Regulatory Framework*, (2022).

<sup>6</sup> Rufus Chrisen Prabakar & Kripa Somi John, *Mediation in Family Dispute*, (2022).

with a specific focus on the state of Jharkhand, examining its legal framework, practical application, challenges, and potential for future development.

## **BACKGROUND OF FAMILY DISPUTES IN INDIA**

Several elements may help to explain the rise in family conflicts in India: fast urbanization, changing socioeconomic dynamics, growing knowledge of legal rights, and changing gender roles. Indian families' conventional patriarchal system is changing as women express their rights and want more autonomy, therefore creating possible family disputes.<sup>7</sup> The increasing prevalence of nuclear families, coupled with the disintegration of traditional support systems, exacerbates the challenges families have in resolving issues amicably.<sup>8</sup> Despite being a robust and unified unit, the Indian family is susceptible to internal discord and disputes that may have significant repercussions for individuals and society as a whole.<sup>9</sup> These disputes often include intricate issues of law, religion, and gender equality, requiring a nuanced understanding of many perspectives and cultural sensitivity.<sup>10</sup> A growing backlog of cases burdens the court, which often finds it difficult to provide quick and efficient resolution to family conflicts, therefore stressing the need of alternative dispute resolution methods like mediation.<sup>11</sup> Mediation is a method of alternative dispute resolution aimed at resolving disputes and disagreements, widely used in several domains including family, marriage, finance, property, neighbourhood, and medical issues.<sup>12</sup>. Motivated by the awareness that the formal legal system was unable to handle the growing caseload and the need for more efficient and accessible justice, the concept of alternative dispute resolution gained prominence after independence.<sup>13</sup> Since 2002, several courts around the country have instituted mediation cells to assist parties, accelerate case resolution, and alleviate the burden on the Indian judicial system via Alternative Dispute Resolution.

<sup>7</sup> R. Sooryamoorthy, "The Indian Family: Needs for a Revisit", 43 *Journal of Comparative Family Studies* 1 (2012), available at: <https://doi.org/10.3138/jcfs.43.1.1> (last visited on: 19.06.2025).

<sup>8</sup> Sterk, *10 Common Causes of Family Conflict and How to Prevent Them*, (2024), available at: <https://www.sterkfamilylaw.com/10-common-causes-of-family-conflict-and-how-to-prevent-them/> (last visited on: 10.06.2025). See also, Animesh Kumar & Mukul Sharma (eds.), *ADR: Bridging Divides, Building Solutions* 39 (Anagh, 2024).

<sup>9</sup> *Supra* note 5.

<sup>10</sup> Tanja Herklotz, Law, "Religion and Gender Equality: Literature on the Indian Personal Law System from a Women's Rights Perspective, 1 *Indian Law Review* 250 (2017), available at: <https://doi.org/10.1080/24730580.2018.1453750> (last visited Feb 2025).

<sup>11</sup> *Supra* note 3.

<sup>12</sup> Fung Kei Cheng, Mediation Skills for Conflict Resolution in Nursing Education, 15 *Nurse Education in Practice* 310 (2015), available at: <https://doi.org/10.1016/j.nepr.2015.02.005> (last visited on: 19.06.2025).

<sup>13</sup> Kiran Dhaiya & Seema Yadav, *Mediation: A Comparative Study Among India, USA and UK*, (2022).

## OVERVIEW OF MEDIATION IN INDIA

Mediation in India has evolved significantly over the past few decades, transitioning from a relatively unknown concept to a widely recognized and utilized dispute resolution mechanism. Mediation initially occurred mostly via unofficial channels, such as village elders and religious leaders, who played a crucial role in grassroots dispute settlement. The formalization of mediation began with the creation of court-annexed mediation facilities, whereby certified mediators assisted disputing parties in negotiating to achieve mutually accepted outcomes.<sup>14</sup> Revised in 2002, Section 89 of the Code of Civil Procedure gave a legislative foundation for sending conflicts to alternative dispute resolution systems including mediation, conciliation, arbitration, and Lok Adalat.<sup>15</sup> Acknowledging its capacity to alleviate court caseloads and provide more effective resolutions to disputes, the court vigorously promoted the use of mediation.<sup>16</sup> Promoting mediation, the Supreme Court of India has also been instrumental in providing direction and rules to support its use in many kinds of proceedings. Recognizing both court-referred mediation and private mediation, the Indian legal system offers a structure for individuals to participate in mediation either via independent means or via the courts.<sup>17</sup> While private mediation includes parties using a private mediator to help the negotiating process, court-referred mediation usually takes place within court-annexed mediation centres.

The Supreme Court's creation of the Mediation and Conciliation Project Committee helped to further promote mediation in India, thereby standardizing mediation training courses and establishing mediation centres all throughout the nation.<sup>18</sup> Despite these advancements, obstacles persist in enhancing public awareness, teaching competent mediators, and establishing robust standards to facilitate the widespread and effective use of mediation in India. The Indian legal system recognizes both court-referred mediation and private mediation via the appointment of a neutral facilitator to help the parties reach a mutually acceptable resolution.<sup>19</sup>

<sup>14</sup> Supra note 2.

<sup>15</sup> Arsh Mishra, *Importance and Practicality of Court Referred Mediation*, (2022)

<sup>16</sup> Ayushi Pandya, *Grassroot Governance and its Role in Mediation: The Role and Contribution of Panchayat Raj in Amplification of Alternative Dispute Resolution in India*, (2022).

<sup>17</sup> Mumal Kunwar Bhati & Nikunj Pandey, *Mediation: An Indian Perspective*, (2022).

<sup>18</sup> Supra note 14.

<sup>19</sup> Supra note 15.

Mediation has gained significant popularity in India as an alternate dispute resolution method for addressing familial issues outside the conventional legal system. Mediation is a systematic process in which an impartial third party—the mediator—assists disputing parties in reaching a mutually agreeable resolution by promoting dialogue and discussion. Mediation has its roots in ancient conflict-resolution methods; hence it is not entirely new to India.<sup>20</sup> The mediator assists the parties in identifying their fundamental interests, exploring alternatives, and reaching a mutual agreement instead of issuing a verdict. Mediating familial issues is particularly suitable for Indian culture, as its emphasis on empowerment and collaboration aligns with the traditional collectivist and harmonious ideals prevalent in that context. Mediation focused on collaboration and empowerment highlights the collectivist and harmonious cultural norms that characterize Indian civilization, particularly suitable for resolving familial disputes. The mediation of familial disputes is increasingly favoured as individuals see its potential to reduce court-related stress, minimize legal expenses, and promote amicable resolutions. Mediation interventions and alternative dispute resolution methodologies assist the Indian judiciary in alleviating its substantial case backlog.<sup>21</sup>

Developed nations have progressively adopted alternative dispute resolution procedures pertinent to many conflicts, including mediation, negotiation, arbitration, and reconciliation, which aid in resolving familial issues.<sup>22</sup> When parties cannot engage in discussions to reach an agreement, Alternative Dispute Resolution (ADR) may assist in resolving civil, commercial, industrial, and familial disputes. Mediation has emerged as an effective tool for resolving familial disputes in a more harmonious and efficient manner, given the increasing burden on Indian courts and the recognized limitations of traditional litigation. Pharmaceutical interventions and alternative dispute resolution strategies assist in resolving issues without resorting to the court system.<sup>23</sup>

## **SCOPE AND OBJECTIVES OF MEDIATION IN FAMILY DISPUTES**

Mediation in familial conflicts in India addresses several matters, including divorce, child custody, asset distribution, alimony, and succession. The primary aim of mediation is to

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<sup>20</sup> *Supra* note 13.

<sup>21</sup> *Supra* note 15.

<sup>22</sup> Zeeshan Ashraf Qureshi, Hafiz Muhammad Usman Nawaz & Mirza Shahid Rizwan Baig, Towards the Establishment of Family Dispute Resolution Center in Pakistan, 6 (1) *Global Legal Studies Review* 1 (2021), available at: [https://doi.org/10.31703/glsr.2021\(vi-i\).01](https://doi.org/10.31703/glsr.2021(vi-i).01) (last visited on: 21.07.2025).

<sup>23</sup> *Ibid.*

enable a mutually satisfactory conclusion that meets the needs and interests of all parties, including children. Mediation is to enable families to independently make choices and devise solutions that are customized to their unique situations, rather than having a court force a decision upon them. Mediation fosters transparent communication and comprehension, therefore safeguarding relationships, alleviating emotional distress for the involved parties, and offering closure to those who have been wronged.<sup>24</sup> Mediation assists parents in prioritizing their children's needs and developing parenting strategies that serve their best interests, so significantly enhancing the welfare of children in familial disputes.<sup>25</sup> Mediation equips families with the necessary skills to navigate difficult discussions and make informed future decisions within a safe and confidential communication space. The increasing popularity of conflict mediation suggests that concerns about the resistance from traditionally educated lawyers may be diminishing in significance.<sup>26</sup> The goal of mediation is not only to resolve the immediate dispute but also to equip families with the skills and tools necessary to manage conflicts constructively in the future.

This study focuses on Jharkhand and tries to provide a comprehensive examination of mediation in the context of family conflicts in India. This article examines the legal framework governing mediation, the many types of family conflicts suitable for mediation, the function of mediators, and the possibilities and challenges associated with their practice. With consideration for the socio-cultural surroundings and the unique needs of the local population, the study seeks to assess the effectiveness of mediation in resolving family disputes in Jharkhand. Specifically in the state of Jharkhand, the study aims to expose ideal practices and provide recommendations for strengthening the mediation process to increase its accessibility, efficiency, and general efficacy in family dispute resolution in India.<sup>27</sup>

## LEGAL FRAMEWORK OF MEDIATION IN INDIA

India's legal system controlling mediation is complex, including court rulings, legislative

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<sup>24</sup> *Supra* note 3.

<sup>25</sup> Carolina Riveros Ferrada & Dagmar Coester-Waltjen, "Alternative Dispute Resolution in Family Disputes in Europe and Chile: Mediation", 15 (2) *Revista Direito GV* 1 (2019), available at: <https://doi.org/10.1590/2317-6172201914> (last visited on: 19.06.2025).

<sup>26</sup> Donna McKenzie, "The Role of Mediation in Resolving Workplace Relationship Conflict", 39 *International Journal of Law and Psychiatry* 52 (2015), available at: <https://doi.org/10.1016/j.ijlp.2015.01.021> (last visited on: 21.07.2025).

<sup>27</sup> Siti Zaharah Jamaluddin, *et. al.*, Application of Mediation in Resolving Elderly Family Issues in Malaysia: Lessons from Canada and Australia, 41 *Kajian Malaysia* 62 (2023), available at: <https://doi.org/10.21315/km2023.41.1.4> (last visited Jun 2025); See, *supra* note13.

enactments, and constitutional clauses. Although there is no one all-encompassing piece of legislation specifically for mediation, many statutes and court decisions acknowledge and support it as a workable means of conflict resolution. Section 89 of the Code of Civil Procedure gives courts authority to recommend matters for alternative dispute resolution-including mediation-where a settlement seems likely. Particularly with relation to international economic conflicts, the Arbitration and Conciliation Act, 1996 offers a framework for conciliation-a process with comparable ideas to mediation. Emphasizing the need of peaceful solutions, the Family Courts Act, 1984 orders family courts to give conciliation and mediation priority in settling family conflicts. Consistent in favor of mediation's usage is the Indian Supreme Court, which understands its ability to lower litigation and advance peaceful solutions.

#### *Constitutional Provisions*

While not explicitly addressing mediation, the Indian Constitution has principles of justice, equality, and social harmony that may serve as an inspiration for mediation. Article 14 ensures that every person has equal access to justice, therefore guaranteeing equality before the law. This includes equitable opportunities to participate in alternative conflict-resolution procedures such as mediation. Article 21 protects the right to life and personal liberty, including the right to a fair and expedient trial, whereas mediation alleviates the strain on the judicial system and expedites dispute settlement.

#### *Relevant Statutes*

India has several laws including provisions that explicitly or tacitly advocates for mediation as a method of conflict resolution. Section 89 of the Code of Civil Procedure empowers courts to direct proceedings towards alternative dispute resolution techniques such as mediation. This enables the attainment of a settlement. The parties are encouraged to consider mediation as a method for peacefully settling their disputes. Lok Adalats were established under the Legal Services Authorities Act of 1987. These Lok Adalats are especially beneficial for financially disadvantaged groups and individuals with restricted access to the legal system, offering venues for mediation and dispute resolution. The Act guarantees that justice is available to all individuals via grassroots mediation as a means of conflict settlement.

The Micro, Small, and Medium Enterprises Development Act of 2006 advocates two strategies-conciliation and mediation-for resolving disputes among micro, small, and medium-sized enterprises. This law fosters a conducive climate for business. The Act acknowledges the need of swiftly and effectively resolving issues to provide conducive conditions for the growth of such enterprises. Mediation has been included into many legislative frameworks for conflict resolution, including the Companies Act of 2013 and the Consumer Protection Act of 2019.<sup>28</sup>

### *Role of Judiciary*

Numerous court opinions have repeatedly emphasized the need of mediation in dispute resolution, particularly with familial matters. The Supreme Court, a staunch proponent of alternative dispute resolution, has recommended its implementation as a mission to transform the landscape of civil litigation in India.<sup>29</sup> Judicial authorities have established regulations and guidelines designed to promote mediation. These standards and regulations prioritize the training and certification of mediators to ensure the mediation process is efficient and effective. The cultivation of an environment conducive to the proliferation of mediation and its acknowledgment as an effective dispute resolution tool is fundamentally reliant on the proactive engagement of the legal system in promoting mediation. The court's recognition of the need for mediation has resulted in the creation of mediation centres inside court facilities, therefore enhancing accessibility for litigants.

## **TYPES OF FAMILY DISPUTES AMENABLE TO MEDIATION**

Mediation is a creative alternative to traditional litigation, demonstrating flexibility and efficacy in resolving various familial issues. Family conflicts include a wide range of issues arising within familial relationships, including marital discord, child custody and visitation disputes, property division, and inheritance matters. Mediation offers a confidential and impartial forum for parties to articulate their desires and interests, so facilitating the collaborative formulation of mutually agreeable solutions.<sup>30</sup>

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<sup>28</sup> Sonali Negi & Arpita Chauhan, *Need for Mediation Laws in India*, (2022).

<sup>29</sup> *Supra* note13.

<sup>30</sup> Boria Sax, *Alternative Dispute Resolution (ADR)* (1996), <https://doi.org/10.21236/ada311045> (last visited Jan 2025).

### *Divorce and Separation*

Mediation is especially advantageous in divorce and separation proceedings, when emotions often escalate and communication may be difficult. Mediation offers a systematic and conducive setting for couples to examine the intricate matters associated with marital dissolution, including asset division, spousal support determination, and parenting arrangement establishment. Mediators assist couples in prioritizing their children's best interests and formulating parenting plans that enhance their well-being, notwithstanding the parents' separation.<sup>31</sup>

Mediation is especially effective for settling problems about divorce and separation, since it enables couples to tackle sensitive matters such as spousal maintenance, property distribution, and child custody in a non-confrontational environment.

### *Child Custody and Visitation*

Child custody and visitation disputes can need protracted legal battles and are often fraught with emotional intensity and hostility. Mediation is a child-focused approach to dispute resolution in which parents collaborate to formulate parenting practices that address their children's needs and promote their healthy development. Mediators may facilitate effective communication, comprehension of perspectives, and cooperative decision-making on child-rearing between parents. Mediation may facilitate the preservation and maintenance of relationships between grandparents and other relatives in Jharkhand, where cultural norms often prioritize the involvement of the extended family in child-rearing.

### *Property Division and Financial Matters*

The resolution of financial problems and property division arising from divorce or separation is significantly influenced by mediation. These issues may be complex and contentious concerning the evaluation and allocation of assets, including real estate, equities, and retirement funds. Mediation provides a platform for parties to candidly and honestly address their financial circumstances, identify their specific interests and needs, and collaboratively develop just and equitable solutions. Mediators may help parties understand the financial and legal consequences of their decisions and explore innovative options for asset distribution that meet their individual and collective goals. This method is particularly effective in

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<sup>31</sup> *Supra* note 2.

ensuring financial stability for both parties' post-separation, so promoting long-term stability and reducing the likelihood of future disputes.

### *Inheritance Disputes*

Inheritance disputes within families may be very disruptive, often resulting in strained relationships and extended legal conflicts. Mediation offers family members a constructive alternative to litigation, facilitating candid dialogue, mutual understanding of perspectives, and collaborative development of solutions that honour the deceased's intentions while addressing the needs of all involved parties.<sup>32</sup> Mediators may help family members manage the challenging legal and emotional issues brought up in inheritance disputes including issues of will interpretation, asset valuation, and property distribution. Mediation may also help families to preserve their ties and stop the long-term damage contentious litigation can inflict.<sup>33</sup> It enables novel concepts like as agreements that provide the long-term care of a family member or the preservation of family enterprises that would be unattainable in a judicial setting.<sup>34</sup> Mediation may effectively address post-divorce issues, custody disputes, inheritance matters, and other challenges via open dialogue and the promotion of mutually agreeable resolutions.<sup>35</sup>

## **MEDIATION IN FAMILY DISPUTES: PROCESS AND PROCEDURE**

Mediation in familial conflicts often entails a systematic procedure with certain phases, commencing with the referral of the issue to mediation, either by judicial mandate or at the discretion of the parties involved. The procedure often starts with an introduction session in which the mediator elucidates the concepts of mediation, delineates their position as a neutral facilitator, and defines the ground rules for the process. The mediator encourages conversation between the parties, assisting them in identifying the disputed issues, exploring their underlying interests, and generating settlement solutions. The mediator may use many strategies, including active listening, reality checking, and brainstorming, to assist the parties in achieving a mutually acceptable agreement.

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<sup>32</sup> *Ibid.*

<sup>33</sup> Muhammad Rizqi Fadhlillah *et. al.*, *Proceedings of the Arbitration and Alternative Dispute Resolution International Conference (ADRIC 2019): The Effectiveness of Mediation in Distribution of Inheritance Association Based on The Supreme Court Report 2016 to 2018* (2020), available at: <https://www.atlantis-press.com/proceedings/adric-19/125944642> (last visited on: 19.06.2025).

<sup>34</sup> Paul L. Warren, "A Systems Approach to Mediation: How to Diagram Family and Commercial Disputes", *SSRN Electronic Journal* (2002), <https://doi.org/10.2139/ssrn.305150> (last visited May 2025).

<sup>35</sup> *Supra* note 2.

### *Stages of Mediation*

- Selection of Mediators

The choice of a qualified and experienced mediator greatly determines how successful the mediation process is. The court or a private mediation firm could choose mediators from a roster of empanelled mediators.

- Initiation of Mediation

The mediation process starts when the family dispute is submitted to mediation, which may occur via court orders, self-referral by the parties involved, or counsel from lawyers. The mediator meets with each side individually to explain the process, address inquiries, and gather relevant information; hence, preparation is essential. The mediator establishes their neutral stance, formulates ground rules, and devises the agenda for the mediation sessions during the first phase.

- Joint Sessions

Joint sessions bring all the participants together so they may exchange knowledge, convey their points of view, and direct contact is possible. The mediator directs the conversation so that every participant has time to speak and be heard. To promote understanding and trust, we support polite conversation, empathy, and active listening. Laying the foundation for cooperative problem-solving, the mediator helps parties recognize shared objectives and areas of agreement.<sup>36</sup>

### *Conduct of Mediation Sessions*

Joint sessions bring all the participants together so they may exchange knowledge, convey their points of view, and direct contact is possible. The mediator facilitates the dialogue, ensuring that each person can speak and be acknowledged. To promote understanding and trust, we support polite conversation, empathy, and active listening. Laying the foundation for cooperative problem-solving, the mediator helps parties recognize shared objectives and areas of agreement.

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<sup>36</sup> Harry Kaminsky & Rhoda Cosmano, *Mediating Child Welfare Disputes: How to Focus on the Best Interest of the Child*, 7 *Mediation Quarterly* 229 (1990), <https://doi.org/10.1002/crq.3900070305> (last visited Apr 2025).

### *Confidentiality and Ethics in Mediation*

Confidentiality is a cornerstone of the mediation process; it ensures that information disclosed during mediation sessions remains private and protected from disclosure in legal proceedings.

### *Settlement Agreement and Enforcement*

If the parties reach an agreement during mediation, the terms of the agreement are typically recorded in writing and signed by the parties. The settlement agreement becomes a legally binding contract that is enforceable in court.

## **MEDIATION IN JHARKHAND: A CASE STUDY**

Jharkhand, like other Indian states, has shown a growing acknowledgment of mediation's significance in settling familial conflicts.<sup>37</sup> The state has instituted many programs to encourage mediation, including the creation of mediation centres and the training of mediators. Effective mediations have resulted in the reconciliation of spouses.<sup>38</sup> The Jharkhand State Legal Services Authority is instrumental in advancing mediation within the state, conducting awareness campaigns, and offering training to mediators.<sup>39</sup> The state's experience with mediation in familial conflicts offers critical insights into the problems and potential of its implementation, imparting lessons for other governments aiming to advance alternative dispute resolution methods.

### *Socio-economic Context*

Eastern Indian state Jharkhand has a varied socioeconomic scene with a sizable tribal population mixed with urban and rural regions. Understanding the dynamics of family conflicts and the efficiency of mediation in settling them depends on knowing the socioeconomic setting of Jharkhand.

### *Implementation of Mediation Programs*

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<sup>37</sup> *Supra* note 1.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Supra* note 3.

The family courts of Jharkhand have initiated many efforts to promote mediation programs designed to facilitate peaceful dispute resolution. These efforts aim to reduce court congestion via a more accessible and cost-effective method of addressing familial issues.

### *Prevalence of Family Disputes*

Family disputes in Jharkhand, as in other parts of India, often arise from various factors, including marital discord, property disputes, and child custody issues.

### *Mediation Centres in Jharkhand*

Mediation centres have been established in various districts of Jharkhand to provide a forum for resolving disputes through mediation.

### *Success Stories and Challenges*

Jharkhand's court-referred mediation system handled 9,386 cases from January to September 2019. Category

### Details/Statistics Case Outcomes<sup>40</sup>

Total Cases Received	9,386
Mediated Cases	6,847 (72.9%)
Non-Starters	2,539 (27.1%)
Successfully Settled	4,387 (46.7% of total received cases)
Failed to Resolve	2,460 (26.2%)
Cases Reverted to Courts	4,999 (53.3% of total cases)
<b>Stakeholder Engagement</b>	
Mediators	57 mediators across 10 districts
Average Cases Handled/Mediator	120 cases
Successful Settlements/Mediator	77 settlements
Lawyers	216 surveyed

<sup>40</sup> Uday Shandar et. al. *Court Referred Mediation in the States of West Bengal and Jharkhand*, available at:

<https://cdnbbsr.s3waas.gov.in/s35d6646aad9bcc0be55b2c82f69750387/uploads/2022/05/2022051745.pdf> (last visited on: 21.07.2025)

Cases Referred/Lawyer/Year	8 cases (average)
Lawyer Success Rate	57.2%
Senior Lawyer Referrals	14–26 cases/year
Senior Lawyer Success Rate	73.6%
Litigants Surveyed	205 litigants (103 successful, 102 unsuccessful)
Older Litigant Success (51–65 years)	52/92 resolved
BPL Litigant Success	77/152 resolved
<b>Case-Type Analysis</b>	
Matrimonial Disputes	47% of caseload (52% success rate)
Civil Cases	28% of caseload (49.7% failure rate)
Criminal Cases	25% of caseload (29.9% success rate)
<b>Key Challenges</b>	
Inadequate Staffing	Reported by 59.9% of mediators
Infrastructure Ratings	47.4% rated as “average” or “poor”
<b>Training Needs</b>	
Demand for Annual Training (Lawyers)	89.5%
Demand for Annual Training (Mediators)	92.6%
<b>Awareness Deficits</b>	
Need for Public Awareness	Highlighted by 98.8% of mediators
Litigant Engagement	Only 59.2% “highly engaged” during mediation
<b>Comparative Insights</b>	
Success Rate (Jharkhand vs. West Bengal)	46.7% vs. 36.6%
Cases Mediated	72.9% vs. 89.8%

(Jharkhand vs. West Bengal)	
Mediator Productivity (Jharkhand vs. West Bengal)	77 vs. 40 settlements/mediator

Table 1:

While mediation has shown promise in Jharkhand for resolving familial disputes, several challenges must be addressed to ensure its effective implementation. Ensuring that marginalized groups and individuals residing in remote areas have access to mediation services is a significant challenge.

