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## Contents

# BALANCING PROTECTION AND AUTONOMY: RETHINKING THE CRIMINALISATION OF ADOLESCENT SEXUALITY

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ABSTRACT

*The Protection of Children from Sexual Offences Act, 2012 (POCSO Act) raised the age of consent in India from 16 to 18, rendering all sexual activity involving persons below 18 a criminal offence, irrespective of consent. This paper interrogates whether such blanket criminalisation is compatible with constitutional guarantees and international human rights standards, and what an alternative framework distinguishing protection from over-criminalisation might look like. Combining doctrinal analysis of the statutory and judicial landscape with the Law Commission of India's 2023 recommendations and emerging empirical research on 'romantic' POCSO cases, it argues that the harms of criminalisation are systemic rather than incidental—violating adolescents' rights to life, dignity, liberty, privacy, and sexual and reproductive health. Drawing on expert consultations and interviews with practitioners working on child marriage, trafficking, and digital safety, the paper directly addresses the three principal child-protection concerns raised against decriminalisation and demonstrates that each can be met through targeted legal and policy responses. It proposes decriminalising consensual, non-exploitative sexual conduct involving adolescents above 16, while preserving the POCSO Act's full protections against abuse and exploitation, consistent with children's evolving autonomy and best interests.*

## I. CONTEXT

The Protection of Children from Sexual Offences Act, 2012 (POCSO Act) was enacted to 'protect children from offences of sexual assault, sexual harassment and pornography'[1] and lay down

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procedural standards for a child-friendly investigation and trial. While it plugged significant gaps in the general penal law, it raised the age of consent from 16 years to 18 years. Consequently, any sexual act - penetrative, non-penentrative, or non-touch based, with a person below 18 years constitutes a sexual offence, which attracts stringent punishment based on the nature of the act. Additionally, any person or hospital with knowledge or apprehension of a sexual offence against a child is legally required to report it to the police, and failure to do so is punishable.[2]

The law operates on the assumption that children are asexual and that sexual activities among or with adolescents under 18 years are inherently exploitative.[3] However, public health surveys reveal that 39% of women and 6% of men in the age group of 25-49 years had their first sexual intercourse before the age of 18 years.[4] The *Crime in India, 2023* report indicates that 52.98% of all registered cases of penetrative and aggravated penetrative sexual assault under the POCSO Act are cases where the offender's relation to the child victim was 'Friends/Online-Friends or Live in Partners on Pretext of Marriage'.[5] While the crime data does not offer any insight on whether the relationships were consensual or exploitative, empirical studies based on judgments of Special Courts under the POCSO Act indicate that 'romantic' cases constitute between 15-27% of decided cases.[6]

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[1] Protection of Children from Sexual Offences Act 2012 (POCSO Act), Objects and Reasons.

[2] POCSO Act 2012, ss 19(1), 20, 21; Bharatiya Nagarik Suraksha Sanhita 2023 (BNSS), s 397; Code of Criminal Procedure 1973 (CrPC), s 357.

[3] Swagata Raha, 'Criminalizing adolescent sexuality – The protection of children from sexual offences act and the rights of adolescents' (P39A Blog, 4 March 2021) ('Raha 2021'); Amita Pitre and Lakshmi Lingam, 'Age of consent: challenges and contradictions of sexual violence laws in India' (2021) 29(2) Sexual and Reproductive Health Matters 461 ('Pitre and Lingam 2021').

[4] International Institute for Population Sciences (IIPS) and ICF, 'National Family Health Survey (NFHS-5), 2019-21, India' (Ministry of Health and Family Welfare, Government of India) vol I ('NFHS 5'); Swagata Yadavar, 'Why India is unprepared for its gathering teen sexual revolution' *Business Standard* (12 January 2018).

[5] National Crime Record Bureau, 'Crime in India 2023' (Ministry of Home Affairs, Government of India) Table 4A.10, ('Crime in India 2023').