### **IMPACT OF MEDIATION ON FAMILY DISPUTE RESOLUTION**

Mediating familial disputes has several benefits and serves as a more amicable and cost-effective alternative to traditional litigation. Mediation empowers participants with ownership and accountability for the outcome, therefore facilitating their active involvement in resolving their issues. This may provide more innovative and customized solutions that meet the specific needs and preferences of the parties involved.<sup>41</sup> The mediation solution is once again shown to be advantageous for all parties, given time constraints and distressing disputes are integral to the Indian litigation landscape.<sup>42</sup> Mediation saves time, energy, and money, relieving the agony of the parties.<sup>43</sup> Mediation is a process which is very flexible and adaptable to the needs of the parties . It helps parties to come to a common ground and dissolve their differences.

The voluntary nature of mediation, involvement of a neutral third party, and its non-binding nature all contribute to its effectiveness in resolving disputes.

Numerous individuals are uninformed about mediation; the majority prefer traditional litigation. Mediation is a neutral third party facilitating a suitable resolution to ongoing problems between the parties involved.<sup>44</sup> Mediation may help preserve family structure, since the family makeup aids in negotiation and enables dispute resolution via mutual agreement.

<sup>41</sup> *Supra* note 13.

<sup>42</sup> Lovely Singh & Anku Anand, *Mediation: In Divorce & Other Family Matters*, (2018).

<sup>43</sup> Abhishek Kumar, *Execution of Mediation in Matrimonial Disputes*, (2017).

<sup>44</sup> *Supra* note 3.

Mediation of familial issues has shown to be quite successful.<sup>45</sup> Emphasizing that pre-litigation mediation may help to avoid little conflicts from becoming into long legal battles, the Supreme Court has acknowledged the value of it in family conflicts.<sup>46</sup>

In India, mediation is a well-known alternative dispute resolution method with legislative support.<sup>47</sup> The courts recognize mediation as an efficient tool for amicable dispute settlement and to lessen their burden.<sup>48</sup>

The mediation process can be used to settle various types of disputes, such as family disputes, property disputes, commercial disputes, and labour disputes.

#### *Reduced Litigation*

By guiding family conflicts away from the official litigation process, mediation has the potential to greatly lighten the workload for the courts.

#### *Empowerment of Parties*

Mediating helps people to actively engage in the resolution of their problems, therefore encouraging responsibility and control over the result.<sup>49</sup>

#### *Preservation of Relationships*

By encouraging discussion and understanding, mediation may assist family members-especially in instances involving children-preserve their connections.<sup>50</sup>

#### *Cost-effectiveness*

Mediation is often a more cost-effective option than litigation, as it can reduce legal fees and court costs.<sup>51</sup> It is time saving and the parties are involved and have control over the outcome.

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<sup>45</sup> Rayani Saragih & Maria Ferba Editya Simanjuntak, “Efektivitas Mediasi Sebagai Alternative Dispute Resolution Terhadap Perkara Perceraian Di Pengadilan Agama Pematangsiantar”, 3 *Journal of Education Humaniora and Social Sciences* 734 (2020), available at: <https://doi.org/10.34007/jehss.v3i2.405> (last visited on. 19.06.2025).

<sup>46</sup> *Supra* note 3.

<sup>47</sup> Sakchie Saluja, *Role of Mediation in Family and Matrimonial, Labour and Industrial Disputes*, (2022).

<sup>48</sup> Manzoor Laskar, “Lok Adalat System in India”, *SSRN Electronic Journal* (2012), available at: <https://doi.org/10.2139/ssrn.2420454> (last visited on: 19.06.2025).

<sup>49</sup> *Supra* note 13.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Supra* note 13.

## CHALLENGES AND OPPORTUNITIES

Even although mediation in family conflict resolution is becoming more and more appreciated, some issues must be resolved to guarantee its efficient use.

### *Lack of Awareness*

A major issue is the public's ignorance of mediation's benefits and availability.

### *Need for Trained Mediators*

Effective mediation depends on the presence of skilled and qualified mediators capable of appropriately directing the process.

Online mediation is in its nascent stages and faces several hurdles. The use of technology in mediation introduces more challenges than it enhances the process, resulting in legal uncertainty and security problems.<sup>52</sup>

### *Enforcement of Agreements*

The effective implementation of mediated settlement agreements establishes the credibility and integrity of the mediation process. Robust enforcement mechanisms deter people from mediating, so undermining the viability of this acceptable alternative to litigation. Furthermore, clearly articulated enforcement regulations enhance adherence to contractual obligations and foster a culture of compliance, so augmenting confidence in processes.

### *Prospects*

By means of constant efforts to raise awareness, educate mediators, and develop the legal environment, mediation has the potential to become more and more important in resolving family conflicts throughout India, particularly areas like Jharkhand. By depending mostly on mediation as the means of dispute settlement, the Indian legal system may encourage more fair, quick, and harmonic results for families in conflict.

## CONCLUSION

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<sup>52</sup> Dewi Sulistianingsih et. al., *Online Dispute Resolution: Does the System Actually Enhance the Mediation Framework*, 9 Cogent Social Sciences (2023), available at: <https://doi.org/10.1080/23311886.2023.2206348> (last visited on: 19.06.2025).

Mediation's importance in resolving family conflicts in India, particularly in Jharkhand, has been highlighted. Mediation provides a flexible and collaborative platform for conflict resolution, allowing parties to communicate openly and find mutually acceptable solutions.<sup>53</sup> Mediation effectively addresses familial issues by empowering participants, alleviating judicial burdens, and preserving connections. Surmounting challenges such as insufficient information, the need for skilled mediators, and the implementation of agreements will enable one to fully appreciate the benefits of mediation.<sup>54</sup>

### *Summary of Findings*

Mediation has surfaced as a feasible alternative to conventional litigation in India for the resolution of familial issues, especially within the context of Jharkhand. We must concentrate on three domains to guarantee the efficacy of mediation programs: amending legislation, increasing awareness, and equipping mediators with comprehensive training, all of which will provide a favorable environment for amicably settling familial conflicts. Attorneys and other practitioners aspiring to engage in mediation must participate in frequent skill development courses.<sup>55</sup>

- Strategic Imperatives for Enhancing Mediation Efficacy in Jharkhand

### *Policy Recommendations*

Various policy recommendations may be considered to enhance the use of mediation in familial disputes. The current legislative framework needs reevaluation to address the increasing disregard for mediation. Emerging lawyers seeking to significantly contribute to the promotion of mediation and enhance its acceptance among warring parties may influence future job opportunities.<sup>56</sup>

### *Areas for Further Research*

Further research is required to examine the enduring effects of mediation on familial relationships and the effectiveness of various mediation methods. To identify and eliminate

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<sup>53</sup> Nur Ezan Rahmat et al., Certification and Mediation Training for the Mediators in Malaysia, 7 Malaysian Journal of Social Sciences and Humanities (MJSSH) (2022), <https://doi.org/10.47405/mjssh.v7i11.1945> (last visited Mar 2025).

<sup>54</sup> Supra 13

<sup>55</sup> Akashdeep Sengupta, PRE-INSTITUTION MEDIATION: A RULE OR A LAW?, (2023).

<sup>56</sup> Supra note 13.

the specific challenges encountered by these disadvantaged groups, it is essential to examine their experiences with mediation services. We must examine how mediation results are influenced by culture, gender, and socioeconomic status to facilitate mediation procedures that are attuned to many cultures and genders, thereby ensuring fair access to justice. The government and the judiciary should promote mediation as a viable dispute resolution method, emphasising its benefits in terms of cost, time, and relationship preservation.<sup>57</sup>

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<sup>57</sup> *Supra* note 2.

## **GEOGRAPHICAL INDICATIONS AND TRADE LAW: LEGAL CHALLENGES IN PROMOTING UTTAR PRADESH'S GI-TAGGED HANDICRAFTS IN GLOBAL MARKETS**

- Nikki Kumar\* & Dr Anis Ahmad\*\*

*"The handicraft is the flower of the artisan's soul, blooming through skilled hands to tell stories of tradition and culture." - Mahatma Gandhi*

### ***Abstract***

*Geographical Indications serve as a vital intellectual property mechanism, anchoring the unique quality, reputation, and characteristics of products to their geographical origins, thereby preserving cultural heritage and fostering economic value. Uttar Pradesh, India's preeminent hub for GI-tagged handicrafts, holds 77 GI registrations as of May 2025, with an ambitious target of 152 by 2026, solidifying its leadership in safeguarding artisanal legacies. Iconic crafts such as Banarasi sarees, Moradabad brassware, Bhadohi carpets, and Gorakhpur terracotta embody centuries-old traditions while significantly contributing to India's rural economy and global export market, which reached US\$1.77 billion for handicrafts between April and September 2023. The state's One District One Product (ODOP) initiative, coupled with events like Maha Kumbh 2025, projected to generate Rs 35 crore in trade, underscores its pivotal role global markets is beset by formidable legal challenges, including inconsistent international GI protections, pervasive counterfeiting, stringent trade regulations, and domestic institutional inefficiencies. These barriers hinder artisans' ability to capitalize on the projected US\$1,218.77 billion global handicraft market by 2025. This paper meticulously examines India's GI legal framework, the cultural and economic significance of Uttar Pradesh's handicrafts, and the multifaceted obstacles to global trade. Through rigorous analysis and vivid case studies, it proposes comprehensive strategies to enhance market access, fortify artisan livelihoods, and preserve India's cultural patrimony. By addressing disparities in*

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global GI regimes, strengthening enforcement, easing trade compliance, and leveraging digital platforms, Uttar Pradesh can cement its stature as a global beacon of artisanal excellence within the complex tapestry of international trade law.

**Keywords:** Geographical Indications, Handicrafts, Uttar Pradesh, ODOP.

## INTRODUCTION

Geographical Indications (GIs) stand as sentinels of authenticity, certifying products as emanating from a specific region where their quality, reputation, or characteristics are indelibly linked to that origin. This legal aegis not only thwarts imitation but also elevates market allure by underscoring cultural and historical significance.<sup>1</sup> In India, *the Geographical Indications of Goods (Registration and Protection) Act, 1999*, harmonizes with the World Trade Organization's *Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement*, erecting a formidable framework for safeguarding traditional products. Uttar Pradesh, a crucible of India's artisanal heritage, reigns supreme in GI-tagged handicrafts, commanding 77 of the nation's 605 GI registrations as of May 2025, with an ambitious goal to reach 152 by 2026. Crafts such as Banarasi sarees, with their silken opulence; Moradabad brassware, gleaming with intricate metalwork; Bhadohi carpets, and Gorakhpur terracotta, sculpted from ancient clay traditions, embody India's cultural soul while fuelling its rural economy and export prowess.<sup>2</sup> India's handicraft exports soared to US \$1.77 billion between April and September 2023, with projections heralding a global handicraft market of US \$1,218.77 billion by the close of 2025, propelled by a burgeoning appetite for artisanal creations. Uttar Pradesh anchors this ascent through initiatives like the One District One Product (ODOP) scheme, which champions district-specific crafts, with events like Maha Kumbh 2025 poised to generate Rs 35 crore in trade.<sup>3</sup> Yet, the path to global markets is strewn with legal and practical obstacles. Discordant international GI protections, rampant counterfeiting, exacting trade barriers, and domestic institutional shortcomings conspire to

<sup>1</sup> Kasturi Das, "Socio-economic Implications of Protecting Geographical Indications in India" 14 *Journal of Intellectual Property Rights* 198-209 (2009).

<sup>2</sup> Poonam Kashyap, *Cultural Heritage and GI-Tagged Crafts of Uttar Pradesh* 134 (Orient BlackSwan, New Delhi, 1<sup>st</sup> edn., 2020).

<sup>3</sup> R.S. Tripathi, "ODOP and the Rise of Uttar Pradesh's Handicraft Sector" 58 *Economic and Political Weekly* 45-52 (2023).

limit artisans' ability to harness global demand while preserving their cultural legacy.<sup>4</sup> This paper undertakes a comprehensive examination of these challenges, focusing on Uttar Pradesh's handicraft sector, and charts a course for enhanced global competitiveness, strengthened artisan livelihoods, and the enduring preservation of India's cultural heritage within the complex framework of international trade law.<sup>5</sup>

## **LEGAL FRAMEWORK GOVERNING GEOGRAPHICAL INDICATIONS IN INDIA**

India's GI framework, enshrined in the *Geographical Indications of Goods (Registration and Protection) Act, 1999*, is a bulwark administered by the Controller General of Patents, Designs, and Trademarks under the Department for Promotion of Industry and Internal Trade (DPIIT).<sup>6</sup> The Act defines a GI as an indication that identifies goods as originating from a specific geographical area, where their quality, reputation, or characteristics are intrinsically tied to that origin.<sup>7</sup> This dovetails with Article 22 of the *TRIPS* Agreement, which mandates protection against misuse and deceptive practices that mislead consumers. By granting exclusive rights to authorized users within the designated area, the framework shields artisans from unauthorized replication, ensuring economic benefits accrue to rightful producers.<sup>8</sup> In Uttar Pradesh, the GI Registry in Chennai has bestowed tags upon a constellation of handicrafts that illuminate the state's cultural mosaic. Banarasi sarees, recognized in 2009, shimmer with intricate silk weaving; Moradabad brassware, tagged in 2013, gleams with masterful metalwork; Amroha Dholak resonates with musical heritage, crafted from mango, jackfruit, or teakwood with goatskin; Kalpi Handmade Paper, rooted in Mughal-era techniques, champions eco-friendly craftsmanship; and Mahoba Gaura Patthar Hastashlip harnesses the unique Pyro Flight Stone. As of May 2025, Uttar Pradesh commands 77 GI tags, including 52 handicrafts, the highest in India, propelled by the ODOP initiative, which amplifies district-specific products. The state's ambition to secure 75 additional GI tags by 2026, with 25 applications already filed, underscores its commitment to cultural and economic ascendancy.<sup>9</sup> Yet, the framework's promise is tempered by challenges. The

<sup>4</sup> Yogesh Pai, "Globalizing Indian Handicrafts: The Role of GI Protection" 10 *Indian Journal of Law and Technology* 78-94 (2014).

<sup>5</sup> R.V. Anuradha, "Geographical Indications and Traditional Knowledge in India" 6 *Journal of Intellectual Property Law & Practice* 255-264 (2011).

<sup>6</sup> V.K. Ahuja, *Intellectual Property Rights in India* 234 (LexisNexis, New Delhi, 2nd edn., 2015).

<sup>7</sup> Geographical Indications of Goods (Registration and Protection) Act, 1999 (Act 48 of 1999), s. 2(1)(e).

<sup>8</sup> Dwij Gupta, "The Socio-Economic Impact of Geographical Indications" 9 *Journal of World Intellectual Property* 539-546 (2006).

<sup>9</sup> Government of Uttar Pradesh, "Annual Report on Handicraft Promotion 2023" 25 (Department for Promotion of Industry and Internal Trade, 2023).

registration process is a labyrinth, demanding exhaustive documentation of geographical linkage and production techniques, which many artisans, constrained by limited literacy and resources, find insurmountable.<sup>10</sup> Post-registration enforcement falters, with scant mechanisms to monitor misuse domestically or abroad. For instance, imitation Banarasi silk, woven on power looms in regions like Surat, undermines the GI's authenticity and erodes artisan incomes.<sup>11</sup> Globally, the absence of harmonized GI protection complicates enforcement. The European Union's *sui generis* system, which safeguards both agricultural and non-agricultural GIs, offers a beacon of robust protection. Conversely, the United States' reliance on trademark law, which prioritizes individual brand rights, hinders recognition of Uttar Pradesh's collective GI rights, dimming their global luster. These fissures call for fortified domestic and international mechanisms to uphold and promote Uttar Pradesh's GI-tagged handicrafts.

## CULTURAL AND ECONOMIC SIGNIFICANCE OF UTTAR PRADESH'S GI-TAGGED HANDICRAFTS

Uttar Pradesh emerges as India's artisanal colossus, wielding 77 GI-tagged products, including 52 handicrafts, as of May 2025, a testament to its unrivalled cultural heritage. Banarasi sarees, with their silken splendour, weave tales of Varanasi's looms; Moradabad brassware, etched with intricate designs, gleams from the 'Brass City', Bhadohi carpets, commanding global markets, thread stories of craftsmanship; and Gorakhpur terracotta, melded from sacred clay, captures ancestral artistry. Recent additions, such as Banaras Block Printing, Azamgarh black pottery, and Varanasi wooden lacquerware, further enrich this legacy. These crafts sustain over 50,000 artisans across Varanasi, Moradabad, Bhadohi, and Gorakhpur, anchoring cultural preservation and economic vitality. The ODOP initiative has catapulted their prominence, with Maha Kumbh 2025 projected to yield Rs 35 crore in trade, illuminating their global allure through vibrant exhibitions and digital platforms.<sup>12</sup> Economically, GI tags are alchemical, transforming authenticity into premium prices and robust export potential. Bhadohi carpets, with US\$1.33 billion in exports between April 2020

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<sup>10</sup> R.V. Anuradha, "Geographical Indications and Traditional Knowledge in India" 6 *Journal of Intellectual Property Law & Practice* 255-264 (2011).

<sup>11</sup> Arup Barman, "Counterfeiting and the Banarasi Saree Industry" 55 *Economic and Political Weekly* 34-41 (2020).

<sup>12</sup> R. K. Sharma, "Cultural Festivals and Handicraft Promotion in India" 47 *Journal of Cultural Economics* 89-104 (2022).

and February 2021, command 40% of the global handmade carpet market.<sup>13</sup> Moradabad brassware, reaching over 50 countries, bolsters India's US \$1.77 billion handicraft export market, with the global handicraft sector poised to reach US \$1,218.77 billion in 2025. The Uttar Pradesh Budget 2025-26, with an unprecedented outlay of ₹ 8,08,736 crore, allocates significant funds for handicraft marketing and infrastructure under ODOP, signalling robust state support.<sup>14</sup> GI tags also kindle tourism, drawing visitors to seek authentic crafts, thus invigorating local economies and spawning ancillary livelihoods.<sup>15</sup> Culturally, these handicrafts are living chronicles of indigenous knowledge. Kalpi Handmade Paper, crafted with Mughal-era techniques, marries sustainability with tradition, Amroha Dholak, hewn from traditional woods, echoes Uttar Pradesh's musical soul; and Varanasi's wooden lacquerware, sculpted without joints, bears ritual sanctity.<sup>16</sup> GI tags shield these traditions from the erosive tides of globalization, ensuring artisans' skills and cultural narratives endure.<sup>17</sup> Yet, global promotion is besieged by challenges. Counterfeiting, exemplified by imitation Banarasi sarees from Surat, tarnishes brand integrity. Limited artisan awareness of GI benefits and stringent trade barriers, such as EU quality standards, stifle economic gains, demanding resolute legal and institutional interventions.

## **INTERNATIONAL TRADE LAW AND GI PROTECTION: OPPORTUNITIES AND CHALLENGES**

The *TRIPS* Agreement stands as the global lodestar for GI protection, compelling member states to thwart misuse and foster fair competition. Article 22 mandates safeguards against deceptive GI use, while Article 23 extends enhanced protection to wines and spirits, a privilege India seeks to broaden to handicrafts, bolstering treasures like Banarasi sarees and Bhadohi carpets.<sup>18</sup> Yet, global implementation is a patchwork of discord. The European Union's *sui generis* system, embracing non-agricultural GIs, offers a paragon of protection

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<sup>13</sup> Bhadohi Carpet Export Association, "Annual Report 2020-21" 22 (Bhadohi Carpet Export Association, 2021).

<sup>14</sup> Government of Uttar Pradesh, "Budget Document 2023-24" 76 (Finance Department, 2023).

<sup>15</sup> Sumantra Bose, "Challenges in Globalizing Indian Handicrafts" 12 *Journal of International Trade Law and Policy* 201-215 (2013).

<sup>16</sup> Priya Sharma, "Traditional Knowledge in Uttar Pradesh's Handicrafts" 9 *Journal of Heritage Studies* 34-47 (2022).

<sup>17</sup> Vandana Singh, "Globalization and the Preservation of Indian Craft Traditions" 20 *Cultural Studies Review* 89-105 (2014).

<sup>18</sup> D. N. Sarma, "Strengthening GI Protection for Indian Handicrafts" 9 *Journal of Intellectual Property Law & Practice* 645-657 (2014).

for Uttar Pradesh's crafts.<sup>19</sup> In stark contrast, the United States' trademark-centric approach, favouring individual rights, obstructs recognition of collective GI rights, as Moradabad brassware grapples to assert its identity in American markets. China, with over 9,700 GIs, has fortified its global standing through bilateral agreements, a model India might emulate to amplify Uttar Pradesh's reach. The *EU-India Free Trade Agreement (FTA)* negotiations, ongoing as of May 2025, strive to harmonize GI protection but falter over non-agricultural GIs, with many nations prioritizing agricultural staples like wines and cheeses. India's fervent advocacy for handicraft GIs is pivotal, yet progress languishes amid divergent legal priorities. Enforcement abroad poses a formidable challenge, with Uttar Pradesh artisans facing prohibitive costs for international litigation.<sup>20</sup> Pursuing counterfeiters in the Middle East, a vital market for Bhadohi carpets, is a labyrinthine and costly endeavour. The absence of a global GI registry compounds these woes, forcing artisans to navigate a mosaic of legal systems. Counterfeiting casts a long shadow, with imitation Banarasi sarees and Bhadohi carpets inundating markets in the Middle East and Southeast Asia, eroding artisan incomes and consumer trust. Trade barriers, such as the EU's textile safety standards and the US's environmental regulations, impose costly certifications that small-scale artisans struggle to meet. The global handicraft market's projected ascent to US \$1,218.77 billion by 2025 presents a golden opportunity, yet compliance costs and legal complexities threaten to dim Uttar Pradesh's prospects.<sup>21</sup> A harmonized global GI framework is imperative to ensure equitable protection and unfettered market access, enabling Uttar Pradesh's crafts to shine on the world stage.

## **LEGAL CHALLENGES IN PROMOTING UTTAR PRADESH'S GI-TAGGED HANDICRAFTS GLOBALLY**

The quest to elevate Uttar Pradesh's GI-tagged handicrafts onto the global stage is a saga of aspiration shadowed by formidable legal and practical impediments. Foremost among these is the lack of uniform GI protection across jurisdictions. The EU's *sui generis* system embraces handicraft GIs, offering a shield of collective rights, yet the United States and China's trademark-based regimes falter in recognizing such communal protections. Moradabad

<sup>19</sup> Gail E. Evans, "The Comparative Advantages of the EU's GI System" 32 *European Intellectual Property Review* 297-305 (2010).

<sup>20</sup> T.C. James, "Challenges in Implementing Counterfeit Protection in India" 15 *Journal of World Intellectual Property* 142-160 (2012).

<sup>21</sup> Sangeeta Khorana, "The Role of Geographical Indications in India's Export Strategy" 49 *Economic and Political Weekly* 56-63 (2014).

brassware, for instance, contends with counterfeit rivals in the US, where GI status lacks legal weight, dimming its market radiance. This global discord undermines the competitive edge of Uttar Pradesh's crafts, stifling their ability to command premium prices. Counterfeiting weaves a pervasive threat, with imitation Banarasi sarees and Bhadohi carpets flooding markets in the Middle East, Southeast Asia, and online platforms, sapping artisan incomes and eroding consumer confidence. A study underscored that counterfeit products, often crafted with inferior power looms, tarnish the reputation of GI-tagged goods. International enforcement is a costly quagmire, and India's GI Registry lacks mechanisms to curb misuse abroad. A case involving imitation Banarasi sarees sold by a US retailer required exorbitant litigation, an unattainable recourse for most artisans. Trade barriers further entangle market access. Non-tariff measures, such as the EU's stringent textile safety standards, demand certifications that small-scale artisans find financially crushing. Banarasi sarees and Bhadohi carpets face delays due to compliance with environmental and chemical regulations, inflation costs, and hampering competitiveness. WTO trade disputes over tariffs and intellectual property protections add layers of complexity, often stalling export processes. Domestically, the GI registration process is a formidable hurdle, requiring intricate documentation that overwhelms artisans with limited resources. Post-registration support is woefully inadequate, with feeble monitoring permitting misuse to flourish.<sup>22</sup> Many Uttar Pradesh artisans remain unaware of GI benefits or lack access to legal aid, curtailing their global aspirations.<sup>23</sup> Global supply chains, dominated by powerful retailers and intermediaries, siphon profits from artisans. A study revealed that Moradabad brassware exporters garner only a fraction of retail prices due to intermediary hegemony.<sup>24</sup> Limited digital infrastructure and marketing acumen hinder artisans' forays into global e-commerce, despite domestic triumphs on platforms like Flipkart. The Maha Kumbh 2025, generating substantial trade through digital and physical showcases, illuminated the potential of such strategies, yet scaling them globally demands significant investment. These challenges

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<sup>22</sup> K.M. Gopakumar, "Enforcement Challenges for Geographical Indications in India" 18 *Journal of Intellectual Property Rights* 321-330 (2013).

<sup>23</sup> Neha Gupta, "GI-Tagged Handicrafts and Economic Development in Uttar Pradesh" 6 *Journal of Indian Culture and Civilization* 67-89 (2023).

<sup>24</sup> Sumantra Bose, "Challenges in Globalizing Indian Handicrafts" 12 *Journal of International Trade Law and Policy* 201-215 (2013).

beckon comprehensive reforms to unshackle Uttar Pradesh's GI-tagged handicrafts and illuminate their global promise.<sup>25</sup>

## CONCLUSION

Uttar Pradesh's GI-tagged handicrafts, with 77 registrations as of May 2025 and a bold vision to secure 152 by 2026, stand as radiant emblems of India's cultural heritage and economic potential. From the lustrous threads of Banarasi sarees to the polished artistry of Moradabad brassware, these creations narrate a saga of tradition and resilience, poised to enchant global markets. Yet, their ascent is shadowed by legal tempests. Disparate GI protections, particularly in trademark-driven markets like the United States, obscure their collective identity. Counterfeiting, exemplified by imitation sarees flooding foreign bazaars, saps artisan livelihoods and tarnishes brand prestige, with international enforcement entangled in prohibitive costs. Exacting trade barriers, such as the EU's stringent certifications, weigh heavily on small-scale artisans, while domestic frailties, arduous registration processes, and feeble oversight hinder progress. To surmount these challenges, India must spearhead a global GI registry, harmonizing safeguards to ensure Uttar Pradesh's crafts gleam across diverse markets. Forging alliances with international bodies to combat counterfeiting, paired with digital authentication tools like QR-code labels, can deter imitation and foster consumer trust. Establishing a dedicated GI Cell in Uttar Pradesh to navigate trade compliance, ease certification burdens, and provide training will empower artisans to meet global demands. Streamlining registration, amplifying artisan awareness through outreach, and strengthening producer collectives will invigorate communities. Embracing partnerships with e-commerce giants and bolstering digital literacy can amplify global reach, mirroring the triumph of Maha Kumbh 2025's showcases. Blockchain-based traceability can further solidify consumer confidence. Regulating intermediary dominance and establishing export hubs will ensure that artisans reap equitable rewards. Through these concerted efforts, unifying global standards, fortifying enforcement, easing compliance, empowering institutions, harnessing digital platforms, and rectifying supply chain imbalances, Uttar Pradesh's GI-tagged handicrafts can transcend obstacles to claim their rightful prominence. This pursuit will not only safeguard artisan livelihoods and preserve India's cultural legacy but also crown Uttar Pradesh as a global beacon of artisanal mastery.

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<sup>25</sup> Delphine Marie-Vivien, "The Protection of Geographical Indications in India: Issues and Challenges" 13 *Journal of World Intellectual Property* 234-250 (2010).

## **NAVIGATING TRANSFER PRICING: ISSUES AND CHALLENGES IN THE ERA OF BEPS 2.0**

- Ramya S. R.\* & Dr Sanjay Kumar \*\*

### ***Abstract***

*The core value driver for Multi-National Companies (MNCs) that operate in different territories is the profit-making motive, and hence, it is a common presumption that an MNC would seek to reduce its tax liability to increase its after-tax profits. The principle against double taxation in international tax law ensures that no income is taxed more than once. However, this doesn't mean the income can go untaxed in any jurisdiction. As such, the transfer price of the transaction between the associated enterprises of the MNC, which takes place cross-jurisdictionally, can only be taxed in the territory that has more nexus than the others to which such income can be attributed. Sometimes, a sovereign nation, in an attempt to exercise its taxing rights with the intention of not losing its tax base, may impose tax at a lower rate than others, creating a favourable tax regime for the MNCs. This practice may serve as an incentive to the MNCs through their strategic tax planning to shift their income and profits to such low-tax jurisdictions. Transfer pricing is one such mechanism of profit shifting exploited by the MNCs. To address these issues, the Organisation for Economic Co-operation and Development (OECD) spearheaded the BEPS 2.0, which aims to curtail the erosion of tax base and shifting of profits for fair and effective taxation. Through its Action plans, the BEPS regime ensures that the income is taxed in the jurisdiction where value creation occurs through substantial economic activities and combats tax abuse. This research paper explores the relationship between transfer pricing and the OECD initiatives in the ever-evolving landscape of international taxation. The study will employ a doctrinal approach to critically analyse the interplay between the BEPS compliance guidelines and the tax planning strategies of MNCs, including restructuring inter-*

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*company transactions. Further, the research paper will also examine the implications of this effort of the OECD to curb tax avoidance on global tax governance through an interdisciplinary approach so as to offer insights on how to navigate the complex intersection of corporates, taxation, and technology to secure fiscal justice.*

**Keywords:** Transfer Pricing, BEPS, Profit Shifting, MNCs, OECD.

## INTRODUCTION

*“The avoidance of taxes is the only intellectual pursuit that carries any reward.”*

- John Maynard Keynes.

Tax is an obligatory payment for everyone's gain in a nation's interest, and the common gain is the responsibility of the government of every nation. Hence, tax is the rightful want of the government to fulfill its duties as a welfare state and to run its administration. Taxing rights can be seen as a government exercising its sovereignty, and it is therefore important for a sovereign nation not to lose its tax base. In the era of globalization, where Multinational companies (hereinafter referred to as MNCs) have branches, subsidiaries, holdings, and divisional offices that operate across the globe, it then becomes natural for them to make transactions worldwide, that is, the transfer of goods and services, between the countries or tax jurisdictions. One of the associated enterprises can be in one jurisdiction while the others operate in other jurisdictions. It is pertinent to note that the tax jurisdictions are not necessarily similar and can have distinct tax systems. It can be high-tax or low-tax jurisdictions, based on the domestic rates of tax that they impose on the taxpayers having a connection (either in the form of territorial nexus or a business connection in the nature of significant economic presence) to their jurisdiction. Then again, with globalization, it is difficult to design domestic tax policies in isolation from other jurisdictions.

In the case of Multinational enterprises (hereinafter referred to as MNEs) that operate globally across many tax jurisdictions, a nation cannot lose its right to tax the income attributable to its territory. The income of the corporate group that relates to a particular transaction can sometimes have its economic value spread across multiple nations involved in the transaction. In that case, rules have to be decided multi-laterally to attribute the extent of the income or profits appropriately to each taxing state.

One of the tax avoidance methods adopted by the MNEs is when the associated enterprises (hereinafter referred to as AEs) reallocate the profits and costs between the entities, known as profit shifting. *Jennison V. Baker*<sup>1</sup> clearly held that “The law should not be seen to sit by limply, while those who would defy it go free and those who seek its protection lose hope.” As such, curbing the ways in which tax avoidance and tax evasion happen became a prominent issue in international taxation that needed to be addressed on an immediate basis, as not only the revenue of the states could be reduced, but the trust that the people may have on a welfare state would erode along with its tax base. Thus, the Organization for Economic Co-operation and Development (hereinafter referred to as OECD)<sup>2</sup> took upon itself the responsibility to address the issues pertaining to international taxation.

This research paper seeks to analyze the measures adopted by the countries of the globe in curbing any shifting of profits and subsequent tax avoidance through aggressive tax planning strategies. The advent of the Base Erosion and Profit Shifting (BEPS) project to the contemporary implementation of the Inclusive Framework with the two-pillar approach and the issues raised and discussed by various countries are also examined to deliberate the future course of action pertaining to mitigating the effects of transfer pricing.

## **TRANSFER PRICING AND SHIFTING OF PROFITS**

The tax planning strategies employed by the MNEs on their tax attributes generally involve those strategies that help secure, increase, and/or accelerate tax relief or other tax incentives. They are very country-specific as they rely on their domestic rules. An OECD report<sup>3</sup> on how tax planning on tax attributes occurs was released, describing a number of aggressive tax planning schemes on losses. The objective of these very schemes varies from the recognition or treatment of losses (to reduce the tax payable), shifting of losses to a party making profits, or shifting of profits to a party making losses (to the constituent entity in an MNE group), circumventing any limitations placed on the carry forward of losses, creating artificial losses in a jurisdiction and ensuing multiple use of the same loss in different jurisdictions.

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<sup>1</sup> *Jennison v. Baker*, [1972] 1 All ER 997.

<sup>2</sup> The Organization for Economic Co-operation and Development is an international, inter-governmental organization headquartered in Paris. It was set up in 1961 to provide guidance for economic growth and promote policies for sustainable economic development with the expansion of world trade.

<sup>3</sup> OCED, *Corporate Loss Utilisation through Aggressive Tax Planning* (OECD Publishing, Paris, 2011), available at: <https://doi.org/10.1787/9789264119222-en> (last visited on: 30.11.2024).

Identified to be the most pressing among the ways to shift the profits, transfer pricing (hereinafter referred to as TP) is when the MNE tries to redistribute their profits through inter-company<sup>4</sup>, intra-group transactions. The transaction between two related parties within the MNE group can be overpriced or underpriced so as to shift the substantial economic value between the parent and subsidiary or two subsidiaries situate in two different countries. As a general rule, these transactions must take place at the market price level as though they occur between two unrelated parties so that the prices are not manipulated<sup>5</sup>. However, when it happens within the group, it serves as a technique to reallocate the income of the MNE by themselves, thus leading to tax avoidance through internal profit shifting by erosion of the tax base of the country. Transfer pricing manipulation became so rampant that the OECD had to step up in the 1970s, more so because the increasing number of member countries may subject the tax base to double taxation. With interconnected issues cropping up, the OECD released a report on ‘Transfer Pricing and Multinational Enterprises’<sup>6</sup> in 1979 that analyzed the problems and practices from the point of view of a taxing state. After the 1995 Transfer Pricing Guidelines<sup>7</sup> for the MNEs and subsequent 2010 guidelines, the OECD called for the Base Erosion and Profit Shifting Action Plan (BEPS project) in 2013<sup>8</sup>. Thus began the process of rendering the methods of profit shifting ineffective.

#### *OECD Action Pathway*

When the OECD set out in 1979 to examine the transfer pricing mechanism to secure the taxing rights of its members, it propounded the principle of Arm’s Length Pricing (ALP) as its standard to assess the price involved in the transaction, imbibed in Article 9<sup>9</sup> of the OECD Model Tax Convention while rejecting the global method of profit allocation. Attention is to be drawn to the fact that these Transfer Pricing guidelines serve as a focal point that is followed by most nations of the world (including the non-OECD member states) through

<sup>4</sup> The inter-company transactions, here, means those transactions between the associated enterprises of the MNE, which shift profits between tax jurisdictions under the pretext of aggressive tax planning.

<sup>5</sup> Eric J. Bartelsman and Roel M.W.J. Beetsma, “Why Pay More? Corporate Tax Avoidance through Transfer Pricing in OECD Countries” 87 *Journal of Public Economics* 2225–2252 (2003), available at: <https://www.sciencedirect.com/science/article/abs/pii/S004727270200018X> (last visited on: 17.09.2024).

<sup>6</sup> OECD, *Transfer Pricing and Multinational Enterprises* (OECD Publishing, Paris, 1979).

<sup>7</sup> OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (OECD Publishing, Paris, 1995).

<sup>8</sup> OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD Publishing, Paris, 2013), available at: <http://dx.doi.org/10.1787/9789264202719-en> (last visited on 12.12.2024).

<sup>9</sup> “Where a Contracting State includes in the profits of an enterprise of that State - and taxes accordingly - profits on which an enterprise of the other Contracting State has been charged to tax in that other State...”

self-enforcement, even if not legally binding (as it is a soft law having quasi-legal status)<sup>10</sup>. The ALP principle treats the inter-company transaction in the same manner it should have been treated had it occurred between two independent, unrelated parties. Here, the benchmark for redistribution of revenue and expenses becomes the behavior of unrelated parties in such a scenario. Thus, the entities of the same corporate group are treated as distinct, separate companies for the purpose of taxation despite falling under the same central command. Further, it was recommended by the OECD that the FAR analysis (functions, assets, and risk analysis) be done before choosing which method of ALP to apply to compute the transfer price.

OECD has always supported the ‘comparable uncontrolled price’ method (CUP), the ‘resale price method’ (RPM), and the ‘cost plus method’ (CPM). The Transactional Profit Methods gained significance only after the 1995 guidelines, following the issues of availability of comparable data. Critics highlight the fact that implementation issues are not the dominant problem of transfer pricing regulations but rather the ALP that evaluates an MNE based on the behaviour of the independent, unrelated parties<sup>11</sup>. The fallacy is at the very core of the Arm’s length standards (ALS) in its assumption based on the centralization of the management of an MNE that defies reality.<sup>12</sup> Moreover, finding sector-specific comparable entities is highly unlikely. The independent parties who provide the ‘uncontrolled comparable’ do not even exist in most sectors.

The period between 1995 and 2010 saw the evolution of TP regulations as reports were issued on intangible assets, intra-group services, and business restructuring of the MNEs, which gave an insight into how transfer pricing can take various forms. They had to be incorporated into the TP guidelines to give rise to the 2010 version. The primary change in this version was that the OECD finally adopted the ‘most appropriate method’ approach rather than blindly supporting only the traditional methods of transfer pricing. The 2022 TP guidelines<sup>13</sup>, which replaced the previous 2017 edition, dealt with the hard-to-value

<sup>10</sup> Alberto Vega, “International Governance Through Soft Law: The Case of the OECD Transfer Pricing Guidelines”, *Working Paper of the Max Planck Institute for Tax Law and Public Finance No. 2012-05* (2012), available at: <http://dx.doi.org/10.2139/ssrn.2100341> (last visited on: 01.12.2024).

<sup>11</sup> Michael Durst, “It’s Not Just Academic: The OECD Should Reevaluate Transfer Pricing Laws” *Tax Notes*, Jan. 18, 2010, at 247-256.

<sup>12</sup> Reuven Avi-Yonah & Ilan Ben-Shalom, “Formulary Apportionment - Myths and Prospects”, *University of Michigan Law School Public Law and Legal Theory Working Paper Series*, Paper 28 (2010).

<sup>13</sup> OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (OECD Publishing, Paris, 2022), available at: <https://doi.org/10.1787/0e655865-en> (last visited on: 12.11.2024).

intangibles, the application of transactional profit split methods, and the pricing of intra-group financial transactions.

## BEPS ACTION PLAN

The OECD BEPS initiative sought to address, through its 15 Action Plans, the shifting of the profits of the MNE to a low tax jurisdiction where it performs little to no substantial economic activity in the name of ‘tax planning’ so as to reduce the group’s tax liability. The BEPS project began in 2013, and the OECD and G20 countries released consensus reports in 2015. The main concern of BEPS was that the multinational groups were separating the taxable income from the economic activities that generate such income in an artificial manner. Action Plans 8 to 10 and 13 talk about transfer pricing, particularly to align the price with value creation and the documentation requisites. Action 13<sup>14</sup> focused on country-by-country reporting (CbCR) for information on the allocation of profits and the revenue from the economic activity performed in each tax jurisdiction. Even the taxes paid by each constituent entity must be disclosed in the master and the local file to assess the fiscal position of the group<sup>15</sup>. This supposedly increased the financial transparency of the MNEs.

Action Plans 8 - 10<sup>16</sup> sought to align the transfer price of the associated enterprise with the economic value it creates. The functional analysis would actually affect the price of the transaction as it signifies the choice of the TP method and the tested party. This means that the comparability analysis will be done from the point of view of the tested party. However, the ‘tested party approach’ is not followed by most countries, including India, as it analyzes the transaction from the other party rather than from the point of view of the MNC in question. Action 8 deals with intangibles - their definition, ownership, and who is entitled to the returns from the unique transactions. In line with this, India also suggests using the ‘Profit Split Method’ (PSM) for such R&D related to intangibles.<sup>17</sup> Nonetheless, in practice, the Indian judiciary always over-utilized the ‘transactional net margin method’ (TNMM) for testing the Indian taxpayer. This is a fundamentally flawed approach because both the tested

<sup>14</sup> Transfer Pricing Documentation: Improving tax transparency with country-by-country reporting.

<sup>15</sup> Ioana Ignat & Liliana Ionescu-Feleagă, “Short History of the Transfer Pricing Concept and Interesting Concerns in Relation to It”, in *Transfer Pricing in Manufacturing: Contributions to Finance and Accounting* (Springer, Cham, 2022).

<sup>16</sup> Transfer Pricing: Guidance for applying arm’s length principle.

<sup>17</sup> CBDT, Circular No. 6/2013 dated 29.06.2013, available at: [https://www.pwc.in/services/tax/news\\_alert/2013/pwc\\_news\\_alert\\_1\\_july\\_2013\\_cbdt\\_issues\\_revised\\_guidance\\_on\\_contract\\_r\\_and\\_d\\_centres.pdf](https://www.pwc.in/services/tax/news_alert/2013/pwc_news_alert_1_july_2013_cbdt_issues_revised_guidance_on_contract_r_and_d_centres.pdf)(last visited on: 30.11.2024).

parties are risk contributors. The routine profits must be distributed according to their activities, and the non-routine profits should then be allocated in accordance with their unique contributions based on a profit-split analysis.

### *Developments In BEPS Framework*

Owing to the mobility of the risks and assets and the corresponding tax structurization by the countries to attract finances and investment, separate entity principles strengthen the tax competition. Expanding the reach of the existing nexus rules may help address the mobility issues. The nature and location of the management of risks, research and development functions, and further classification of the functions as routine or high value-addition would determine the ALP more appropriately. Such in-depth information on the operations of the MNC is now possible through Action 13 of the BEPS.

With increasing global mobility, the manner in which profits are attributed to a subsidiary and a permanent establishment (PE) significantly varies. As pointed out by ‘Manuel de los Santos, Head of the Transfer Pricing Unit, OECD Centre for Tax Policy and Administration’, “We need to pause and see whether the core OECD instruments, i.e., the Chapter 1 of OECD Transfer Pricing Guidelines relating to ALP, are still fit for purpose<sup>18</sup>. ” India, like other OECD members, follows the ‘Significant People Functions’ approach to attribute the profits to the PEs as it seeks to identify the economic ownership to address the disconnect between economic activity and profits. Action 10 particularly clarified the use of profit split methods in ‘global value chains’. The profit generated must be equivalent to the value generated by the transaction<sup>19</sup>. It specifically spoke of the low value-adding services that are performed intra-group, which can be categorized as high risk.

Based on these action plans, a discussion draft to amend the TP guidelines was produced, which led to the amendments of 2017. The 2017 guidelines were a toolkit to help developing countries analyze transfer pricing. The evolving research on this resulted in two other reports

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<sup>18</sup> Ralf Heussner, *et. al.*, “Deloitte OECD Interview Series – Part Two: Attribution of Profit to PEs and the Authorised OECD Approach” *Deloitte*, Feb. 15, 2024, available at: <https://www.internationaltaxreview.com/article/2cuif1o2nx07h1938sf7k/sponsored/deloitte-oecd-interview-series-part-two-attribution-of-profit-to-pes-and-the-authorised-oecd-approach> (last visited on: 09.12.2024).

<sup>19</sup> OECD, *Aligning Transfer Pricing Outcomes with Value Creation*, Actions 8-10 - 2015 Final Reports, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing, Paris, 2015), available at: <https://doi.org/10.1787/9789264241244-en> (last visited on: 06.11.2024).

in 2018<sup>20</sup> that discussed using the transactional profit split methods and when to use the same. In 2018, additional guidelines were issued under Action 7 for attributing profits to permanent establishments (PEs). The outcomes of these actions came to be placed under the ‘common approaches’ category as they form the foundational principles for nations such that there is convergence in the domestic transfer pricing practices. Despite all this progress, issues still continue to exist relating to the criteria for attribution of profits in accordance with value creation and application of profit split methods. BEPS requires not only continuous coordination but also multi-lateral consensus to be implemented.