[6] Shruthi Ramakrishnan and Swagata Raha, "Romantic' Cases under the POCSO Act: A Study of 1715 Judgments of Special Courts in Assam, Maharashtra & West Bengal' (Enfold Proactive Health Trust, 2022) ('Ramakrishnan and Raha 2022'); Enfold Proactive Health Trust and Project 39A, National Law University, Delhi, 'The Verdict and Beyond: Judicial Trends and Survivor Narratives in Child Sexual Abuse Cases' (Enfold Proactive Health Trust, 2024) 100 ('Enfold and P39A 2024'); Enfold Proactive Health Trust, 'Response of the Child Protection System to Violence against Children in Rajasthan' (Enfold Proactive Health Trust, 2022); Maharukh Adenwalla and Prakriti Shah, 'Age of Consent under the POCSO Act' (SCC Online Blog, 12 March 2023); Centre for Child and the Law, 'Study on the working of Special Courts under the POCSO Act, 2012 in Delhi' (National Law School of India University, Bangalore, January 2016) 18 ('CCL Delhi Study 2016'); Centre for Child and the Law, 'Study on the working of Special Courts under the POCSO Act, 2012 in Andhra Pradesh' (National Law School of India University, Bangalore, November 2017) 35; Centre for Child and the Law, 'Study on the working of Special Courts under the POCSO Act, 2012 in Assam' (National Law School of India University, Bangalore, February 2017) 63; Centre for Child and the Law, 'Study on the working of Special Courts under the POCSO Act, 2012 in Maharashtra' (National Law School of India

International standards urge States to support adolescents through this stage of growth and not penalise factually consensual and non-exploitative sexual activity among adolescents of similar ages. Several High Courts have emphasised that criminalisation of consensual sex is not the objective of the POCSO Act[7] and that teenagers acting on their emotions and physical attraction is normal.[8] They have quashed proceedings in cases involving consensual adolescent sex,[9] urged the need for legislative amendments recognising consent[10] and recommended that instead of an adult-centric approach, a support-oriented one anchored on a biosocial approach to adolescent sexuality be adopted.[11]

University, Bangalore, September 2017) 38; Centre for Child and the Law, 'Study on the working of Special Courts under the POCSO Act, 2012 in Karnataka' (National Law School of India University, Bangalore, August 2017) 66; HAQ: Centre for Child Rights and Forum Against Sexual Exploitation of Children, 'Implementation of the POCSO Act: Goals, Gaps and Challenges – Study of cases in Special Courts in Delhi & Mumbai 2012–2015' (HAQ, 2017) ('HAQ and FACSE 2017'); Vidhi Centre for Legal Policy, 'A Decade of POCSO: Developments, Challenges and Insights from Judicial Data' (Vidhi, 2022) 95.

[7] *Vijaylakshmi v State represented by the Inspector of Police* 2021 SCC OnLine Mad 317 (Madras HC); *Atul Mishra v State of Uttar Pradesh*, Criminal Miscellaneous Bail Application No 53947 of 2021 (Allahabad HC, 25 January 2022); *Aarush Jain v State of Karnataka*, Criminal Petition No 3710 of 2022 (Karnataka HC, 9 September 2022); *Vrushabh Sudhir Shinde v The State of Maharashtra and Anr*, Bail Application No 257 of 2022 (Bombay HC, 20 November 2022); *K Anantha Perumal v The Inspector of Police*, Criminal Appeal No 59 of 2016 (Madras HC, 31 March 2023); *XXXX v State Government of National Capital Territory of Delhi*, Bail Application 2729/2022 (Delhi HC, 20 October 2022).

[8] *Sabari @ Sabarinathan v Inspector of Police* AIR OnLine 2019 Mad 1364 (Madras HC); *Agavai v The State* 2022 SCC OnLine Mad 1961 (Madras HC); *Ashik Ramjan Ansari v State of Maharashtra* 2023 SCC OnLine Bom 1390 (Bombay HC); *E Nareshkumar v State*, Criminal Appeal No 544 of 2018 (Madras HC, 10 September 2024).