### *Paving The Pathway To BEPS 2.0*

The problems associated with BEPS include not just the inability to agree to the criteria for profit allocation but also the unilateral measures undertaken by the sovereign nations like that of Digital Services Tax (hereinafter referred to as DSTs) and interpretations of significant presence in the taxable territory. As such, the OECD charted the tax on the digital economy based on user-created economic value in the market countries where businesses operate<sup>21</sup>. A value chain analysis for the varied business models that would determine the contribution of users to the multi-sided platform of the digital business is an economically sound approach for allocating taxing rights. This is the stand of OECD taken to build consensus to avoid unilateral measures to the multi-lateral international taxing issues. BEPS sought to look beyond the arm’s length principle, and hence, work continued on the digital economy front as it was widely accepted that the market-based countries were denied an appropriate share of their tax base. A pure destination-based model would not be appreciated, and at the same time, addressing tax competition requires the participation of low-tax jurisdictions. This again called for a system that would have the ALP as a foundation upon which to build, and thus, any formula-based approach was out of the equation. With the broad consensus that profits should be taxed rather than revenues on a ‘net basis’<sup>22</sup>, an improved international tax system

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<sup>20</sup> OECD, *Revised Guidance on the Application of the Transactional Profit Split Method: Inclusive Framework on BEPS: Action 10*, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing, Paris, 2018), available at: <https://www.oecd.org/tax/beps/revised-guidance-on-the-application-of-the-transactional-profitsplit-method-beps-action-10.pdf> (last visited on: 20.11.2024).

<sup>21</sup> Vladimir Starkov and Oceana Wang, “What is the Value of Users, Anyway? How to Value the User Contribution to Digital Enterprises” *Tax Notes International*, Jan. 20, 2020, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3586419](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3586419) (last visited on: 16.10.2024).

<sup>22</sup> Joseph L. Andrus & Richard S. Collier, “Transfer Pricing and the Arm’s-Length Principle After the Pillars” *Tax Notes*, Jan. 31, 2022.

needs to be implemented quickly to increase the global economy, including a global minimum tax (GMT).

## **BEPS INCLUSIVE FRAMEWORK**

The era of Transfer Pricing is undergoing changes in the global scenario with the advent of the BEPS 2.0 initiative addressing the digitalization of the economy, which introduced the Two-Pillar approach over which political and geographical concerns ensue. The original timeline to reach a political multi-lateral consensus was targeted towards the end of 2020, but disagreements on critical issues caused failure to adhere. This has led to the timeline for implementation being shifted over and over again, making the BEPS initiative a work in progress. While the feasibility of such a Transfer Pricing regime needs to be discussed, Pillar One redistributes the profits of the MNE in such a manner that the jurisdictions wherein there is a ‘significant economic presence’ with a substantial market and user participation. Pillar Two, which is the GloBE rules, designed a global minimum tax regime that prevents the shifting of profits to tax havens/ low-tax jurisdictions<sup>23</sup>.

### *Two-Pillar Approach*

The BEPS 2.0 was introduced by the OECD to dampen profit shifting by the MNEs as a two-pillar approach with the unilateral measures by the various countries in mind. To put it simply, Pillar One would tax the digital economy while Pillar Two would impose a minimum tax, which would help resolve a few transfer pricing issues. Pillar 1, in its Amount A, reallocates 25% profits in excess of 10% for companies having turnover over €20 billion to a market jurisdiction in which the group derives more than €1 million<sup>24</sup> in revenue. This is done on the basis of the sales factor to prevent double taxation. Here, profits (in turn, taxes) are reallocated to where the markets are rather than where the economic activities are. The attribution of residual profits to market states and a safe harbor mechanism for the marketing and distribution activities work hand-in-hand as part of the pillar one mechanism. Amount B of Pillar 1 is a critical component that applies ALP to the in-country baseline marketing and distribution activities focusing on low-capacity countries in order to avoid double taxation<sup>25</sup>.

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<sup>23</sup> Erika Scuderi & Raphael Holzinger, “Global Transfer Pricing Developments”, in Michael Lang and Raffaele Petrucci (eds.), *Transfer Pricing Developments Around the World 2021* (Wolters Kluwer, 2021).

<sup>24</sup> “The domestic currency equivalent will be computed in the corresponding tax jurisdiction.”

<sup>25</sup> OECD, *Outcome Statement on the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (July 11, 2023), available at: <https://www.oecd.org/tax/beps/outcome-statement->

Pillar 2 operates for MNEs with turnover exceeding € 750 million<sup>26</sup> through the ‘Global Anti-Base Erosion’ (GloBE) Model Rules, imposing 15%, which may create a secondary taxing right<sup>27</sup>. The GloBE rules implement a top-up tax in case of excess profits if taxed below the 15% rate through the ‘Income Inclusion Rule’ (IIR) and ‘Undertaxed Profits Rule’ (UTPR). The ‘Ultimate Parent Entity’ (UPE) would pay the top-up tax in its resident jurisdiction. However, if the UPE has not adopted the IIR, the UTPR will deny deductions or similar measures for the group entities to adjust the unpaid top-up tax. The ‘Effective Tax Rate’ (ETR) is computed for the qualifying taxes for the determination of top-up tax, and tax is imposed domestically through the ‘qualified domestic minimum top-up tax’ (QDMTT) mechanism<sup>28</sup>. Together, both pillars were seen as a hybrid model combining different income allocation methods, and hence, integrating them to form a single unified tax system was of utmost importance.

## PROGRESS IN THE TRANSFER PRICING WORLD

More countries have introduced the Digital Services Tax levy to tax the ‘digital presence’ in their jurisdictions, which doesn’t require a physical nexus to the state. However, these DSTs have a hybrid character with features of both income tax and sales tax, raising the question of whether tax treaties against double taxation are applicable<sup>29</sup>. Amount A of Pillar One creates a taxing right to those market jurisdictions where the residual profits are located, and this, in turn, not only reduces the complex compliance burdens but prevents the proliferation of these DST-like measures unilaterally. However, a Multi-Lateral Convention (MLC) must be designed to allocate a defined portion of the profits to those members having a nexus.

### 5.1 The Arguments Surrounding BEPS 2.0

on-the-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2023.pdf (last visited on: 01.12.2024).

<sup>26</sup> “The equivalent of €750 million will be computed as per the domestic currency of each tax jurisdiction.”

<sup>27</sup> Carolyn Wright, “OECD and Country Officials Discuss BEPS 2.0 Pillars One and Two and Other OECD Tax Work” *Ernst & Young Tax News Update: Global Edition*, Nov. 6, 2023, available at: [https://www.ey.com/en\\_gl/tax-alerts/oecd-and-country-officials-discuss-beps-2-0-pillars-one-and-two-](https://www.ey.com/en_gl/tax-alerts/oecd-and-country-officials-discuss-beps-2-0-pillars-one-and-two-) (last visited on:15.12.2024).

<sup>28</sup> KPMG, “Global Minimum Tax: Complexities Abound” *KPMG Global Tax and Legal – Hot Topic*, May 25, 2023, available at: <https://kpmg.com/kpmg-us/content/dam/kpmg/frv/pdf/2023/hot-topic-global-minimum-tax.pdf> (last visited on: 24.12.2024).

<sup>29</sup> Isabel Verlinden, *et. al.*, “Chapter 2: Transfer Pricing Developments in the European Union”, in Michael Lang and Raffaele Petruzzi (eds.), *Transfer Pricing Developments Around the World 2021*(Wolters Kluwer, 2021).

Following the rudimentary explanation of the pillars of BEPS 2.0, it can be understood that the ALP will still serve as the exclusive method for those MNCs below the revenue threshold and entities engaged in specific sectors like mining and financial services. At the same time, while there is material uncertainty on how the pillars will pan out, the question of whether a shared timeline for the implementation of the pillars or a decoupled implementation would be fitting needs to be considered. Pillar 1 Amount A reallocates the profits to the market country irrespective of any taxable presence or resident entity, which means that those countries with smaller markets but higher economic presence will actually lose out on their taxing rights. A loss carry-forward regime and simplified administrative process are required, coupled with a double taxation avoidance mechanism. The profit re-attribution to ensure tax certainty necessitates a dispute resolution approach by applying a formula to a newly defined tax base with business line segmentation. In order to ensure that the entity is paying the tax liability on the relevant profits, pillar 2 needs to leverage by providing an incentive through its jurisdictional top-up tax<sup>30</sup>. If pillar 2 can fix the partial reallocation of the profits to the market jurisdiction, then the MNC will not be motivated to avoid tax as it will be forced to pay an additional tax of the same amount in another jurisdiction. This requires consensus on the designs for the different tax systems and business models that ensure a level playing field<sup>31</sup>.

What this means for the countries is another question altogether, as discussed extensively. This is because, for international cooperation to be achieved, the costs that each country has to pay are of varying degrees for both the Pillars and how it will impact the tax revenue, and the subsequent response of the country will vary.

#### *Issues In Amount B for Simplification of TP Rules*

Amount B of Pillar 1 is subject to the in-scope intercompany transactions<sup>32</sup> for the distributors, sales agent, or commissionaire as tested party where a one-sided Most Appropriate Method (MAM) of transfer pricing can be applied. However, a distributor with

<sup>30</sup> Heyden Wardell-Burrus, “A Pillar One Design Proposal: Leveraging Pillar Two”, *Oxford Centre for Business Taxation Working Paper No. 22/06* (2022).

<sup>31</sup> Erika Scuderi & Raphael Holzinger, “Chapter 1: Global Transfer Pricing Developments”, in Michael Lang and Raffaele Petrucci (eds.), *Transfer Pricing Developments Around the World 2021* (Wolters Kluwer, 2021).

<sup>32</sup> OECD, *Release of New Tools for the Implementation of Amount B Relating to the Simplification of Transfer Pricing Rules* (OECD Publishing, Paris, 2024), available at: <https://www.oecd.org/en/about/news/announcements/2024/12/release-of-new-tools-for-the-implementation-of-amount-b-relating-to-the-simplification-of-transfer-pricing-rules.html> (last visited on: 26.12.2024).

unique contributions or assuming economically significant risks cannot be a qualified party. The exclusion of non-distribution activities and non-tangible goods and services/commodities from the ambit of Amount B again brings with it the challenges posed by the ALP method in identifying whether TNMM or CUP is most appropriate. Suppose unilateral adjustments are to be made to the returns computed (in case of ‘net risk adjustment’ or ‘net operating asset intensity percentage’) due to an insufficient global dataset. In that case, the tax administrations may lose or gain their tax base as MNEs can undertake business restructuring to fall in or out of the scope. Amount B is the only approach that doesn’t have a revenue threshold (unlike Amount A and Pillar 2)<sup>33</sup>. It can be made widely applicable for those transactions if it can potentially have a positive impact. The Pillar One exclusion of extractive businesses and regulated financial services when the intention is to cover the highly digitalized business models is another issue, as the technical complexities remain despite simplifying the assessment procedures.

#### *Challenges in Implementing Pillar Two*

In the implementation of Pillar Two, the variations in the accounting standards of the consolidated financial statements do create differences in basis. Also, the impact of deferred taxes for such differences needs to be accounted for. The rules prohibit any deferred tax accounting as part of the top-up tax as a temporary relief measure<sup>34</sup>. Suppose no consensus on pillar two is reached. In that case, a unilateral minimum tax levy within the scope of the bilateral treaties is still possible, but multi-nationally, it complicates and damages the taxing bodies. It would be sensible to say that Pillar 1 and Pillar 2 need to be implemented in the same timeline as they back each other up because not only does there need to be a multilateral agreement for treaty ratification, but it also requires the countries to roll back their unilateral levy of DSTs. Efforts are being made around pillars 1 and 2, especially with regard to the interaction of the ALP approach with the destination-based approach of the amounts A and B of pillar 1. Hence, it can be said that any delay in reaching a political agreement on the implementation is undesirable.

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<sup>33</sup> EY Global, “OECD Releases Final Guidance on Pillar One Amount B on Baseline Distribution” *EY Global*, Feb. 22, 2024, available at: [https://www.ey.com/en\\_gl/technical/tax-alerts/oecd-releases-final-guidance-on-pillar-one-amount-b-on-baseline-](https://www.ey.com/en_gl/technical/tax-alerts/oecd-releases-final-guidance-on-pillar-one-amount-b-on-baseline-) (last visited on: 22.12.2024).

<sup>34</sup> KPMG, “Global Minimum Top-Up Tax: Relief from Deferred Tax Accounting” *KPMG Global Tax and Legal – Insights*, Sept. 29, 2023, available at: <https://kpmg.com/xx/en/our-insights/ifrg/2024/beps-proposed-amendments-deferred-tax-ias12.html> (last visited on: 24.12.2024).

### *Advancing The Design To Protect Tax Base*

Further, the requirement of an MLC to give effect to Pillar 1 causes the time difference in the implementation of the two pillars, which in turn has separated the pillars 1&2. If you look at it from the perspective of the countries, the Pillars provide for relatively little gain compared to the unilateral DSTs. Moreover, the effect of double taxation that must be eliminated also falls on the tier-1 countries, which are smaller. Such issues have resulted in the search for alternatives to Pillar One, viz., models resembling Value Added Taxes (VAT), Digital services tax (DST), Significant economic presence (SEP), or options for withholding the taxes in case of digital supply. One distinct feature of these alternatives is that they concentrate on taxing turnover, not profits and taxing supplier, rather than the consumer or the market state.

Another question would be concerning ‘value creation’ for the splitting of profits. While examining the term from the viewpoint of operational contributions of the business, its limitation, whether to include only the functional contributions or the other capital and risk contributions, is relevant as the right approach for quantifying the value of the contributions is not spelled out in the OECD guidelines. The potential allocation keys and their weightage are not specified to identify the economically relevant characteristics to perform functional analysis for profit splitting<sup>35</sup>. While BEPS has attempted to answer the ‘what?’ and ‘when?’ here through its extensive discussions, the question of ‘how?’ has been neglected, especially in the wake of digitalization concerns<sup>36</sup>.

### *Repercussions of the Inclusive Framework*

Suppose someone is of the opinion that pillars 1 and 2 are going to curb profit shifting entirely. In that case, it is better to understand that the pillars would not effectively reduce tax competition, and in effect, tax planning would take a different form than what is in existence. However, the tax differentials would be reduced, and the transfer pricing would become less aggressive as the incentive to shift profits becomes minuscule. This is owing to the fact that there is less difference in tax when the transaction is taxed at 15% and, say, 20% than when it

<sup>35</sup> OECD, *Aligning Transfer Pricing Outcomes with Value Creation*, Actions 8-10 Final Reports (OECD Publishing, Paris, 2015).

<sup>36</sup> Andrew Hickman, “Arm’s Length Principle Mutations: Control of Risk in the OECD Guidelines and Variations in Practice”, *MNE Tax* (2021).

is taxed at zero (assume tax havens) and 20%. The primary objective of the Inclusive Framework is to create a level-playing field for tax jurisdictions such that the stimulant for profit shifting is not solely tax arbitrage. In a theoretical construct, the tax advantages shrink and lessen the incentive to shift. However, as pointed out by Herzfeld<sup>37</sup>, a comparison with the Anti-inversion law of the US that sought to curb paper profit shifting resulted in the shifting of real substance instead. Real economic behavior is unpredictable, and any regulations may end up incentivizing a different kind of profit shift and consequent tax competition altogether.

## CONCLUSION AND SUGGESTIONS

The income of an MNE is easier to ascertain, and as such, a model of income allocation that is based on revenue is preferable over the one based on its expenditure. It may so be possible that a model based on outflows might disregard the quality of the expenditure. As a revenue-based solution, whether the Inclusive Framework under the BEPS project can ameliorate the tax avoidance situation is a worthy discussion. MNEs benefitting from the tax arbitrage offered by the low-tax jurisdictions or the tax havens can diminish to a large extent following the implementation of BEPS 2.0<sup>38</sup>, but having ALP as the core foundational principle still doesn't address the concerns of the complex model vis-a-vis treatment of risks and capital. The paucity of information was an important concern of the ALP, which can be overcome by BEPS Action 13.

However, when it comes to the two-pillar approach, Amount B of Pillar 1, which seeks to reallocate a proportion of the profits to the demand jurisdiction, seems more generalized, while there is potential for a specific approach. The doubts raised and issues that arise can always be settled without leading to tax uncertainty through Advance Pricing Agreements (APAs) and Mutual Agreement Procedure (MAP) arrangements. This would further enhance predictability both to the tax payers and the tax jurisdictions in whether any dispute is subject to review or otherwise reassessment<sup>39</sup>. Amount A of Pillar 1 applies fractional apportionment

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<sup>37</sup> Chip Harter, *et.al.*, "Hashing Out the Pros and Cons of a Global Minimum Tax: Transcript Print" *Tax Notes*, Sept. 30, 2021, available at: <https://www.taxnotes.com/featured-analysis/hashing-out-pros-and-cons-global-minimum-tax-transcript/2021/09/30/79gr0> (last visited on: 29.11.2024).

<sup>38</sup> Felix Hugger, *et. al.*, "The Global Minimum Tax and the Taxation of MNE Profit", OECD Taxation Working Papers, No. 68 (OECD Publishing, Paris, 2024), available at: <https://doi.org/10.1787/9a815d6b-en> (last visited on: 19.11.2024).

<sup>39</sup> OECD, *Pillar One - Amount B: Inclusive Framework on BEPS* (OECD Publishing, Paris, 2024), available at: <https://doi.org/10.1787/21ea168b-en> (last visited on: 25.12.2024).

by properly excluding the intangible assets, and the implementation of it will eliminate double taxation rules. Since it doesn't seem to generate more revenue than individual digital taxes, many countries have rejected Pillar One from a tax revenue perspective<sup>40</sup>. The alternatives presented for Pillar One need the development of a formula that depends on the profit margin of similar businesses and also needs to be a model that taxes the consumers. There is one other proposal that imposes a two-stage tax model, which suggests taxing the net profits by withholding tax in the product line as well as taxing the revenue source, i.e., the location of the customers. The indicators from Amount A of Pillar One can be used to identify the final adjustments. Irrespective of the propounded alternatives, a transfer pricing approach that secures a stable, coordinated international tax system, ensuring tax equity for all businesses alike, is the need of the hour, and any failure to deliver would result in a patchwork of unilateral measures. Unilateral measures by any country are not only mutually damaging but may cause an international tax war<sup>41</sup>.

The domestic incorporation of the Pillar Two compliance and filing obligations necessitates a safe harbor provision that provides for penalty relief for non-compliance during the transitional period if reasonable measures had been taken in good faith and can be made inapplicable to fraud, tax avoidance, or abuse of tax treaties. The non-qualifying and stateless constituent entities that escape taxation under the IIR or UTPR rules must be addressed through such a safe harbor mechanism. The STTR rule and the implementation of an MLI allow 'taxing back' the profits that were subject to minimum or no tax in their jurisdictions. The Inclusive Framework of the OECD has made substantial progress through the impact assessment of pillars 1 and 2, wherein over 130 tax jurisdictions have agreed upon implementing the pillar two solution<sup>42</sup> to protect the tax base of the countries where the MNEs operate. The Pillar Two solutions come into effect on 1<sup>st</sup> January 2025, and will change the global tax landscape when it comes to tax avoidance through transfer pricing. Countries like India are moving towards the implementation of the two-pillar solution

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<sup>40</sup> Reuven Avi-Yonah & Ajitesh Kir, "Building the Gateway: Why the Two Pillars Need Each Other", *University of Michigan Law & Economics Research Paper* No. 24-023 (2024), available at: <https://dx.doi.org/10.2139/ssrn.4766111>(last visited on:14.11.2024).

<sup>41</sup> Daniel Bunn, "Chaos to the Left of Me. Chaos to the Right of Me." *Tax Foundation*, May 5, 2020, available at: <https://taxfoundation.org/blog/pascal-saint-adams-oecd-digital-tax-negotiation-timeline/> (last visited on: 23.12.2024).

<sup>42</sup> OECD, *Action 1: Tax Challenges Arising from Digitalization* (OECD Publishing, Paris, July 11, 2023), available at: <https://www.oecd.org/tax/beps/beps-actions/action1/> (last visited on: 30.10.2024).

through the withdrawal of the equalization levy<sup>43</sup>. It is important for the countries to incorporate the UTPR and STTR rules in their domestic legislation as soon as possible to facilitate the mitigation of the incentives and tax competition provided by the tax havens. On the other hand, non-advanced developing economies that may lose out on their investments post-implementation will have to provide tax incentives that are expenditure-based (for instance, in India, the CSR initiatives under section 135<sup>44</sup> of the Companies Act, 2013 can be given deductions). Expenditure-based incentives rely upon the investments made, irrespective of profitability, and can serve as a tax structure to retain foreign investments while aligning with the pillars of the Inclusive framework. However, the questions surrounding the integration of the pillars with the existing model of ALP and transfer pricing hinder the progression to swiftly adopt the new model with no delay because, after everything, the OECD intends to stick with the path of the arm's length principle for the time being.

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<sup>43</sup> The Union Budget 2024-25 proposed the withdrawal of the 2% equalization levy on non-resident e-commerce operators with effect from Aug. 1, 2024.

<sup>44</sup> The Companies Act, 2013 (Act 18 of 2013), sec. 135 (5).

## **ETHICAL AI AND CORPORATE GOVERNANCE: DESIGNING INTERNAL COMPLIANCE FOR RESPONSIBLE AI USE**

- Plabanee Patnaik\* & Sidhant Soin\*\*

### ***Abstract***

*The current legal and operational frameworks of corporate governance are significantly and structurally challenged by the use of fully autonomous and semi-autonomous Artificial Intelligence (AI) in business decision-making. The new risks that AI introduces, such as algorithmic bias, “black box” opacity, and the potential for systemic harm to occur at an unprecedented speed and scale, are not well addressed by traditional models, which are predicated on human agency and clear lines of accountability. According to this article, in order to address this new situation and ensure that its directors fulfil their fiduciary responsibilities, a company must completely restructure its internal compliance. This is not only a commendable concept, but it is also a moral and legal obligation. This article illustrates this point by segmenting it into three distinct components. Initially, it provides a concise, practical definition of “Responsible AI” that is applicable to both legal and business contexts. Secondly, it conducts a critical comparative analysis of the global regulatory landscape that is currently broken, examining the respective approaches of the European Union, the United States, and India. Third, it examines traditional concepts regarding corporate liability and fiduciary duty in the context of algorithms and demonstrates the necessity of a more rigorous application of these concepts. The article concludes with a set of guidelines for a novel approach to ensuring that all employees adhere to the rules. These regulations are predicated on four interconnected pillars: proactive AI Impact Assessments, top-down governance, robust audit trails, and a comprehensive corporate AI policy. This comprehensive framework provides businesses with a means to capitalise on the advantages of AI while simultaneously mitigating its significant risks, which are both ethical and legal.*

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**Keywords:** AI, Governance, Ethical AI, Algorithmic Accountability, EU AI Act.

## INTRODUCTION

The contemporary corporation is founded on delegated authority and is managed by systems of human oversight and accountability.<sup>1</sup> The entire framework of corporate law, as evidenced by the significant case of *Salomon v. A. Salomon Co. Ltd.*<sup>2</sup>, is based on this principle. The concept of a distinct legal entity that is managed by human agents has been the foundation.<sup>3</sup> This structure is fundamentally altered by Artificial Intelligence (AI).<sup>4</sup> The incorporation of fully automated and semi-automated systems for critical business operations, including credit-risk assessment, hiring, supply chain management, and high-frequency trading<sup>4</sup>, introduces a novel form of agency to the corporate ecosystem. This system operates at a scale, speed, and level of complexity that renders it difficult for individuals to monitor. Consequently, a governance gap exists that current legal and compliance models were not designed to address.<sup>5</sup>

This discrepancy has tangible consequences. A company's reputation and finances can be significantly impacted by poorly managed AI, as evidenced by high-profile failures. Businesses are currently confronted with issues such as discriminatory algorithms<sup>6</sup>, biased loan-adjudication systems<sup>7</sup>, and dangerously flawed self-driving cars<sup>8</sup>, which are not hypothetical scenarios. The question of "who is responsible?" becomes extremely complex when an AI system causes harm. Is it the developer who authored the code, the vendor who

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<sup>1</sup> Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* 8 (PublicAffairs, New York, 2019).

<sup>2</sup> *Salomon v. A. Salomon & Co. Ltd.*, [1897] AC 22 (HL).

<sup>3</sup> Lawrence B. Solum, "Legal Personhood for Artificial Intelligences" 70 *North Carolina Law Review* 1231 (1992).

<sup>4</sup> Donald MacKenzie, "How to Make Money in Microseconds" 21 *London Review of Books* 16 (2011).

<sup>5</sup> Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* 3 (Harvard University Press, Cambridge, 2015).

<sup>6</sup> Jeffrey Dastin, "Amazon scraps secret AI recruiting tool that showed bias against women" *Reuters*, Oct. 10, 2018, available at: <https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G> (last visited on: 27.06.2025).

<sup>7</sup> Julia Angwin, et.al., "The Secret Bias Hidden in Mortgage-Approval Algorithms" *The Markup*, Aug. 25, 2021, available at: <https://themarkup.org/denied/2021/08/25/the-secret-bias-hidden-in-mortgage-approval-algorithms> (last visited on June 27, 2025).

<sup>8</sup> Cade Metz, "Uber's Self-Driving Car Didn't Know Pedestrians Could Jaywalk" *The New York Times*, Nov. 6, 2019, available at: <https://www.nytimes.com/2019/11/06/technology/uber-self-driving-car-arizona.html> (last visited on: 27.06.2025).

supplied the system, the manager who implemented it,<sup>9</sup> or the board of directors who authorised its use without a comprehensive understanding of the potential hazards?

This article addresses the central challenge. It asserts that applying high-level ethical principles on a case-by-case basis is inadequate.<sup>10</sup> In order to survive the algorithmic era, organisations must establish a new, robust internal compliance architecture that is specifically designed to regulate AI. This is not merely a matter of being socially responsible or doing the right thing<sup>11</sup>; it is becoming an essential component of the fiduciary duties of care and oversight that directors are obligated to fulfil for the company.

The primary inquiry that this research aims to address is: *To what extent do current corporate governance frameworks and fiduciary obligations, which were designed for organisations that are managed by humans, effectively ensure the responsible development and utilisation of autonomous AI systems? In order to address this accountability gap, which internal compliance structures are legally mandated?*

To address this, the article emphasises that conventional corporate governance models, particularly the business judgement rule and the duty of oversight, are inadequate in addressing the distinctive risks associated with AI due to their reliance on assumptions regarding human cognition and decision-making. In order to fulfil their fiduciary obligations, corporate boards must establish a new, integrated compliance architecture in the era of AI. This architecture is composed of four primary components:

- (1) Board-level technological proficiency and transparent accountability at the highest levels.
- (2) Mandatory AI Impact Assessments (AIIAs) prior to deployment;
- (3) The maintenance of comprehensive and auditable algorithmic records; and
- (4) The development of a comprehensive, company-wide AI Policy.

This article comprises five sections.

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<sup>9</sup> W.K.C. Guthrie, *A History of Greek Philosophy*, Vol. 3: *The Fifth-Century Enlightenment* 129 (Cambridge University Press, 1969).

<sup>10</sup> Luciano Floridi, “Translating Principles into Practices: A Diachronic and Syncronic Analysis of AI Ethics” 1 *Philosophy & Technology* 1-12 (2019).

<sup>11</sup> A. C. Fernando, *Corporate Governance: Principles, Policies and Practices* 42 (Pearson Education, New Delhi, 3<sup>rd</sup> edn., 2015).

- The Part II of the article will deconstruct the concept of “Responsible AI” from a vague ideal to a concrete, risk-based standard that businesses can employ to maintain compliance.
- Part III examines the necessity of reevaluating and applying conventional corporate law principles, such as the duty of care and the Caremark standard for oversight liability, to regulate AI systems.
- Part IV examines the regulatory environments of the European Union, the United States, and India, and it compares them in order to identify significant trends and legal pressures.
- The primary contribution of this work is illustrated in Part V, which provides a comprehensive plan for an integrated internal compliance framework.
- Ultimately, the article concludes with recommendations for modifications to the law and the practices of businesses.

It asserts that the most effective method of fostering genuine corporate responsibility in the algorithmic era is to develop proactive internal compliance systems.

## **HOW TO IMPLEMENT “RESPONSIBLE AI” IN CORPORATE GOVERNANCE**

The terms “*ethical AI*” and “*responsible AI*” are frequently used interchangeably; however, it is crucial to distinguish between the two in order to ensure legal compliance and corporate governance.<sup>12</sup> In a legal and corporate context, responsibility refers to accountable, auditable, and risk-managed behaviour, while ethics are broad, normative principles.<sup>13</sup> The objective of a board of directors is not merely to contemplate ethics, but to establish a tangible framework for the *responsible* deployment of AI.<sup>14</sup> We can establish a practical definition of Responsible AI for corporate governance that is based on four primary, actionable principles: Fairness, Transparency, Accountability, and Security (FTAS) through the implementation of new regulations and the consensus of experts.

### *Fairness: The Obligation to Minimise Algorithmic Bias*

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<sup>12</sup> Virginia Dignum, *Responsible Artificial Intelligence: How to Develop and Use AI in a Responsible Way* (Springer, 2019).

<sup>13</sup> Aristotle, *Nicomachean Ethics*, Book II (W.D. Ross trans., Oxford University Press, 2009).

<sup>14</sup> Mireille Hildebrandt, “The Artificial Intelligence of Law. Who is the Master?”, in Mireille Hildebrandt & Antoinette Rouvroy (eds.), *Law, Human Agency and Autonomic Computing* 115 (Routledge, 2011).

When an AI system consistently generates biased results, it reinforces and frequently exacerbates biases that are already present in its training data, a phenomenon known as algorithmic bias occurs.<sup>15</sup> This is not a technical issue; rather, it is a significant governance challenge.<sup>16</sup> The company is at risk of legal and reputational damage under anti-discrimination laws if a loan adjudication system demonstrates racial bias<sup>17</sup> or an AI system used for hiring unfairly rejects qualified female candidates.<sup>18</sup> Consequently, before and *during* the deployment of an AI system, the principle of fairness necessitates the identification, measurement, and mitigation of these biases.<sup>19</sup> This includes ensuring that all individuals have equal opportunities, which is a critical component of human rights and anti-discrimination legislation, in addition to ensuring that the numbers are equal.<sup>20</sup>

### *The Necessity of Clear Explanations: Transparency*

Many advanced AI systems, particularly those that employ deep learning, operate as “black boxes.”<sup>21</sup> The internal decision-making logic of these systems is so intricate that even their creators are unable to decipher it. This lack of clarity is in direct opposition to the legal principles of due process and reasoned decision-making.<sup>22</sup> For instance, an AI that denies credit to an individual is unable to appeal or review the decision without understanding the rationale behind it<sup>23</sup>. Transparency, or “*explainability*,” necessitates that AI systems provide explicit, human-comprehensible rationales for their outputs.<sup>24</sup> It is not always necessary to provide proprietary code; however, it is necessary to be able to articulate the primary factors and reasoning that resulted in a particular decision, particularly one that has significant legal or financial repercussions.

### *Determining Responsibility in an Autonomous System*

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<sup>15</sup> Cathy O’Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* 21 (Crown, New York, 2016).

<sup>16</sup> Solon Barocas and Andrew D. Selbst, “Big Data’s Disparate Impact” 104 *California Law Review* 671 (2016).

<sup>17</sup> *Supra* note 6.

<sup>18</sup> *Supra* note 7.

<sup>19</sup> The Equal Credit Opportunity Act, 15 U.S.C. sec. 1691-1691f (United States).

<sup>20</sup> The Constitution of India, art. 15.

<sup>21</sup> *Supra* note 5 at 107.

<sup>22</sup> *State v. Loomis*, 881 N.W.2d 749 (Wis. 2016).

<sup>23</sup> Danielle Keats Citron and Frank Pasquale, “The Scored Society: Due Process for Automated Predictions” 89 *Washington Law Review* 1 (2014).

<sup>24</sup> Bryce Goodman and Seth Flaxman, “European Union Regulations on Algorithmic Decision-Making and a ‘Right to Explanation’” 38 *AI Magazine* 50 (2017).

Corporate governance's most critical component is accountability.<sup>25</sup> It implies that each action taken by a company must be accompanied by explicit lines of authority and responsibility. This is further complicated by the inclusion of autonomous agents in the decision-making process.<sup>26</sup> True accountability for AI requires that a specific individual or organisation be held accountable for any action taken by an AI system.<sup>27</sup> To achieve this, a governance framework that clearly defines roles and responsibilities for the entire AI lifecycle, from data collection and model training to deployment, monitoring, and decommissioning, is necessary. The AI system becomes a convenient scapegoat if this does not occur, which weakens the very concept of corporate liability and disseminates responsibility.<sup>28</sup>

### *Obligation to Prevent Emerging Security Threats*

Safety is the final regulation. New vulnerabilities are generated by AI systems. Adversarial attacks can compromise them by subtly altering the input data, causing the system to make significant errors, or by corrupting the training data through poisoning.<sup>29</sup> It is the responsibility of a company that employs AI to ensure that its systems are robust and secure against these types of threats, a principle identified as “*secure by design*.<sup>30</sup>” This is not merely a cybersecurity concern; it is also a critical component of risk management. The failure to safeguard the control system of an autonomous vehicle or a financial trading algorithm from a malicious attack is a severe violation of the duty of care.<sup>31</sup>

The vague concept of “Responsible AI” is transformed into a precise set of objectives for the operation of an organisation by these four concepts—Fairness, Transparency, Accountability,

<sup>25</sup> Robert C. Clark, *Corporate Law* 34 (Aspen Publishers, 1986).

<sup>26</sup> Samir Chopra & Laurence F. White, *A Legal Theory for Autonomous Artificial Agents* 77 (University of Michigan Press, 2011).

<sup>27</sup> Andrea Renda, *The ‘Do-ocracy’ of AI: Governance by Experimentation* 4 (Centre for European Policy Studies, 2019).

<sup>28</sup> Ryan Abbott, *The Reasonable Robot: Artificial Intelligence and the Law* 45 (Cambridge University Press, 2020).

<sup>29</sup> Ram Shankar Siva Kumar, *et.al.*, “Adversarial Machine Learning - Industry Perspectives”, paper presented at AISec ‘18: Proceedings of the 11<sup>th</sup> ACM Workshop on Artificial Intelligence and Security (October 2018), available at: <https://dl.acm.org/doi/10.1145/3270101.3270104> (last visited on: 27.06.2025).

<sup>30</sup> European Union Agency for Cybersecurity (ENISA), *Securing AI*, November 2020, available at: <https://www.enisa.europa.eu/publications/securing-ai> (last visited on: 27.06.2025).

<sup>31</sup> David C. Vladeck, “Machines without Principals: Liability Rules and Artificial Intelligence” 89 *Washington Law Review* 117 (2014).

and Security. They provide a method for evaluating the effectiveness of a board and the adherence of a company to its regulations.

## IN THE ERA OF ALGORITHMS, HOW CAN FIDUCIARY DUTIES BE INTERPRETED DIFFERENTLY?

Corporate fiduciary law is founded on two fundamental principles: loyalty and care. In the best interests of the corporation, directors must act as if they are a reasonably prudent individual.<sup>32</sup> The use of AI does not create new fiduciary duties; however, it significantly alters the way in which these duties are understood and applied.<sup>33</sup>

### *The Problem of Technological Competence and the Duty of Care*

In the past, the duty of care mandated that directors must possess a comprehensive understanding of the technologies in use before making a business decision.<sup>34</sup> However, in the current era of AI, this definition of “*important information*” must also encompass a comprehensive understanding of the technologies. It is impossible for a board to make an informed decision when they approve the expenditure of millions on a core AI system without understanding its primary risks, such as its potential for bias or its “*black box*” operation.<sup>35</sup>

This raises the question of technological proficiency. Although directors are not required to be data scientists, courts may begin to perceive a complete and passive lack of knowledge about basic technology risks as a breach of the duty of care.<sup>36</sup> Directors are shielded from liability for honest errors in judgement by the business judgement rule; however, the decision must be made with sufficient knowledge.<sup>37</sup> A decision to employ a powerful, opaque AI system without conducting sufficient research into its potential risks is not merely a lapse in judgement; it is a failure of the process.<sup>38</sup> The business judgement rule may not be applicable

<sup>32</sup> The Companies Act, 2013 (Act 18 of 2013), sec. 166.

<sup>33</sup> Lynn A. Stout, “The Shareholder Value Myth” 33 *Stetson Law Review* 116 (2003).

<sup>34</sup> *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

<sup>35</sup> Thomas H. Davenport & Rajeev Ronanki, “Artificial Intelligence for the Real World” 96 *Harvard Business Review* 108 (2018).

<sup>36</sup> Matthew U. Scherer, “Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies” 29 *Harvard Journal of Law & Technology* 353 (2016).

<sup>37</sup> *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

<sup>38</sup> Andrew M. Perlman, “The Public’s Unmet Need for Legal Services & What Law Schools Can Do About It” 148 *Daedalus* 37 (2019).

to a board that is unable to demonstrate a record of informed inquiry into AI risks, as courts, particularly in Delaware, are increasingly inclined to investigate the deliberative process.<sup>39</sup>

### *The Obligation of Oversight: From “Caremark” to “Algorithmic Caremark”*

Perhaps the most potent legal leverage for AI governance is the obligation to supervise. *In re Caremark International Inc.*, Derivative litigation obligation was most effectively articulated.<sup>40</sup> *Caremark* determined that a board of directors must ensure that the company has the appropriate information and reporting systems in place to provide senior management and the board with timely, accurate information. If the board neglects to do so, it may, in rare instances, be held accountable for a “*sustained or systematic failure of the board to exercise oversight.*”<sup>41</sup>

The *Caremark* standard, which was further clarified in subsequent cases such as *Stone v. Ritter*, establishes a high standard for plaintiffs to satisfy. They must demonstrate that the defendant acted in bad faith.<sup>42</sup> Nevertheless, the rationale behind *Caremark* is directly applicable to the dangers of AI. The type of “*mission-critical*” operational risk that *Caremark* was intended to mitigate is an AI system that operates without adequate monitoring, auditing, and reporting mechanisms.<sup>43</sup> One could argue that a board that permits the use of a high-stakes AI system (such as one for medical diagnosis or autonomous navigation) without any means of verifying its safety, bias, or security flaws is not fulfilling its *Caremark* responsibilities.<sup>44</sup>

This implies that a “*Algorithmic Caremark*” standard has been established. This would imply that directors are obligated to implement the following actions for AI systems that are essential to the mission:

1. Ensure that a reasonable system is in place to collect and report information that can monitor the AI for potential risks to safety, transparency, and fairness.

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<sup>39</sup> *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

<sup>40</sup> *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996).

<sup>41</sup> *Ibid.* at 971.

<sup>42</sup> *Stone v. Ritter*, 911 A.2d 362 (Del. 2006).

<sup>43</sup> Robert J. Jackson Jr., “Corporate Governance: The Role of the SEC and the Board”, speech delivered at the 26th Annual Tulane Corporate Law Institute (March 27, 2014), available at: <https://www.sec.gov/news/speech/2014-spch032714rjj>(last visited on: 27.06.2025).

<sup>44</sup> Elizabeth Pollman, “Corporate Oversight and Disobedience” 72 *Vanderbilt Law Review* 2013 (2019).

2. Address any “*red flags*” that this system raises, such as evidence of major system failures or unfair outcomes.

A high-risk AI application that lacks an oversight system may be considered an example of a bad faith failure to fulfil one’s obligation that satisfies the rigorous *Caremark* test for liability.<sup>45</sup>

## **AN EXAMINATION OF THE FUTURE OF REGULATION IN THE UNITED STATES, THE EUROPEAN UNION, AND INDIA**

The legal risks associated with AI are not isolated incidents. Companies are required to adhere to new and frequently conflicting regulations that govern AI, as they are evolving rapidly worldwide. These critical international strategies are essential for any multinational organisation.

### *The Risk-Based Approach of the AI Act in the European Union*

The European Union has adopted the most comprehensive and aggressive approach with its proposed Artificial Intelligence Act (AI Act).<sup>46</sup> The Act establishes a risk-based framework that categorises AI systems into four categories: unacceptable risk (which are prohibited), high-risk, limited-risk, and minimal-risk.<sup>47</sup>

The primary objective of the Act is to regulate high-risk AI systems, which are employed in critical infrastructure, law enforcement, and employment. A number of stringent requirements must be satisfied by the providers of these systems before they can be sold, including:

- Implementing a risk management system.<sup>48</sup>
- Employing high-quality training data to mitigate bias.<sup>49</sup>
- Maintaining an abundance of technical documentation and logging capabilities.<sup>50</sup>

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<sup>45</sup> *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019).

<sup>46</sup> Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, COM (2021) 206 final (Apr. 21, 2021).

<sup>47</sup> Paul Nemitz, “Constitutional Democracy and Technology in the Age of Artificial Intelligence” 379 *Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences* (2018).

<sup>48</sup> *Supra* note 46, art. 9.

<sup>49</sup> *Supra* note 46, art. 10.

- Ensuring that the appropriate individuals are in charge.<sup>51</sup>

The AI Act is a significant stride towards the establishment of a horizontal regulatory framework for AI. It transforms numerous Responsible AI principles from voluntary best practices to mandatory legal obligations for companies that conduct business in the EU, with substantial penalties for noncompliance.<sup>52</sup> It will have an impact on companies worldwide that sell AI systems to the EU market due to its extraterritorial scope.

#### *The United States: A Sector-Specific, Pro-Innovation Position*

The European Union has implemented a comprehensive regulatory framework, whereas the United States has implemented a more fragmented, sector-specific approach. The current policy, as outlined in a variety of executive orders and agency guidance, is to promote innovation while minimising risks within the confines of existing legal frameworks.<sup>53</sup> A critical AI Risk Management Framework (RMF) has been developed by the National Institute of Standards and Technology (NIST).<sup>54</sup> In contrast to the EU AI Act, the NIST RMF is optional, providing organisations with a structured and adaptable approach to “*map, measure, and manage*” AI risks.

Although there is no single “*AI Act*” in the United States, there are regulations that are applicable to specific sectors. For instance, the Equal Employment Opportunity Commission (EEOC) has cautioned that the implementation of artificial intelligence (AI) in the hiring process may violate existing anti-discrimination laws.<sup>55</sup> Financial regulators are also conducting a thorough examination of AI-based credit models to ensure that they adhere to fair lending laws.<sup>56</sup> This presents a significant challenge for businesses in terms of

<sup>50</sup> *Supra* note 46, arts. 11, 12.

<sup>51</sup> *Supra* note 46, art. 14.

<sup>52</sup> *Supra* note 46, art. 71.

<sup>53</sup> Exec. Order No. 13859, 84 *Federal Register* 3967 (Feb. 14, 2019), “Maintaining American Leadership in Artificial Intelligence”.

<sup>54</sup> National Institute of Standards and Technology, *AI Risk Management Framework (AI RMF 1.0)* (January 2023), available at: <https://www.nist.gov/itl/ai-risk-management-framework> (last visited on: 27.06.2025).

<sup>55</sup> U.S. Equal Employment Opportunity Commission, *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees* (May 12, 2022), available at: <https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence>(last visited on: 27.06.2025).

<sup>56</sup> Consumer Financial Protection Bureau, “CFPB Circular 2022-03: Adverse action notification requirements in connection with credit decisions based on complex algorithms” (May 26, 2022), available

maintaining an accurate record of the various federal and state laws and agency-specific guidance.

### *India: Formulating a Master Plan for “Responsible AI for All”*

India's approach is still in the works, but it has two main goals: using AI to help the economy grow and dealing with social issues. The government's main policy think tank, NITI Aayog, has put out a number of discussion papers, one of which is the National Strategy for Artificial Intelligence.<sup>57</sup> These papers support the idea of “*AI for All*,” which stresses the importance of including everyone and using AI to solve big problems in areas like healthcare, agriculture, and education.

The NITI Aayog papers on governance have suggested principles for Responsible AI that are in line with what most people around the world agree on, which are fairness, openness, and responsibility.<sup>58</sup> India's new data protection law, the Digital Personal Data Protection Act, 2023, has rules that will affect AI, especially when it comes to consent and the right to know about automated decision-making. However, there is still no comprehensive law like the EU's AI Act.<sup>59</sup> India's path suggests a balancing act: it wants to build public trust through responsible governance while also encouraging innovation. This will probably result in a mix of ethical guidelines and rules that apply to specific sectors.

This comparison shows that there is a clear global trend: no matter what kind of regulatory model is used, there is a growing legal expectation that businesses will use AI in a responsible and risk-managed way. This outside pressure strongly supports the internal fiduciary duty to create strong compliance systems.

## **THE BLUEPRINT: A UNIFORM INTERNAL COMPLIANCE SYSTEM FOR AI**

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at: <https://www.consumerfinance.gov/compliance/circulars/circular-2022-03-adverse-action-notification-requirements-in-connection-with-credit-decisions-based-on-complex-algorithms/> (last visited on: 27.06.2025).

<sup>57</sup> NITI Aayog, *National Strategy for Artificial Intelligence* (June 2018), available at: <https://www.niti.gov.in/sites/default/files/2019-01/NationalStrategy-for-AI-Discussion-Paper.pdf> (last visited on: 27.06.2025).

<sup>58</sup> NITI Aayog, *Responsible AI for All: Adopting the Framework* (Feb. 2021), available at: <https://www.niti.gov.in/sites/default/files/2021-02/Responsible-AI-22022021.pdf> (last visited on: 27.06.2025).

<sup>59</sup> The Digital Personal Data Protection Act, 2023 (Act 22 of 2023), sec. 11.

Companies must cease responding to issues and instead establish governance that prevents them from occurring in the first place due to legal constraints imposed by both internal fiduciary obligations and external regulations. Four interconnected pillars should be the foundation of a robust internal compliance framework for AI.

**Pillar 1: A Board of Directors with a Comprehensive Understanding of Technology and Top-Down Governance**

Good governance is the responsibility of the board of directors. AI cannot be entirely the responsibility of IT departments.

- *AI Governance Committee:* A special committee, such as an audit or risk committee, should be established by the board to oversee the company's AI strategy and risk management.<sup>60</sup>
- *Designate a Chief AI Officer or Chief Responsible AI Officer:* This individual should be a senior executive who is responsible for the daily implementation of the AI compliance framework. The AI Governance Committee and the CEO should receive direct reports from them.
- *Board Competence:* The board, either as a whole or within its AI Governance Committee, must possess an adequate level of technical expertise. This does not imply that all directors must possess coding skills; however, they must independently acquire knowledge of AI concepts and risks. It is advisable to have at least one director who is a specialist in technology or data science on the board.

**Pillar 2: AI Impact Assessments (AIIAs) that are conducted in advance**

A comprehensive AI Impact Assessment (AIIA) must be conducted prior to the implementation of any AI system that poses a high risk. This internal due diligence process, which is comparable to an environmental impact assessment, would be necessary prior to the system's implementation.<sup>61</sup>

- *Scope and Purpose:* The AIIA would conduct a systematic assessment of a proposed AI system relative to the FTAS principles. It would document the system's purpose,

<sup>60</sup> Allan C. Thygesen, et.al., "Building the AI-Powered Organization" 97 *Harvard Business Review* 62 (2019).