[9] *John Franklin Shylla v State of Meghalaya* 2023 SCC OnLine Megh 303 (Meghalaya HC); *Karan v State of Himachal Pradesh*, Criminal Miscellaneous Petition No 1191 of 2022 (Himachal Pradesh HC, 3 January 2023); *Tarun Vaishnav v State of Rajasthan* 2022 SCC OnLine Raj 2237 (Rajasthan HC); *Amit Kumar v The State* 2022 SCC OnLine Del 4188 (Delhi HC); *Aarush* (n 7); *Vijaylakshmi* (n 7); *V Anil Kumar v The State of Andhra Pradesh*, Criminal Petition No 3355 of 2022 (Andhra Pradesh HC, 2 May 2022); *Mohit v State of Uttar Pradesh*, Under Section 482/378/407 No 551 of 2021 (Allahabad HC, 8 March 2021); *Unni A and Ors v State of Kerala and Ors* 2020 SCC OnLine Ker 17576; *Md Jahirul Maulana v State of Assam* 2016 SCC OnLine Gau 781 (Gauhati HC); *Sunilkumar Dilipbhai Patel v State of Gujarat* 2020 SCC OnLine Guj 2434 (Gujarat HC); *Ashok Dhondiba Kale v State of Maharashtra and Ors* 2018 SCC OnLine Bom 1826 (Bombay HC); *Akash Gupta v State of Uttarakhand and Ors*, Criminal Miscellaneous Application No 502 of 2018 (Uttarakhand HC, 27 October 2018); *Parampreet Singh v State of Punjab and Ors*, Criminal Miscellaneous Petition No 5009/2022 in Criminal Main-35578/2020 (Punjab and Haryana HC, 21 March 2022).

[10] *Sabari* (n 8); *Vijaylakshmi* (n 7); *Anandan and Ors v State and Ors*, Criminal Miscellaneous Petition Nos 13296 and 13297 of 2022 (Madras HC, 2 September 2022); *Kothandapani v State and Ors*, Criminal Original Petition No 20729 of 2022 (Madras HC, 2 September 2022); *S Kanthasamy v The State and Ors*, Criminal Original Petition No 17614 of 2022 (Madras HC, 26 August 2022); *Manimaran v The Station House Officer, Kottucherry Police Station and Ors* 2021 SCC OnLine Mad 6613 (Madras HC); *Rahul Chandel Jatav v State of Madhya Pradesh* 2023 SCC OnLine MP 7078 (Madhya Pradesh HC); *Veekesh Kalawat v State of Madhya Pradesh* 2023 SCC OnLine MP 6937 (Madhya Pradesh HC); *State of Karnataka v Basavaraj* 2022 SCC OnLine Kar 1608 (Karnataka HC).

[11] *Vijaylakshmi* (n 7).

Two High Courts requested the Law Commission of India (LCI) to reconsider the age of consent in light of the criminalisation of adolescents engaged in consensual relationships,[12] following which the LCI considered this in Report No. 283 on Age of Consent under the POCSO Act in 2023 (LCI Report).[13] The report acknowledged that the 'blanket criminalisation of sexual activity amongst and with a child, though intended to safeguard children, is leading to incarceration of young boys and girls who engage in such activities as a consequence of sexual curiosity and need for exploration that may to some extent be normative for an adolescent.'[14] However, it expressed concerns that decriminalising consensual sexual acts involving adolescents above 16 years could adversely affect efforts to address child marriage, trafficking, and online harms faced by children. It recommended that judicial discretion be introduced in sentencing to deal with such cases instead of imposing high mandatory minimum sentences.[15] The criminalisation of adolescents who engage in consensual non-exploitative sexual acts has also been acknowledged as a problem by the National Human Rights Commission,[16] civil society organisations,[17] health experts,[18] among others.