<sup>61</sup> Animesh Kumar, "The Symbiosis of Artificial Intelligence and Legal Research: An Analysis" 13 (2) *Pragyaan Journal of Law* 12 (2023), available at: <https://ssrn.com/abstract=5267852> (last visited on: 27.06.2025).

the data sources it employs, the potential biases, the measures taken to make it comprehensible, and the security vulnerabilities it contains.

- *Procedure:* The AIIA should be conducted by a cross-functional team that includes legal, compliance, technical, and business professionals. It is necessary to identify potential risks and implement specific measures to mitigate them prior to the system's implementation. For instance, if an AIIA identifies a high risk of bias in a recruitment tool, it may necessitate additional data balancing, model retraining, or a "human-in-the-loop" review to inform final hiring decisions.
- *Documentation:* The completed AIIA is a critical piece of evidence. It demonstrates to regulators and courts that the board and management took AI risks seriously and managed them in a careful, informed, and proactive manner, which is a strong defence against claims of negligence or lack of oversight.

#### ***Pillar 3: Continuous monitoring and Robust Audit Trails***

The implementation of AI systems does not conclude the governance of AI. The organisation must have the capacity to audit and supervise its AI systems during their operation.

- *Algorithmic Logging:* In accordance with regulations such as the EU AI Act, the organisation is obligated to maintain comprehensive logs for high-risk systems.<sup>62</sup> These logs should encompass critical operational parameters, the data that was employed to make specific decisions, and any significant issues or failures. This results in a "algorithmic audit trail" that is essential for the investigation of incidents following their occurrence and for demonstrating the company's accountability.
- *Performance Monitoring:* It is imperative to establish systems that continuously evaluate the performance of AI in relation to the key risk indicators (KRIs) that have been established. It is imperative that these KRIs encompass assessments of fairness, security, and accuracy. For example, it is crucial to conduct consistent testing of a loan-processing AI to ensure that its approval rates across various demographic groups remain within statistically acceptable bounds. An automatic alert should be issued for review if they exceed these limits.

#### ***Pillar 4: The Comprehensive Corporate AI Policy***

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<sup>62</sup> *Supra* note 46, art. 20.

The last pillar is a comprehensive, clear, and company-wide AI Policy that has been officially approved by the board of directors. This document serves as the organization's AI governance constitution.

- *Content:* The policy should explicitly state the company's dedication to Responsible AI and delineate the prerequisites for the other three pillars. It must establish the roles and responsibilities of the AI Governance Committee and Chief AI Officer, establish standards for data handling, model validation, and the procurement of third-party AI systems, and clearly define what constitutes a high-risk AI system. Additionally, the AIIA process must be mandated.<sup>63</sup>
- *Procurement Standards:* The policy must address the substantial risks associated with utilising AI from third-party vendors. It should be stated that any AI system purchased from a vendor must undergo the same rigorous AIIA process as an in-house system, and that contracts with vendors must include robust clauses regarding data rights, transparency, and liability.
- *Training and Culture:* Training programs should be mandatory for all employees who require knowledge of the policy, including developers, business users, and management. The objective should be to establish a corporate culture in which all employees are accountable for the responsible development and utilisation of AI.

This four-pillar framework is a legally sound and comprehensive approach to accomplishing tasks. It transforms abstract concepts into concrete, verifiable actions, establishing a framework that safeguards a business's fiduciary obligations while simultaneously enabling it to innovate with AI in a responsible manner.

## SUGGESTIONS AND RECOMMENDATIONS

The analysis urges both legal standard-setters and companies to take action. The subsequent recommendations are intended to be beneficial, supported by empirical evidence, and designed to address the governance deficiencies that were identified.

### *Management and Boards of Directors*

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<sup>63</sup> Mark MacCarthy and Kenneth Propp, "A New Model for AI Vendor Accountability" *Brookings Institution*, Nov. 29, 2022, available at: <https://www.brookings.edu/techstream/a-new-model-for-ai-vendor-accountability/> (last visited on: 27.06.2025).

*Immediate Board-Level Education:* Similar to financial reporting standards, public company boards should receive formal, consistent training on the risks and governance of AI. This action directly satisfies the duty of care requirement of being informed.

*Establish a formal AI governance framework:* Companies should not wait for the government to dictate their actions. They should take the lead and establish a framework that is based on the four pillars mentioned above: the establishment of a dedicated governance committee, the requirement of AIIAs for high-risk systems, the implementation of robust monitoring, and the adoption of a formal AI policy. This would demonstrate that they are adhering to the Caremark standard for diligent oversight.

*Modify the charters of the Risk and Audit committees:* The existing charters of the Risk and Audit committees should be immediately modified to indicate that they are responsible for AI-related risks until a distinct AI Governance Committee is established.

#### *For Legislators and Regulators*

*Clarify the Director's Responsibility for Technological Oversight:* In order to clarify the director's responsibility for technological oversight, corporate law statutes, such as the Indian Companies Act, 2013<sup>64</sup>, should be amended. A legislative nudge could expedite the adoption of best practices, but a principles-based approach is preferable to an excessive number of regulations. For instance, commentary could emphasise that the duty of care outlined in section 166(3) encompasses the necessity of exercising caution when implementing large-scale technology.

*Provide a “Safe Harbour” for Good-Faith Compliance:* In an effort to incentivise the proactive implementation of robust governance, regulators may wish to consider the inclusion of a “safe harbour” provision. This would establish a rebuttable presumption that a company has fulfilled its duty of care if it can demonstrate that it adhered to a recognised and rigorous governance framework (such as the NIST RMF or the four-pillared model outlined in this article) and documented its diligence through a formal AIIA process.<sup>65</sup> This would promote meaningful compliance rather than merely checking boxes.

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<sup>64</sup> The Companies Act, 2013 (Act 18 of 2013), sec. 166(3).

<sup>65</sup> Deven R. Desai and Joshua A. Kroll, “Trust but Verify: A Guide to Auditing Automated Decision-Making” 31 *Harvard Journal of Law & Technology* 1 (2017).

*Enhance the consistency of international standards:* Given that AI is being developed and utilised globally, it is imperative that international organisations and national regulators collaborate to ensure that critical governance concepts are more uniform. For instance, they should establish a consensus regarding the definition of “high-risk AI” and the methodology for conducting impact assessments. This would facilitate multinational corporations’ compliance with regulations and enhance the predictability of the legal environment.<sup>66</sup>

## CONCLUSION

The integration of AI into business operations is a significant transformation, comparable to the industrial revolution or the onset of the internet age. It presents significant opportunities for efficiency and innovation, but it also introduces significant risks and governance issues that exceed the capabilities of conventional legal frameworks. This article has contended that the fundamental principles of corporate law, particularly the fiduciary responsibilities of directors, are not outdated; rather, they require a fresh perspective and a technologically savvy approach.

The passive, reactive approach to AI governance is no longer viable. The powerful imperative for proactive change is created by the spectre of “*Algorithmic Caremark*” liability and the increasing tide of global regulation. The decision for corporate leaders is not whether or not to regulate AI, but rather how. A patchwork of ethical statements and disjointed policies will prove insufficient. An internal compliance architecture that is legally-grounded, integrated, and holistic is necessary to address the challenges of the algorithmic era.

The proposal for a four-pillared framework, which is centred on a comprehensive policy, continuous auditing, proactive impact assessments, and top-down governance, serves as a blueprint for such an architecture. It is a model that is intended to cultivate public trust, ensure accountability, and build resilience. Corporations can exploit the transformative potential of AI in a manner that is not only profitable but also fair, transparent, and accountable to the societies they serve by incorporating responsibility into their internal governance structures, rather than merely mitigating legal risk. The construction of this new governance is one of the most critical tasks that the contemporary corporation must

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<sup>66</sup> Anu Bradford, *The Brussels Effect: How the European Union Rules the World* 198 (Oxford University Press, 2020).

undertake, and its successful completion will determine the future of corporate responsibility in the twenty-first century.

## **NORTH EAST INDIA'S TANTRIC TEXT AND ITS INTERPRETATION THROUGH MIMANSA**

- Dr Keshav Jha\*

### ***Abstract***

*"Mimansa" is a philosophical school concerned primarily with the system of interpretation and construction of the Vedic text in general and "karma-kanda" in particular. Although the whole exercise of construction of and interpretation of the ancient scriptures and texts appears to be somewhat easy, the fact of the matter remains that it's an extremely tricky task. The task becomes difficult for the reason that for proper appreciation of what has been written in the texts (be it "vedic" text or the "agama" text) uniform expansion of words, sentences and context is a must so that the same expression written in any kind of text does not differ to different kind of readers, scholars and researchers. North-east India's tantric texts must be interpreted using "Mimansa" principles of interpretation, which happens to be an advanced system of exegesis, taking into consideration all the possible limitations.*

**Keywords:** Tantra, Mimansa, Exegesis, Interpretation, Construction, Nyaya, Axiom.

### **INTRODUCTION**

The "Mimansa" principles of interpretation represent an extremely rigorous form of epistemology and hermeneutics, because of which this sophisticated system is considered an "Indian hermeneutical" system. Though initially it was not meant to perform the task of construction and exegesis of the tantric texts, and only "vedic-rituals" and texts were intended to be interpreted by it, yet because of the extremely sophisticated technicality and robust methodology, its use for interpreting the tantric texts started.

There is a section of scholars who are of the opinion that this use started when the tantric scholars faced criticism from the traditional Vedic scholars and circles.

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The idea of “Agama-pramanya” believes that since “Agamas” are derived from conversation between Shiva and Shakti, they are also divine revelation. There is another section of scholars who believe that the tantra-texts are “veda-sammata”, i.e. in close concordance with the Vedas.

A clear-cut example of the abovementioned fact is the concept of “vidhi” and “pratishedha”, i.e., the idea of “prescription” and “prohibition”.

Tantric scholars like *Abhinava Gupta* tried to reconcile the ideological conflict between the generally accepted belief of allowing meat, wine and “maithuna” in the tantric system with the general prohibition of these substances in the “Vedic” injunctions.

This conflict is resolved by the idea and concept of “vishesh-vidhi” which is also called “special-vidhi” which is applicable only for a “sadhaka”, i.e. tantric sadhaka, who has already been initiated into the process and has acquired some specific qualification, and this is the reason why this overrides the normal prohibition of the cedic injunctions which is popularly considered as “samanya-pratishedha”.

This scheme also fits in with the popular principle of the “Mimansa” school of interpretation and construction, which says that under all circumstances, a general rule shall be overridden by a special and specific one.

Similarly, the potency and ritualistic efficacy of the tantric system as elaborated in the “yogini tantra” and “kalika-purana” has been trans-positioned with the ideal of acquiring “apurva” vis-à-vis the inner transformation, kundalini awakening and acquisition of “sidhdhi” and “shakti”.

Similarly, the glorifying sections of the tantric literature, like “yogini tantra”, have been trans-positioned with the idea of “arthavada” and thereby establish that those passages which are glorificatory and unnecessarily exaggerate the stuff need not be interpreted as injunctions as per the “mimansa” principles of interpretation and construction, and this is the reason why the prescriptions like “maithuna would lead to attainment of sidhis” have been interpreted as “arthavada” and not as obligatory injunctions in the tantric system.

Likewise, the idea of “adhikara” has been drawn from the “mimansa” principles of interpretation and has been used for the construction of tantric literature and as in the Vedic system, those having “adhikara” could only perform the Vedic rituals; similarly, in the tantra

system, only the qualified “sadhaka” could perform the tantric rituals ordained for the initiated only.

Similarly, the “Mimansa” principle of “Lakshanika-vritti” and “Upamana” have also been utilised by the tantric scholars to arrive at an unambiguous and clear conclusion whenever there is any case of contradiction, if the literal meaning is adhered to, and multiple practices were interpreted in a symbolic manner in tantra.

Six axioms (Sarthakyata, Laghava, Arthaekatva, Gunapradhana, Samanjasya, Vikalpa) and the six rules of interpretation ( Shruti, Linga, Vakya, Prakaran, Sthana, Samakhya) of “Mimansa” principles have been exhaustively applied by Abhinav Gupta in interpreting the tantric rituals and injunctions as contained in “Yogini Tanta” and other “Shakta tantra” texts to arrive at a logical conclusion and decipher the intended meaning of the tantric text.

Similarly, the various “Nyayas” of the “Mimansa” principles of interpretation have been vehemently used by the tantric scholars to resolve the conflicting situation.

These “Nyayas” are of various categories:-

- Nyaya relating to the interpretation of expressions,
- Nyaya relating to textual construction,
- Nyaya relating to the interpretation of conflicting and prohibitory texts,
- Nyaya relating to miscellaneous elements.

A few of the examples of these “Nyayas” are Sfadi Nyaya, Aruni Nyaya, Shastric Usage Nyaya, Sarvasya Dakshina Nyaya, Phalachamasa Nyaya, etc.

## CONCLUSION

“Tantra” of North-East India is an altogether different paradigm and often claims to be dialogic in nature, i.e. seeking its origin in the conversation between “Shiva-Parvati”. Apart from the “ritualistic prescriptions” and “tantra-specific mantras”, it also contains esoteric elements. Many brilliant tantric scholars like Abhinav Gupta have successfully attempted this and achieved success in it.

Not only Indian scholars but many foreign scholars like Alexis Sanderson and David Lawrence have also shown how the “Mimansa” system of interpretation can aid in the proper understanding, viable construction and accurate exegesis of tantric texts.

Therefore, the need of the hour is the exploration of this great gem of exegesis, interpretation and construction so that our cultural heritage can be preserved in a better way.

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## **UNFAIR PRACTICES IN THE GIG ECONOMY: WORKER RIGHTS AND CONSUMER IMPACT**

- Pradeep Dixit\*

### ***Abstract***

*The rapid expansion of the gig economy has reshaped the nature of work and service delivery across sectors, particularly in developing economies like India. While digital platforms offer convenience, flexibility, and access to income-generating opportunities, they also give rise to serious concerns related to labour rights and consumer protection. This article critically examines the structural unfairness embedded within gig work, focusing on the exploitation of workers and the often-overlooked ethical dilemmas faced by consumers. Platform-based workers are frequently misclassified as independent contractors, depriving them of essential labour rights such as minimum wages, health coverage, and job security. The use of algorithmic management further compounds this issue by introducing non-transparent systems of control, leading to instability and arbitrary deactivations. On the consumer side, practices such as dynamic pricing, surveillance, and manipulative app design raise significant questions around fairness and informed consent. Despite recent legislative developments, including India's Social Security Code, 2020 and select state-level initiatives, meaningful protections for gig workers remain insufficient. Drawing from global legal models, judicial interpretations, and policy proposals, this paper argues for a more inclusive and enforceable regulatory framework. It calls for the creation of hybrid employment classifications, algorithmic accountability, fair contract principles, and the promotion of worker cooperatives. The study ultimately emphasizes the need to balance technological innovation with the values of equity, transparency, and social justice in the digital labour economy.*

**Keywords:** Gig Economy, Platform Work, Worker Misclassification, Algorithmic Management, Data Privacy.

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## INTRODUCTION

The contemporary corporation is founded on delegated authority and is managed by systems of human oversight and accountability.<sup>1</sup> The entire framework of corporate law, as evidenced by the significant case of *Salomon v. A. Salomon Co. Ltd.*<sup>2</sup>, is based on this principle. The concept of a distinct legal entity that is managed by human agents has been the foundation.<sup>3</sup> This structure is fundamentally altered by Artificial Intelligence (AI).<sup>4</sup> The incorporation of fully automated and semi-automated systems for critical business operations, including credit-risk assessment, hiring, supply chain management, and high-frequency trading<sup>4</sup>, introduces a novel form of agency to the corporate ecosystem. This system operates at a scale, speed, and level of complexity that renders it difficult for individuals to monitor. Consequently, a governance gap exists that current legal and compliance models were not designed to address.<sup>5</sup>

This discrepancy has tangible consequences. A company's reputation and finances can be significantly impacted by poorly managed AI, as evidenced by high-profile failures. Businesses are currently confronted with issues such as discriminatory algorithms<sup>6</sup>, biased loan-adjudication systems<sup>7</sup>, and dangerously flawed self-driving cars<sup>8</sup>, which are not hypothetical scenarios. The question of "who is responsible?" becomes extremely complex when an AI system causes harm. Is it the developer who authored the code, the vendor who

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<sup>1</sup> Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* 8 (PublicAffairs, New York, 2019).

<sup>2</sup> *Salomon v. A. Salomon & Co. Ltd.*, [1897] AC 22 (HL).

<sup>3</sup> Lawrence B. Solum, "Legal Personhood for Artificial Intelligences" 70 *North Carolina Law Review* 1231 (1992).

<sup>4</sup> Donald MacKenzie, "How to Make Money in Microseconds" 21 *London Review of Books* 16 (2011).

<sup>5</sup> Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* 3 (Harvard University Press, Cambridge, 2015).

<sup>6</sup> Jeffrey Dastin, "Amazon scraps secret AI recruiting tool that showed bias against women" *Reuters*, Oct. 10, 2018, available at: <https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G> (last visited on: 27.06.2025).

<sup>7</sup> Julia Angwin, et.al., "The Secret Bias Hidden in Mortgage-Approval Algorithms" *The Markup*, Aug. 25, 2021, available at: <https://themarkup.org/denied/2021/08/25/the-secret-bias-hidden-in-mortgage-approval-algorithms> (last visited on June 27, 2025).

<sup>8</sup> Cade Metz, "Uber's Self-Driving Car Didn't Know Pedestrians Could Jaywalk" *The New York Times*, Nov. 6, 2019, available at: <https://www.nytimes.com/2019/11/06/technology/uber-self-driving-car-arizona.html> (last visited on: 27.06.2025).

supplied the system, the manager who implemented it,<sup>9</sup> or the board of directors who authorised its use without a comprehensive understanding of the potential hazards?

This article addresses the central challenge. It asserts that applying high-level ethical principles on a case-by-case basis is inadequate.<sup>10</sup> In order to survive the algorithmic era, organisations must establish a new, robust internal compliance architecture that is specifically designed to regulate AI. This is not merely a matter of being socially responsible or doing the right thing<sup>11</sup>; it is becoming an essential component of the fiduciary duties of care and oversight that directors are obligated to fulfil for the company.

The primary inquiry that this research aims to address is: *To what extent do current corporate governance frameworks and fiduciary obligations, which were designed for organisations that are managed by humans, effectively ensure the responsible development and utilisation of autonomous AI systems? In order to address this accountability gap, which internal compliance structures are legally mandated?*

To address this, the article emphasises that conventional corporate governance models, particularly the business judgement rule and the duty of oversight, are inadequate in addressing the distinctive risks associated with AI due to their reliance on assumptions regarding human cognition and decision-making. In order to fulfil their fiduciary obligations, corporate boards must establish a new, integrated compliance architecture in the era of AI. This architecture is composed of four primary components:

- (1) Board-level technological proficiency and transparent accountability at the highest levels.
- (2) Mandatory AI Impact Assessments (AIIAs) prior to deployment.
- (3) The maintenance of comprehensive and auditable algorithmic records; and
- (4) The development of a comprehensive, company-wide AI Policy.

This article comprises five sections.

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<sup>9</sup> W.K.C. Guthrie, *A History of Greek Philosophy*, Vol. 3: *The Fifth-Century Enlightenment* 129 (Cambridge University Press, 1969).

<sup>10</sup> Luciano Floridi, “Translating Principles into Practices: A Diachronic and Syncronic Analysis of AI Ethics” 1 *Philosophy & Technology* 1-12 (2019).

<sup>11</sup> A. C. Fernando, *Corporate Governance: Principles, Policies and Practices* 42 (Pearson Education, New Delhi, 3<sup>rd</sup> ed., 2015).

- The Part II of the article will deconstruct the concept of “Responsible AI” from a vague ideal to a concrete, risk-based standard that businesses can employ to maintain compliance.
- Part III examines the necessity of reevaluating and applying conventional corporate law principles, such as the duty of care and the Caremark standard for oversight liability, to regulate AI systems.
- Part IV examines the regulatory environments of the European Union, the United States, and India, and it compares them in order to identify significant trends and legal pressures.
- The primary contribution of this work is illustrated in Part V, which provides a comprehensive plan for an integrated internal compliance framework.
- Ultimately, the article concludes with recommendations for modifications to the law and the practices of businesses.

It asserts that the most effective method of fostering genuine corporate responsibility in the algorithmic era is to develop proactive internal compliance systems.

## **HOW TO IMPLEMENT “RESPONSIBLE AI” IN CORPORATE GOVERNANCE**

The terms “*ethical AI*” and “*responsible AI*” are frequently used interchangeably; however, it is crucial to distinguish between the two in order to ensure legal compliance and corporate governance.<sup>12</sup> In a legal and corporate context, responsibility refers to accountable, auditable, and risk-managed behaviour, while ethics are broad, normative principles.<sup>13</sup> The objective of a board of directors is not merely to contemplate ethics, but to establish a tangible framework for the *responsible* deployment of AI.<sup>14</sup> We can establish a practical definition of Responsible AI for corporate governance that is based on four primary, actionable principles: Fairness, Transparency, Accountability, and Security (FTAS) through the implementation of new regulations and the consensus of experts.

### *Fairness: The Obligation to Minimise Algorithmic Bias*

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<sup>12</sup> Virginia Dignum, *Responsible Artificial Intelligence: How to Develop and Use AI in a Responsible Way* (Springer, 2019).

<sup>13</sup> Aristotle, *Nicomachean Ethics*, Book II (W.D. Ross trans., Oxford University Press, 2009).

<sup>14</sup> Mireille Hildebrandt, “The Artificial Intelligence of Law. Who is the Master?”, in Mireille Hildebrandt & Antoinette Rouvroy (eds.), *Law, Human Agency and Autonomic Computing* 115 (Routledge, 2011).

When an AI system consistently generates biased results, it reinforces and frequently exacerbates biases that are already present in its training data, a phenomenon known as algorithmic bias occurs.<sup>15</sup> This is not a technical issue; rather, it is a significant governance challenge.<sup>16</sup> The company is at risk of legal and reputational damage under anti-discrimination laws if a loan adjudication system demonstrates racial bias<sup>17</sup> or an AI system used for hiring unfairly rejects qualified female candidates.<sup>18</sup> Consequently, before and *during* the deployment of an AI system, the principle of fairness necessitates the identification, measurement, and mitigation of these biases.<sup>19</sup> This includes ensuring that all individuals have equal opportunities, which is a critical component of human rights and anti-discrimination legislation, in addition to ensuring that the numbers are equal.<sup>20</sup>

### *The Necessity of Clear Explanations: Transparency*

Many advanced AI systems, particularly those that employ deep learning, operate as “black boxes.”<sup>21</sup> The internal decision-making logic of these systems is so intricate that even their creators are unable to decipher it. This lack of clarity is in direct opposition to the legal principles of due process and reasoned decision-making.<sup>22</sup> For instance, an AI that denies credit to an individual is unable to appeal or review the decision without understanding the rationale behind it<sup>23</sup>. Transparency, or “*explainability*,” necessitates that AI systems provide explicit, human-comprehensible rationales for their outputs.<sup>24</sup> It is not always necessary to provide proprietary code; however, it is necessary to be able to articulate the primary factors and reasoning that resulted in a particular decision, particularly one that has significant legal or financial repercussions.

### *Determining Responsibility in an Autonomous System*

<sup>15</sup> Cathy O’Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* 21 (Crown, New York, 2016).

<sup>16</sup> Solon Barocas and Andrew D. Selbst, “Big Data’s Disparate Impact” 104 *California Law Review* 671 (2016).

<sup>17</sup> *Supra* note 6.

<sup>18</sup> *Supra* note 7.

<sup>19</sup> The Equal Credit Opportunity Act, 15 U.S.C. sec. 1691-1691f (United States).

<sup>20</sup> The Constitution of India, art. 15.

<sup>21</sup> *Supra* note 5 at 107.

<sup>22</sup> *State v. Loomis*, 881 N.W.2d 749 (Wis. 2016).

<sup>23</sup> Danielle Keats Citron and Frank Pasquale, “The Scored Society: Due Process for Automated Predictions” 89 *Washington Law Review* 1 (2014).

<sup>24</sup> Bryce Goodman and Seth Flaxman, “European Union Regulations on Algorithmic Decision-Making and a ‘Right to Explanation’” 38 *AI Magazine* 50 (2017).

Corporate governance's most critical component is accountability.<sup>25</sup> It implies that each action taken by a company must be accompanied by explicit lines of authority and responsibility. This is further complicated by the inclusion of autonomous agents in the decision-making process.<sup>26</sup> True accountability for AI requires that a specific individual or organisation be held accountable for any action taken by an AI system.<sup>27</sup> To achieve this, a governance framework that clearly defines roles and responsibilities for the entire AI lifecycle, from data collection and model training to deployment, monitoring, and decommissioning, is necessary. The AI system becomes a convenient scapegoat if this does not occur, which weakens the very concept of corporate liability and disseminates responsibility.<sup>28</sup>

### *Obligation to Prevent Emerging Security Threats*

Safety is the final regulation. New vulnerabilities are generated by AI systems. Adversarial attacks can compromise them by subtly altering the input data, causing the system to make significant errors, or by corrupting the training data through poisoning.<sup>29</sup> It is the responsibility of a company that employs AI to ensure that its systems are robust and secure against these types of threats, a principle identified as “*secure by design*.<sup>30</sup>” This is not merely a cybersecurity concern; it is also a critical component of risk management. The failure to safeguard the control system of an autonomous vehicle or a financial trading algorithm from a malicious attack is a severe violation of the duty of care.<sup>31</sup>

The vague concept of “Responsible AI” is transformed into a precise set of objectives for the operation of an organisation by these four concepts—Fairness, Transparency, Accountability,

<sup>25</sup> Robert C. Clark, *Corporate Law* 34 (Aspen Publishers, 1986).

<sup>26</sup> Samir Chopra & Laurence F. White, *A Legal Theory for Autonomous Artificial Agents* 77 (University of Michigan Press, 2011).

<sup>27</sup> Andrea Renda, *The ‘Do-ocracy’ of AI: Governance by Experimentation* 4 (Centre for European Policy Studies, 2019).

<sup>28</sup> Ryan Abbott, *The Reasonable Robot: Artificial Intelligence and the Law* 45 (Cambridge University Press, 2020).

<sup>29</sup> Ram Shankar Siva Kumar, *et.al.*, “Adversarial Machine Learning - Industry Perspectives”, paper presented at AISec ‘18: Proceedings of the 11<sup>th</sup> ACM Workshop on Artificial Intelligence and Security (October 2018), available at: <https://dl.acm.org/doi/10.1145/3270101.3270104> (last visited on: 27.06.2025).

<sup>30</sup> European Union Agency for Cybersecurity (ENISA), *Securing AI*, November 2020, available at: <https://www.enisa.europa.eu/publications/securing-ai> (last visited on: 27.06.2025).

<sup>31</sup> David C. Vladeck, “Machines without Principals: Liability Rules and Artificial Intelligence” 89 *Washington Law Review* 117 (2014).

and Security. They provide a method for evaluating the effectiveness of a board and the adherence of a company to its regulations.

## **IN THE ERA OF ALGORITHMS, HOW CAN FIDUCIARY DUTIES BE INTERPRETED DIFFERENTLY?**

Corporate fiduciary law is founded on two fundamental principles: loyalty and care. In the best interests of the corporation, directors must act as if they are a reasonably prudent individual.<sup>32</sup> The use of AI does not create new fiduciary duties; however, it significantly alters the way in which these duties are understood and applied.<sup>33</sup>

### *The Problem of Technological Competence and the Duty of Care*

In the past, the duty of care mandated that directors must possess a comprehensive understanding of the technologies in use before making a business decision.<sup>34</sup> However, in the current era of AI, this definition of “*important information*” must also encompass a comprehensive understanding of the technologies. It is impossible for a board to make an informed decision when they approve the expenditure of millions on a core AI system without understanding its primary risks, such as its potential for bias or its “*black box*” operation.<sup>35</sup>

This raises the question of technological proficiency. Although directors are not required to be data scientists, courts may begin to perceive a complete and passive lack of knowledge about basic technology risks as a breach of the duty of care.<sup>36</sup> Directors are shielded from liability for honest errors in judgement by the business judgement rule; however, the decision must be made with sufficient knowledge.<sup>37</sup> A decision to employ a powerful, opaque AI system without conducting sufficient research into its potential risks is not merely a lapse in judgement; it is a failure of the process.<sup>38</sup> The business judgement rule may not be applicable

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<sup>32</sup> The Companies Act, 2013 (Act 18 of 2013), sec. 166.

<sup>33</sup> Lynn A. Stout, “The Shareholder Value Myth” 33 *Stetson Law Review* 116 (2003).

<sup>34</sup> *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

<sup>35</sup> Thomas H. Davenport & Rajeev Ronanki, “Artificial Intelligence for the Real World” 96 *Harvard Business Review* 108 (2018).

<sup>36</sup> Matthew U. Scherer, “Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies” 29 *Harvard Journal of Law & Technology* 353 (2016).

<sup>37</sup> *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

<sup>38</sup> Andrew M. Perlman, “The Public’s Unmet Need for Legal Services & What Law Schools Can Do About It” 148 *Daedalus* 37 (2019).

to a board that is unable to demonstrate a record of informed inquiry into AI risks, as courts, particularly in Delaware, are increasingly inclined to investigate the deliberative process.<sup>39</sup>

### *The Obligation of Oversight: From “Caremark” to “Algorithmic Caremark”*

Perhaps the most potent legal leverage for AI governance is the obligation to supervise. *In re Caremark International Inc.*, Derivative litigation obligation was most effectively articulated.<sup>40</sup> *Caremark* determined that a board of directors must ensure that the company has the appropriate information and reporting systems in place to provide senior management and the board with timely, accurate information. If the board neglects to do so, it may, in rare instances, be held accountable for a “*sustained or systematic failure of the board to exercise oversight.*”<sup>41</sup>

The *Caremark* standard, which was further clarified in subsequent cases such as *Stone v. Ritter*, establishes a high standard for plaintiffs to satisfy. They must demonstrate that the defendant acted in bad faith.<sup>42</sup> Nevertheless, the rationale behind *Caremark* is directly applicable to the dangers of AI. The type of “*mission-critical*” operational risk that *Caremark* was intended to mitigate is an AI system that operates without adequate monitoring, auditing, and reporting mechanisms.<sup>43</sup> One could argue that a board that permits the use of a high-stakes AI system (such as one for medical diagnosis or autonomous navigation) without any means of verifying its safety, bias, or security flaws is not fulfilling its *Caremark* responsibilities.<sup>44</sup>

This implies that a “*Algorithmic Caremark*” standard has been established. This would imply that directors are obligated to implement the following actions for AI systems that are essential to the mission:

1. Ensure that a reasonable system is in place to collect and report information that can monitor the AI for potential risks to safety, transparency, and fairness.

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<sup>39</sup> *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

<sup>40</sup> *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996).

<sup>41</sup> *Ibid.* at 971.

<sup>42</sup> *Stone v. Ritter*, 911 A.2d 362 (Del. 2006).

<sup>43</sup> Robert J. Jackson Jr., “Corporate Governance: The Role of the SEC and the Board”, speech delivered at the 26th Annual Tulane Corporate Law Institute (March 27, 2014), available at: <https://www.sec.gov/news/speech/2014-spch032714rjj>(last visited on: 27.06.2025).

<sup>44</sup> Elizabeth Pollman, “Corporate Oversight and Disobedience” 72 *Vanderbilt Law Review* 2013 (2019).

2. Address any “*red flags*” that this system raises, such as evidence of major system failures or unfair outcomes.

A high-risk AI application that lacks an oversight system may be considered an example of a bad faith failure to fulfil one’s obligation that satisfies the rigorous *Caremark* test for liability.<sup>45</sup>

## **AN EXAMINATION OF THE FUTURE OF REGULATION IN THE UNITED STATES, THE EUROPEAN UNION, AND INDIA**

The legal risks associated with AI are not isolated incidents. Companies are required to adhere to new and frequently conflicting regulations that govern AI, as they are evolving rapidly worldwide. These critical international strategies are essential for any multinational organisation.

### *The Risk-Based Approach of the AI Act in the European Union*

The European Union has adopted the most comprehensive and aggressive approach with its proposed Artificial Intelligence Act (AI Act).<sup>46</sup> The Act establishes a risk-based framework that categorises AI systems into four categories: unacceptable risk (which are prohibited), high-risk, limited-risk, and minimal-risk.<sup>47</sup>

The primary objective of the Act is to regulate high-risk AI systems, which are employed in critical infrastructure, law enforcement, and employment. A number of stringent requirements must be satisfied by the providers of these systems before they can be sold, including:

- Implementing a risk management system.<sup>48</sup>
- Employing high-quality training data to mitigate bias.<sup>49</sup>
- Maintaining an abundance of technical documentation and logging capabilities.<sup>50</sup>

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<sup>45</sup> *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019).

<sup>46</sup> Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, COM (2021) 206 final (Apr. 21, 2021).

<sup>47</sup> Paul Nemitz, “Constitutional Democracy and Technology in the Age of Artificial Intelligence” 379 *Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences* (2018).

<sup>48</sup> *Supra* note 46, art. 9.

<sup>49</sup> *Supra* note 46, art. 10.

- Ensuring that the appropriate individuals are in charge.<sup>51</sup>

The AI Act is a significant stride towards the establishment of a horizontal regulatory framework for AI. It transforms numerous Responsible AI principles from voluntary best practices to mandatory legal obligations for companies that conduct business in the EU, with substantial penalties for noncompliance.<sup>52</sup> It will have an impact on companies worldwide that sell AI systems to the EU market due to its extraterritorial scope.

#### *The United States: A Sector-Specific, Pro-Innovation Position*

The European Union has implemented a comprehensive regulatory framework, whereas the United States has implemented a more fragmented, sector-specific approach. The current policy, as outlined in a variety of executive orders and agency guidance, is to promote innovation while minimising risks within the confines of existing legal frameworks.<sup>53</sup> A critical AI Risk Management Framework (RMF) has been developed by the National Institute of Standards and Technology (NIST).<sup>54</sup> In contrast to the EU AI Act, the NIST RMF is optional, providing organisations with a structured and adaptable approach to “*map, measure, and manage*” AI risks.

Although there is no single “*AI Act*” in the United States, there are regulations that are applicable to specific sectors. For instance, the Equal Employment Opportunity Commission (EEOC) has cautioned that the implementation of artificial intelligence (AI) in the hiring process may violate existing anti-discrimination laws.<sup>55</sup> Financial regulators are also conducting a thorough examination of AI-based credit models to ensure that they adhere to fair lending laws.<sup>56</sup> This presents a significant challenge for businesses in terms of

<sup>50</sup> *Supra* note 46, arts. 11, 12.

<sup>51</sup> *Supra* note 46, art. 14.

<sup>52</sup> *Supra* note 46, art. 71.

<sup>53</sup> Exec. Order No. 13859, 84 *Federal Register* 3967 (Feb. 14, 2019), “Maintaining American Leadership in Artificial Intelligence”.

<sup>54</sup> National Institute of Standards and Technology, *AI Risk Management Framework (AI RMF 1.0)* (January 2023), available at: <https://www.nist.gov/itl/ai-risk-management-framework> (last visited on: 27.06.2025).

<sup>55</sup> U.S. Equal Employment Opportunity Commission, *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees* (May 12, 2022), available at: <https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence>(last visited on: 27.06.2025).

<sup>56</sup> Consumer Financial Protection Bureau, “CFPB Circular 2022-03: Adverse action notification requirements in connection with credit decisions based on complex algorithms” (May 26, 2022), available

maintaining an accurate record of the various federal and state laws and agency-specific guidance.

### *India: Formulating a Master Plan for “Responsible AI for All”*

India's approach is still in the works, but it has two main goals: using AI to help the economy grow and dealing with social issues. The government's main policy think tank, NITI Aayog, has put out a number of discussion papers, one of which is the National Strategy for Artificial Intelligence.<sup>57</sup> These papers support the idea of “*AI for All*,” which stresses the importance of including everyone and using AI to solve big problems in areas like healthcare, agriculture, and education.

The NITI Aayog papers on governance have suggested principles for Responsible AI that are in line with what most people around the world agree on, which are fairness, openness, and responsibility.<sup>58</sup> India's new data protection law, the Digital Personal Data Protection Act, 2023, has rules that will affect AI, especially when it comes to consent and the right to know about automated decision-making. However, there is still no comprehensive law like the EU's AI Act.<sup>59</sup> India's path suggests a balancing act: it wants to build public trust through responsible governance while also encouraging innovation. This will probably result in a mix of ethical guidelines and rules that apply to specific sectors.

This comparison shows that there is a clear global trend: no matter what kind of regulatory model is used, there is a growing legal expectation that businesses will use AI in a responsible and risk-managed way. This outside pressure strongly supports the internal fiduciary duty to create strong compliance systems.

## **THE BLUEPRINT: A UNIFORM INTERNAL COMPLIANCE SYSTEM FOR AI**

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at: <https://www.consumerfinance.gov/compliance/circulars/circular-2022-03-adverse-action-notification-requirements-in-connection-with-credit-decisions-based-on-complex-algorithms/> (last visited on: 27.06.2025).

<sup>57</sup> NITI Aayog, *National Strategy for Artificial Intelligence* (June 2018), available at: <https://www.niti.gov.in/sites/default/files/2019-01/NationalStrategy-for-AI-Discussion-Paper.pdf> (last visited on: 27.06.2025).

<sup>58</sup> NITI Aayog, *Responsible AI for All: Adopting the Framework* (Feb. 2021), available at: <https://www.niti.gov.in/sites/default/files/2021-02/Responsible-AI-22022021.pdf> (last visited on: 27.06.2025).

<sup>59</sup> The Digital Personal Data Protection Act, 2023 (Act 22 of 2023), sec. 11.

Companies must cease responding to issues and instead establish governance that prevents them from occurring in the first place due to legal constraints imposed by both internal fiduciary obligations and external regulations. Four interconnected pillars should be the foundation of a robust internal compliance framework for AI.

**Pillar 1: A Board of Directors with a Comprehensive Understanding of Technology and Top-Down Governance**

Good governance is the responsibility of the board of directors. AI cannot be entirely the responsibility of IT departments.

- *AI Governance Committee:* A special committee, such as an audit or risk committee, should be established by the board to oversee the company's AI strategy and risk management.<sup>60</sup>
- *Designate a Chief AI Officer or Chief Responsible AI Officer:* This individual should be a senior executive who is responsible for the daily implementation of the AI compliance framework. The AI Governance Committee and the CEO should receive direct reports from them.
- *Board Competence:* The board, either as a whole or within its AI Governance Committee, must possess an adequate level of technical expertise. This does not imply that all directors must possess coding skills; however, they must independently acquire knowledge of AI concepts and risks. It is advisable to have at least one director who is a specialist in technology or data science on the board.

**Pillar 2: AI Impact Assessments (AIIAs) that are conducted in advance**

A comprehensive AI Impact Assessment (AIIA) must be conducted prior to the implementation of any AI system that poses a high risk. This internal due diligence process, which is comparable to an environmental impact assessment, would be necessary prior to the system's implementation.<sup>61</sup>

- *Scope and Purpose:* The AIIA would conduct a systematic assessment of a proposed AI system relative to the FTAS principles. It would document the system's purpose,

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<sup>60</sup> Allan C. Thygesen, et.al., "Building the AI-Powered Organization" 97 *Harvard Business Review* 62 (2019).

<sup>61</sup> Animesh Kumar, "The Symbiosis of Artificial Intelligence and Legal Research: An Analysis" 13 (2) *Pragyaan Journal of Law* 12 (2023), available at: <https://ssrn.com/abstract=5267852> (last visited on: 27.06.2025).

the data sources it employs, the potential biases, the measures taken to make it comprehensible, and the security vulnerabilities it contains.

- *Procedure:* The AIIA should be conducted by a cross-functional team that includes legal, compliance, technical, and business professionals. It is necessary to identify potential risks and implement specific measures to mitigate them prior to the system's implementation. For instance, if an AIIA identifies a high risk of bias in a recruitment tool, it may necessitate additional data balancing, model retraining, or a "human-in-the-loop" review to inform final hiring decisions.
- *Documentation:* The completed AIIA is a critical piece of evidence. It demonstrates to regulators and courts that the board and management took AI risks seriously and managed them in a careful, informed, and proactive manner, which is a strong defence against claims of negligence or lack of oversight.

#### **Pillar 3: Continuous monitoring and Robust Audit Trails**

The implementation of AI systems does not conclude the governance of AI. The organisation must have the capacity to audit and supervise its AI systems during their operation.

- *Algorithmic Logging:* In accordance with regulations such as the EU AI Act, the organisation is obligated to maintain comprehensive logs for high-risk systems.<sup>62</sup> These logs should encompass critical operational parameters, the data that was employed to make specific decisions, and any significant issues or failures. This results in a "algorithmic audit trail" that is essential for the investigation of incidents following their occurrence and for demonstrating the company's accountability.
- *Performance Monitoring:* It is imperative to establish systems that continuously evaluate the performance of AI in relation to the key risk indicators (KRIs) that have been established. It is imperative that these KRIs encompass assessments of fairness, security, and accuracy. For example, it is crucial to conduct consistent testing of a loan-processing AI to ensure that its approval rates across various demographic groups remain within statistically acceptable bounds. An automatic alert should be issued for review if they exceed these limits.

#### **Pillar 4: The Comprehensive Corporate AI Policy**

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<sup>62</sup> *Supra* note 46, art. 20.

The last pillar is a comprehensive, clear, and company-wide AI Policy that has been officially approved by the board of directors. This document serves as the organization's AI governance constitution.

- *Content:* The policy should explicitly state the company's dedication to Responsible AI and delineate the prerequisites for the other three pillars. It must establish the roles and responsibilities of the AI Governance Committee and Chief AI Officer, establish standards for data handling, model validation, and the procurement of third-party AI systems, and clearly define what constitutes a high-risk AI system. Additionally, the AIIA process must be mandated.<sup>63</sup>
- *Procurement Standards:* The policy must address the substantial risks associated with utilising AI from third-party vendors. It should be stated that any AI system purchased from a vendor must undergo the same rigorous AIIA process as an in-house system, and that contracts with vendors must include robust clauses regarding data rights, transparency, and liability.
- *Training and Culture:* Training programs should be mandatory for all employees who require knowledge of the policy, including developers, business users, and management. The objective should be to establish a corporate culture in which all employees are accountable for the responsible development and utilisation of AI.

This four-pillar framework is a legally sound and comprehensive approach to accomplishing tasks. It transforms abstract concepts into concrete, verifiable actions, establishing a framework that safeguards a business's fiduciary obligations while simultaneously enabling it to innovate with AI in a responsible manner.

## SUGGESTIONS AND RECOMMENDATIONS

The analysis urges both legal standard-setters and companies to take action. The subsequent recommendations are intended to be beneficial, supported by empirical evidence, and designed to address the governance deficiencies that were identified.

### *Management and Boards of Directors*

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<sup>63</sup> Mark MacCarthy and Kenneth Propp, "A New Model for AI Vendor Accountability" *Brookings Institution*, Nov. 29, 2022, available at: <https://www.brookings.edu/techstream/a-new-model-for-ai-vendor-accountability/> (last visited on: 27.06.2025).

*Immediate Board-Level Education:* Similar to financial reporting standards, public company boards should receive formal, consistent training on the risks and governance of AI. This action directly satisfies the duty of care requirement of being informed.

*Establish a formal AI governance framework:* Companies should not wait for the government to dictate their actions. They should take the lead and establish a framework that is based on the four pillars mentioned above: the establishment of a dedicated governance committee, the requirement of AIIAs for high-risk systems, the implementation of robust monitoring, and the adoption of a formal AI policy. This would demonstrate that they are adhering to the Caremark standard for diligent oversight.

*Modify the charters of the Risk and Audit committees:* The existing charters of the Risk and Audit committees should be immediately modified to indicate that they are responsible for AI-related risks until a distinct AI Governance Committee is established.

#### *For Legislators and Regulators*

*Clarify the Director's Responsibility for Technological Oversight:* In order to clarify the director's responsibility for technological oversight, corporate law statutes, such as the Indian Companies Act, 2013<sup>64</sup>, should be amended. A legislative nudge could expedite the adoption of best practices, but a principles-based approach is preferable to an excessive number of regulations. For instance, commentary could emphasise that the duty of care outlined in section 166(3) encompasses the necessity of exercising caution when implementing large-scale technology.

*Provide a "Safe Harbour" for Good-Faith Compliance:* In an effort to incentivise the proactive implementation of robust governance, regulators may wish to consider the inclusion of a "safe harbour" provision. This would establish a rebuttable presumption that a company has fulfilled its duty of care if it can demonstrate that it adhered to a recognised and rigorous governance framework (such as the NIST RMF or the four-pillared model outlined in this article) and documented its diligence through a formal AIIA process.<sup>65</sup> This would promote meaningful compliance rather than merely checking boxes.

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<sup>64</sup> The Companies Act, 2013 (Act 18 of 2013), sec. 166(3).

<sup>65</sup> Deven R. Desai and Joshua A. Kroll, "Trust but Verify: A Guide to Auditing Automated Decision-Making" 31 *Harvard Journal of Law & Technology* 1 (2017).

*Enhance the consistency of international standards:* Given that AI is being developed and utilised globally, it is imperative that international organisations and national regulators collaborate to ensure that critical governance concepts are more uniform. For instance, they should establish a consensus regarding the definition of “high-risk AI” and the methodology for conducting impact assessments. This would facilitate multinational corporations’ compliance with regulations and enhance the predictability of the legal environment.<sup>66</sup>

## CONCLUSION

The integration of AI into business operations is a significant transformation, comparable to the industrial revolution or the onset of the internet age. It presents significant opportunities for efficiency and innovation, but it also introduces significant risks and governance issues that exceed the capabilities of conventional legal frameworks. This article has contended that the fundamental principles of corporate law, particularly the fiduciary responsibilities of directors, are not outdated; rather, they require a fresh perspective and a technologically savvy approach.

The passive, reactive approach to AI governance is no longer viable. The powerful imperative for proactive change is created by the spectre of “*Algorithmic Caremark*” liability and the increasing tide of global regulation. The decision for corporate leaders is not whether or not to regulate AI, but rather how. A patchwork of ethical statements and disjointed policies will prove insufficient. An internal compliance architecture that is legally-grounded, integrated, and holistic is necessary to address the challenges of the algorithmic era.