However, the continued criminalisation of adolescents above 16 years and young persons for factually consensual and non-exploitative acts have significant implications on their rights. This paper outlines the existing legal framework and examines the implications of blanket criminalisation of all sexual acts on adolescents' rights. It also examines child protection concerns related to the decriminalisation of sexual acts involving adolescents on child marriage laws, trafficking laws, and children's online safety. It proposes policy changes premised on children's rights under the Indian Constitution and international legal standards, particularly the principle of

[12] *Basavaraj* (n 10)*; Veekesh Kalawat* (n 10).
[13] Law Commission of India, *Age of Consent under the Protection of Children from Sexual Offences Act, 2012* (Law Commission Report No 283, 2023) ('LCI Report 2023').
[14] ibid para 18.2, 101.
[15] LCI Report 2023 (n 13) 116–118.
[16] National Human Rights Commission, 'Recommendations, North West Regional Conference held on 18–19 June 2018'.
[17] CCL Delhi Study 2016 (n 6); Partners for Law in Development, 'Submissions to the ICJ: Impact on Health and Human Rights Through Criminalisation in Adolescent Sexuality' (2018); HAQ and FACSE 2017 (n 6).
[18] Sumitra Debroy, 'Mumbai: 95% Fall in Abortions Among Under-15, Experts Worry Unsafe Options on Rise' *The Times of India* (13 May 2019); Centre for Child and the Law, 'An Analysis of Mandatory Reporting under the POCSO Act and its Implications on the Rights of Children' (National Law School of India University, June 2018) ('CCL 2018'); Veenashree Anchan and others, 'POCSO Act, 2012: Consensual Sex as a Matter of Tug of War Between Developmental Need and Legal Obligation for the Adolescents in India' (2020) 43(2) Indian Journal of Psychological Medicine ('Anchan and others 2020'); N Jagadeesh and others, 'Ethical concerns related to mandatory reporting of sexual violence' (2016) 2(2) Indian Journal of Medical Ethics 116 ('Jagadeesh and others 2016'); Prarthana Lohia and Anshit Baxi, 'Balancing protection and autonomy: Navigating sexual and reproductive healthcare for adolescent girls in India' (SVRI Blog).

best interest of the child and their right to life, liberty, dignity, sexual and reproductive health, and privacy.

The central question this paper engages with is whether the blanket criminalisation, under the POCSO Act, of all sexual activity involving persons below 18 years is compatible with fundamental rights and international human rights law standards, and if not, what an alternative legal framework that distinguishes protection from over-criminalisation might be. The paper combines doctrinal analysis of the statutory framework and judicial decisions with the LCI's 2023 recommendations and an emerging body of empirical research on 'romantic' POCSO cases, in order to demonstrate that the harms of criminalisation are not incidental or marginal but systemic. It responds directly to the three principal child protection concerns related to decriminalisation – child marriage, trafficking, and online harm, and argues that each can be addressed through targeted legal and policy responses without blanket criminalisation of consensual adolescent sexual activity.

The empirical data in this paper is drawn primarily from existing studies of decided POCSO and PCMA cases. The arguments and policy formulation proposed in the paper have been shaped by inputs gathered from consultation and semi-structured interviews with experts in child trafficking, child marriage and digital safety, identified through purposive sampling on the basis of their published work and field engagement. Three thematic online consultations were held with a total of 90 participants drawn from organisations working on child protection, child rights, anti-trafficking, gender justice, and digital safety, as well as child protection functionaries such as members of Child Welfare Committees, Juvenile Justice Boards, and District Child Protection Units. Participants were identified through the authors' institutional networks and through the National Coalition on Advancing Adolescent Concerns. The consultations were structured around the three child-protection concerns most frequently raised against decriminalisation – child marriage, trafficking, and online harm – and were used to test the analytical arguments developed from the doctrinal and empirical literature, to identify gaps in the existing legal response, and to surface field-level experience of how the POCSO Act actually operates in adolescent cases. The proposed law reform takes into account the concerns raised by frontline workers and experts.

The paper uses 'child' in its legal connotation under the POCSO Act, that is, any person below 18 years. 'Adolescent' is used in its developmental and public-health frame to refer to

persons between 10 and 19 years, with particular attention to those between 16 and 18 years, who are at the centre of the decriminalisation debate. 'Young persons' refers to those between 19-24 years who are routinely drawn into POCSO proceedings on account of acts committed with a person below 18. The paper's normative position is that all persons below 18 are entitled to protection from sexual abuse and exploitation, but adolescent autonomy needs to be balanced with protection and hence the law should not criminalise consensual non-exploitative sexual conduct of those above 16 years.