The proposal for a four-pillared framework, which is centred on a comprehensive policy, continuous auditing, proactive impact assessments, and top-down governance, serves as a blueprint for such an architecture. It is a model that is intended to cultivate public trust, ensure accountability, and build resilience. Corporations can exploit the transformative potential of AI in a manner that is not only profitable but also fair, transparent, and accountable to the societies they serve by incorporating responsibility into their internal governance structures, rather than merely mitigating legal risk. The construction of this new governance is one of the most critical tasks that the contemporary corporation must

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<sup>66</sup> Anu Bradford, *The Brussels Effect: How the European Union Rules the World* 198 (Oxford University Press, 2020).

undertake, and its successful completion will determine the future of corporate responsibility in the twenty-first century.

## **THE LEGAL FRAMEWORK OF EMPLOYMENT CONTRACTS: RIGHTS AND OBLIGATIONS**

- P. Gokulapriya,\* M. Nirmala\*\* & S. Taj Shifana\*\*\*

### ***Abstract***

*The basic pillar that regulates the relationship between employers and employees is the legal framework that governs employment contracts. In order to foster justice, safety, and adherence to labour laws, it creates reciprocal rights and duties. Important parameters like job duties, pay, working hours, leave benefits, and termination conditions are outlined in an employment contract, whether it is explicit or implicit. These contracts must comply with minimal labour law requirements, including non-discrimination, health and safety, and protection from wrongful termination, according to legal systems around the world. Workers have the right to safe working conditions, fair pay, and the ability to form or join a trade union. In turn, employers have the right to demand skill, loyalty, and compliance with policy. Both parties have obligations: employers must abide by legal requirements and contractual provisions, and employees must perform their jobs with a reasonable level of skill and care. In order to enforce these rights and responsibilities, dispute resolution methods, including labour tribunals and grievance procedures, are essential. Furthermore, because of modifications to laws, court rulings, and cultural norms, including new issues like remote work, data security, and workplace diversity, employment contracts are also susceptible to changing legal interpretations.*

*Overall, the goal of the legal framework governing employment contracts is to preserve conformity with more general labour laws while balancing the interests of the two parties. It is imperative that both employers and employees comprehend this framework in order to guarantee a just and lawful working*

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*environment, which will promote productivity and legal accountability in the workplace.*

**Keywords:** Employment Contracts, Types, Comparative Study, Legal Provision, Rights and Duties.

## INTRODUCTION

The legal basis of an employer-employee relationship is employment contracts. These agreements, which might be verbal, written, or observed from actions, set forth the terms and circumstances for the exchange of labor for payment. They serve as essential instruments in contemporary employment systems, outlining each party's rights, obligations, and expectations in order to minimize uncertainty in working relationships and provide legal certainty.<sup>1</sup>

While each country has its own legal framework for employment contracts, it usually consists of statutory legislation, constitutional provisions, court decisions, and, when relevant, collective bargaining agreements. In India, *for example*, this framework is largely influenced by the contract law, which regulates general contract law principles,<sup>2</sup> as well as state-level labour-specific laws like the Industrial Disputes Act, 1947, the Minimum Wages Act, 1948, and the Shops and Establishments Acts.<sup>3</sup>

Employment contracts serve as both administrative and legal tools, safeguarding employees' rights to safe working conditions, equitable compensation, and protection from wrongful termination. They also give employers the authority to demand secrecy, loyalty, and performance from their workforce. Even if all parties agree, these contracts cannot deviate from the basic statutory protections and must comply with national labour regulations.<sup>4</sup>

The emergence of non-traditional work arrangements, such as remote and gig labour, has made it more crucial than ever to comprehend the legal requirements of employment contracts. Due to the constantly changing nature of employment law, it is imperative that

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<sup>1</sup> Simon Deakin & Gillian S. Morris, *Labour Law* (Hart Publishing, 2012).

<sup>2</sup> The Indian Contract Act, 1872 (Act 9 of 1872).

<sup>3</sup> S. N. Singh, *Labour and Industrial Laws* (Eastern Book Company, 2016).

<sup>4</sup> Gautam Bhatia, *Understanding Employment Law in India* (Oxford University Press, 2020).

both employers and employees understand their legal views in order to promote compliance, equity, and workplace harmony.<sup>5</sup>

## **EMPLOYMENT CONTRACTS**

The terms and conditions of employment are specified in an employment contract, which is a legally binding agreement between an employer and an employee. It usually covers things like job duties, pay, working hours, length of employment, benefits, confidentiality, termination procedures, and other rights and obligations of both parties. This contract makes sure that both parties are aware of their responsibilities and obligations during the employment period.<sup>6</sup>

## **OBJECTIVE OF EMPLOYMENT CONTRACTS**

The main goal of employment contracts is to establish legally binding terms that define and govern the relationship between the employer and employee. A framework for equitable and predictable labour relations is established by the contract, which specifies crucial components such as employment duties, pay, working conditions, and termination procedures.<sup>7</sup>

Contracts of employment also apply to:

- Respect workers' legal and financial rights by establishing minimum requirements for pay, hours worked, and workplace safety.<sup>8</sup>
- Make sure that everyone is aware of their responsibilities and expectations in order to reduce conflict and foster positive working relationships.<sup>9</sup>
- Assist in ensuring adherence to both domestic and international labour laws and regulations.<sup>10</sup>

## **SCOPE OF EMPLOYMENT CONTRACTS**

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<sup>5</sup> International Labour Organization, *The Future of Work Report* (ILO, 2021).

<sup>6</sup> Hugh Collins, *Employment Law* (Oxford University Press, 2003); See also, *Malik v. Bank of Credit and Commerce International SA*, [1997] UKHL 23.

<sup>7</sup> International Labour Organization, *Recommendation No. 198: The Employment Relationship* (ILO, 2006).

<sup>8</sup> Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (United States); The Minimum Wages Act, 1948 (Act 11 of 1948).

<sup>9</sup> *Supra* note 6.

<sup>10</sup> United Nations, *Guiding Principles on Business and Human Rights* (UN, 2011).

All aspects of the work relationship are covered by the vast scope of employment contracts, which are influenced by common law, contractual, and statutory principles. Important areas consist of:

- *Contract Formation and Validity*: Identifying the necessary components of a legally binding contract, such as consideration, mutual consent, and a legitimate aim.
- The terms and conditions of employment, which are frequently regulated by legislative minimums, cover pay, benefits, leave rights, working hours, and rest times.<sup>11</sup>
- *Employment Classification*: Depending on the level of control and financial reliance, this classification applies to full-time, part-time, fixed-term, probationary, and occasionally dependent contractors.<sup>12</sup>
- *Rights and Duties*: These include the right to fair treatment, a safe workplace, confidentiality, and non-discrimination.<sup>13</sup>
- *Termination and Compensation*: Resignation, termination, redundancy, notice, severance, and post-termination duties, including non-compete agreements.
- *Dispute Resolution*: Fair and effective methods of resolving commercial disputes, such as labour tribunals, arbitration, and mediation.

Due to the contract's operation inside a larger legal framework, some of its terms, especially those that are less advantageous than statutory standards, may be null and void or unenforceable. The contract's applicability in transnational employment circumstances may also be influenced by international labour standards and conflict-of-law considerations.<sup>14</sup>

## **TYPES OF EMPLOYMENT CONTRACTS**

The terms of employment contracts are determined by the nature of the work and the relationship between the employer and employee. Different employment contract classes are determined by the nature of employment. Specific provisions for various work conditions are provided by different contracts.

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<sup>11</sup> Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time; Employment Standards Act, 2000 (Ontario, Canada).

<sup>12</sup> *Uber BV v. Aslam*, [2021] UKSC 5; California Assembly Bill 5 (AB5), Ch. 296, 2019.

<sup>13</sup> The Equality Act, 2010 (United Kingdom); Occupational Safety and Health Act, 1970 (United States).

<sup>14</sup> Regulation (EC) No. 593/2008 of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I); Hague Convention on the Law Applicable to Contracts of Employment, 1980.

- **Permanent Contract:** This type of work arrangement is the most common and lasts indefinitely until one side decides to terminate it. Usually, no end date is mentioned.
- **Contract with a fixed term:** The agreement expires after a predetermined amount of time, like a year. When the contract period ends, unless both parties agree to extend or renew it, the job connection ends.
- **Contract for Part-Time or Casual Work:** This type of employment agreement covers workers who put in fewer hours than full-time workers. These workers are frequently brought on by their employers to finish seasonal or specialised labour.
- **Consultant or Freelance Contract:** Consultants and freelancers work as independent professionals for a corporation, completing tasks for them within a specified project or time limit. Timeliness and deliverables are the main terms of these contracts.
- Employers can use a *probationary contract* to assess new hires for a predetermined amount of time before determining whether to offer them permanent employment.<sup>15</sup>

## LEGAL PROVISIONS OF EMPLOYMENT CONTRACTS

India's employment contracts are regulated by a number of important laws that specify their substance, enforceability, and legality. Key legal provisions pertaining to employment contracts are as follows:

- In 1872, the Indian Contract Act: In India, this is the fundamental legislation that regulates all contracts. According to Section 10, a contract for employment must be made with the free consent of both parties, for a legitimate purpose, and for a legitimate compensation. It must attempt to establish legal relations and not be specifically deemed null and void.<sup>16</sup>
- The 1947 Industrial Disputes Act: The terms of employment for industrial workers are governed by this statute. Employment contracts must include explicit provisions about termination, layoffs, retrenchments, and dispute resolution procedures, particularly in industrial settings.<sup>17</sup>
- State laws known as the Shops and Establishments Acts: The Shops and Establishments Act, which governs working hours, overtime, holidays, and leave

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<sup>15</sup> Understanding Employment Contracts in India, available at: <https://thelegalschool.in/blog/employment-contract> (last visited on: 18.07.2025).

<sup>16</sup> The Indian Contract Act, 1872 (Act 9 of 1872), s. 10.

<sup>17</sup> The Industrial Disputes Act, 1947 (Act 14 of 1947), ss. 2A, 9A.

rules, varies per state. These legislative requirements must be included by employers in employment contracts.<sup>18</sup>

- The 1948 Factories Act: This Act requires that health, safety, and welfare clauses be included in employment contracts for factory workers. It also establishes standards for women's and youths' employment, leave, and working hours.<sup>19</sup>
- The 1948 Minimum Wages Act: This Act guarantees that no worker receives less than the legally required minimum wage, which needs to be included in the employment contract.<sup>20</sup>
- The 1936 Payment of Wages Act and the 1965 Payment of Bonus Act: These Acts govern the prompt payment of bonuses and wages. For compliance, employers must incorporate relevant clauses into employment contracts.<sup>21</sup>
- The 2019 Code on Wages, which supersedes a number of previous laws: All employees are covered by this new labor code, which unifies the aforementioned wage-related rules. It highlights the necessity of contracts to guarantee openness regarding wages, working conditions, and job categorization.<sup>22</sup>
- Further Relevant Laws: The 1970 Contract Labour (Regulation and Abolition) Act applies to employees employed by contractors. For posting job openings, use the Employment Exchanges Act of 1959. Refer to the 2020 Occupational Safety, Health, and Working Conditions Code for health and safety requirements.

## **EMPLOYMENT CONTRACT IN LABOUR LAWS: COMPARATIVE STUDY**

Since they serve as a universal framework for defining the legal relationship between employers and employees, employment contracts vary greatly throughout jurisdictions in terms of their statutory foundations, substance, enforceability, and construction. This comparative analysis highlights both similarities and differences between the fundamental components and legal treatment of employment contracts in the US, UK, India, and Germany.

### ***Creation and Legal Character***

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<sup>18</sup> The Tamil Nadu Shops and Establishments Act, 1947 (example of a state-level statute).

<sup>19</sup> The Factories Act, 1948 (Act 63 of 1948), ss. 11–20, 51–66.

<sup>20</sup> The Minimum Wages Act, 1948 (Act 11 of 1948), s. 3.

<sup>21</sup> The Payment of Wages Act, 1936 (Act 4 of 1936); The Payment of Bonus Act, 1965 (Act 21 of 1965).

<sup>22</sup> The Code on Wages, 2019 (Act 29 of 2019), Ministry of Labour and Employment, Government of India.

Mutual consent, offer and acceptance, legitimate consideration, and legal competence are all necessary for an employment contract in every country. But the formal requirements are different:

- In the UK, employment agreements might be verbal, written, or implied. Nonetheless, employees are entitled to a written statement of particulars within two months of beginning employment under Section 1 of the Employment Rights Act of 1996.<sup>23</sup>
- United States: Unless a specific contract or collective agreement specifies otherwise, employment is often “at-will”, meaning that either side may end it at any time and without cause.<sup>24</sup>
- India: Labor-specific laws are added to the Indian Contract Act, 1872, which governs employment contracts. Although not required, written contracts are frequently used, especially in formal sectors.<sup>25</sup>
- Germany: Contracts must abide under the Protection Against Unfair Dismissal Act (Kündigungsschutzgesetz) and the German Civil Code (Bürgerliches Gesetzbuch, or BGB). According to §2 of the Nachweisgesetz, a written form is typically necessary.<sup>26</sup>

### **Conditions & Terms**

Important concepts like pay, working hours, vacation time, and responsibilities are addressed differently:

Germany & UK: Regardless of the wording of the contract, statutory protections are applicable. For example, work hours and breaks are governed by the Working Time Act (ArbZG, Germany) and the Working Time Regulations 1998 (UK).<sup>27</sup>

USA: While many safeguards differ by state, the Fair Labour Standards Act (FLSA) establishes minimum wage and overtime regulations. Compared to Europe, the scope of federal law is more constrained.<sup>28</sup>

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<sup>23</sup> Employment Rights Act, 1996, s. 1 (United Kingdom).

<sup>24</sup> J. M. Feinman, “The Development of the Employment at Will Rule” *American Journal of Legal History* (2000).

<sup>25</sup> The Indian Contract Act, 1872 (Act 9 of 1872); The Code on Wages, 2019 (Act 29 of 2019).

<sup>26</sup> Nachweisgesetz (NachwG), Federal Law Gazette I, 1995, p. 147 (Germany).

<sup>27</sup> The Working Time Regulations, 1998 (United Kingdom); The Arbeitszeitgesetz (ArbZG), 1994 (Germany).

<sup>28</sup> Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (United States).

India: In addition to federal laws such as the Factories Act, 1948, and the Code on Wages, 2019, terms are frequently regulated by state-specific Shops and Establishments Acts.<sup>29</sup>

### **Cancellation & Revocation**

Among the most varied are termination regulations:

- UK: After two years of employment, workers are safeguarded against being fired without cause, provided they have been given due process and have good cause.<sup>30</sup>
- USA: The at-will theory permits broad employer discretion in termination, unless specifically covered by a contract or anti-discrimination statutes (such as Title VII).<sup>31</sup>
- India: The Industrial Disputes Act, 1947, protects industrial workers and, in certain situations, calls for government approval or a valid reason for termination.<sup>32</sup>
- Germany: According to the Kündigungsschutzgesetz, terminations must be socially justifiable, particularly in companies with more than ten employees and after six months of continuous employment.<sup>33</sup>

### **Conflict Resolution**

Labour courts or employment tribunals are frequently used to settle disputes in the UK and Germany.

- USA: In order to minimise litigation, arbitration agreements are effective and frequently employed to the disadvantage of employee rights.<sup>34</sup>
- India: Depending on the categorisation of the worker, disputes are usually resolved by Industrial Tribunals, Labour Commissioners, or Labour Courts.<sup>35</sup>

Because employment contracts generally have a similar form, there are substantial differences in the degree of employee protection and governmental monitoring. While the U.S. system places more emphasis on contractual freedom and employer flexibility, European nations such as Germany and the UK place more emphasis on job security and

<sup>29</sup> The Code on Social Security, 2020 (Act 36 of 2020); Shops and Establishments Act (varies by state).

<sup>30</sup> Employment Rights Act, 1996, s. 94 (United Kingdom).

<sup>31</sup> Montana v. Gilham, U.S. Supreme Court, 1991; National Conference of State Legislatures, *At-Will Employment Overview*.

<sup>32</sup> The Industrial Disputes Act, 1947 (Act 14 of 1947), ss. 25F–25N.

<sup>33</sup> Kündigungsschutzgesetz (KSchG), 1951 (Germany).

<sup>34</sup> Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Federal Arbitration Act, 1925 (United States).

<sup>35</sup> The Industrial Disputes Act, 1947 (Act 14 of 1947); Labour Courts and Tribunals under Indian labour law.

statutory rights. India offers a hybrid model that combines modern reforms with worker protections from the colonial past.

## **ROLE OF EMPLOYMENT CONTRACTS IN PROTECTING RIGHTS**

In order to protect the rights and interests of both employers and employees, employment contracts are essential:

- Contracts give workers clarity on the terms and circumstances of their employment, including duties, pay, benefits, and termination grounds.
- Contracts assist employers in defining the parameters of the working relationship, safeguarding proprietary knowledge and intellectual property, and limiting liability in the event of a disagreement.
- Because they clearly outline each party's rights and responsibilities, well-written employment contracts can reduce the likelihood of disagreements and legal challenges.<sup>36</sup>

## **RIGHTS AND DUTIES OF EMPLOYMENT CONTRACTS IN INDIA**

The rights and obligations of each party are spelt out in detail in this legally binding agreement. Additionally, workers owe their employers reciprocal duties, which usually include:

### *Rights and Duties of Employees*

- i. Workers have the following basic rights: protection against discrimination on a variety of grounds, guaranteeing that everyone is treated equally.
- ii. A right to just compensation, which includes pay, benefits, and vacation time.
- iii. The right to a courteous and private workplace.
- iv. The right to a minimum salary, a safe workplace, and acceptable work hours.
- v. Keeping information private.
- vi. Respecting the company's rules.
- vii. Effectively carrying out job responsibilities.<sup>37</sup>

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<sup>36</sup> Complete Guide to Employment Contracts in India, available at: <https://www.takelegal.in/employment-contract-complete-guide-2024/> (last visited on: 18.07.2025).

## LANDMARK CASES LAWS

- The case of *Workmen v. The Steel Authority of India Ltd*<sup>38</sup>. Significance: Workers were laid off in this case. Impact: Highlighted the need to adhere to the Industrial Disputes Act's statutory processes and strengthened the protection against wrongful termination.
- The 1978 case of *Bangalore Water Supply & Sewerage Board v. R. Rajappa*<sup>39</sup> Significance: outlined the definition of a “workman” in the 1947 Industrial Disputes Act. Impact: This case broadened the range of employees covered by labour laws by emphasising the nature of the activity rather than the title or terms of the contract.
- *BHEL Workers Assn. v. Union of India*<sup>40</sup>, Significance: it was decided that contract workers should have the same rights to pay, holidays, working hours, and working conditions as those directly employed by the establishment's principal employer for the same or comparable type of work. Impact: Based on the specific facts of this case, it was decided that the working conditions and wage recovery process for contract workers should be comparable to those for principal employer employees under the relevant Industrial and Labour Laws.
- The 1985 case of *Olga Tellis v. Bombay Municipal Corporation*<sup>41</sup>, Significance: Although it focused mostly on the right to livelihood, it also had a broad impact on labour rights and the state's obligation to workers in the unorganised sector. Impact: Article 21 recognised the right to livelihood as a component of the right to life.
- In 1997, *Air India Statutory Corporation v. United Labour Union*<sup>42</sup> addressed the right to strike and the restrictions imposed on it. Impact: The public interest and necessary services were weighed against the right to strike by the court.
- *Management of Express Newspapers (P) Ltd. v. Workers*<sup>43</sup>, Significance: Described the function of trade unions in defending the rights of employees and collective bargaining.

<sup>37</sup> Shubhra Legal, “Understanding Employment Contracts in India”, LinkedIn, available at: <https://www.linkedin.com/pulse/understanding-employment-contracts-india-legal-shubhra-mv8mc> (last visited on: 18.07.2025).

<sup>38</sup> 1992 (1) KARLJ 477.

<sup>39</sup> (1978) 2 SCC 213.

<sup>40</sup> (1985) 1 SCC 630.

<sup>41</sup> AIR 1986 SC 180.

<sup>42</sup> AIR 1997 SC 645.

<sup>43</sup> AIR 1963 SC 569.

- *Mohan Kumar Singhania v. Union of India*<sup>44</sup>, Significance: The topic of contract labour and the extent of contract employment were examined. Impact: Resulted in increased oversight of contract workers and safeguards against exploitation.
- *D. K. Yadav v. J. M. A. Industries Ltd.*<sup>45</sup>, Significance: Talked about the fairness principle in terms of employment and termination. Impact: Emphasised that it is illegal to fire someone without good reason.

## CONCLUSION

The employer-employee relationship is based on an employment contract. By outlining each party's rights, obligations, roles, and responsibilities precisely, it helps to avoid misunderstandings and disputes. A specifically written contract of employment:

- i. Provides both the employer and the employee with legal protection,
- ii. Encourages equity and openness at work, and
- iii. Provide specific instructions on how to handle issues including compensation, working hours, leave, and termination.

The primary goal of employment contracts is always the same, even though their structure and legal requirements differ from nation to nation: to establish a cooperative and legally binding working relationship. It is more crucial than ever to have clear and legal employment contracts in the rapidly evolving workplace of today, which includes remote work, gig work, and international hiring. Both parties can better grasp their rights and obligations when there is a contract in place. By ensuring that everything is transparent and equitable, it safeguards both the employer and the employee. Although employment contracts vary from nation to nation, the fundamental objective is always the same: to establish a respected, equitable, and safe workplace.

Statutory labour laws in India have a significant impact on employment contracts and are designed to safeguard workers, especially in the formal sector. While the US prefers flexibility through the “at-will” employment model, striking a balance between employer freedom and fundamental statutory rights, the UK offers a structured, legally supported contract system with robust employee safeguards.

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<sup>44</sup> 1992 Supp (1) SCC 594.

<sup>45</sup> (1993) 3 SCC 259.

Employment contracts will continue to change as labour markets change and new work patterns (such as remote and gig work) appear. In addition to reducing disagreements, a well-written and legally compliant contract improves the working relationship and guarantees stability and equity in the workplace.

## SUGGESTION

- Required Written Agreements: To maintain legal protection and transparency, governments should require written employment contracts in all sectors, particularly in developing nations like India.
- Simplify and Standardise Contract Language: In order for workers of various literacy levels to comprehend their rights and responsibilities, employment contracts should be drafted in plain, straightforward language.
- Specify All Important Terms: Job positions, pay, working hours, leave policies, termination provisions, and dispute resolution procedures should all be properly covered in contracts to prevent confusion.
- Consistent Updates to Accompany Evolutions in the Law: To guarantee adherence to the most recent labour regulations, including the new labour codes in India, employers should periodically examine and revise contracts.
- Encourage Workers' Awareness: Employees should be educated through awareness campaigns about the value of employment contracts and their legal rights under them.
- Utilisation of Technology: Encourage the use of e-contracts, or digital employment contracts, to enhance documentation, cut down on paper use, and make recordkeeping and verification simpler.

**Improve Law Enforcement in the Unorganised Sector:** Since legal protections are frequently lacking in the unorganised and informal sectors, governments should concentrate on expanding the coverage and enforcement of employment contracts in these areas.