## II. DOMESTIC LEGAL FRAMEWORK

Indian laws do not distinguish between sexual offences and factually consensual normative adolescent sexual activity, whether offline or online, treating both alike, thereby conflating protection with over-criminalisation.

This section maps the domestic legal framework relevant to sexual offences against children under the POCSO Act, the general penal law (the IPC, now succeeded by the BNS), the Information Technology Act, 2000 and the Juvenile Justice (Care and Protection of Children) Act, 2015. It then outlines relevant provisions of the Prohibition of Child Marriage Act, 2006 which as child marriages may be valid but sex within them is criminal. It finally consolidates the principal judicial responses of the High Courts that have articulated concerns about the over-reach of the criminal law into adolescent relationships. The intention is to emphasise select features of the laws that the analysis in Section III then critically interrogates. Note that India transitioned from the Indian Penal Code, 1860 (IPC) to the Bharatiya Nyaya Sanhita, 2023 (BNS) and from the Code of Criminal Procedure, 1973 (CrPC) to the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) on 1 July 2024. The references in this paper are to the current provisions of the BNS, with the corresponding IPC sections cited where the older provision is relevant to the judgments discussed.

### *A. Sexual Offences against Children*

The POCSO Act was enacted pursuant to Article 15(3), Constitution of India, which empowers the State to make special provisions for women and children and India's obligation under

the United Nations Convention on the Rights of the Child, 1989 (UNCRC).[19] A 'child' is defined in Section 2(d), POCSO Act to mean 'any person below the age of eighteen years' and all sexual acts - penetrative and non-penetrative - with a child are criminalised. With the enactment of the POCSO Act, India's age of consent for sexual acts was effectively raised from 16 years to 18 years.[20] This change was also introduced in the Indian Penal Code, 1860 (IPC) in 2013 and is reflected in the Bharatiya Nyaya Sanhita, 2023 (BNS).[21]

Penetrative sex with a child is punishable under Section 64, BNS and Section 4(1), POCSO Act with a minimum imprisonment of 10 years which may extend to life imprisonment till the remainder of a person's natural life. If the child is below 16 years, the minimum punishment is 20 years' imprisonment. Aggravated penetrative sexual assault, which includes sex that results in a pregnancy, or repeated penetrative sexual acts, is punishable under Section 6, POCSO Act, with a minimum of 20 years' rigorous imprisonment, which may extend to life imprisonment, or the death penalty. Courts have no discretion to award sentences below the minimum terms prescribed under the POCSO Act or IPC. The POCSO Act also provides for mandatory reporting of sexual offences against children and the police are legally obligated to record information received about commission of a sexual offence under the POCSO Act, and failure to do so is a punishable offence.[22]

Section 67B, Information Technology Act, 2000 (IT Act) and Section 15, POCSO Act target the creation and sharing of sexually explicit material involving children in compliance with the UNCRC to prevent 'the exploitative use of children in pornographic performances and materials.'[23] 'Child pornography' is defined under Section 2(da), POCSO Act, as 'any visual depiction of sexually explicit conduct involving a child which include photograph, video, digital or computer generated image indistinguishable from an actual child and image created, adapted, or modified, but appear to depict a child.' Sections 13 and 14, POCSO Act, penalise the use of a child for pornographic purposes, i.e, in any form of media for the purposes of sexual gratification and

[19] POCSO Act 2012, Preamble.
[20] Further, in *Independent Thought v Union of India* AIR 2017 SC 494 (Supreme Court), the marital rape exception in the Indian Penal Code 1860 (IPC) was read down, and thus sex with a wife below the age of 18 years constitutes rape under s 375, IPC. This change is reflected in the Bharatiya Nyaya Sanhita 2023 (BNS).
[21] The Bharatiya Nyaya Sanhita 2023 (BNS) replaced the Indian Penal Code 1860 (IPC) with effect from 1 July 2024. The Code of Criminal Procedure 1973 (CrPC) was similarly replaced by the Bharatiya Nagarik Suraksha Sanhita 2023 (BNSS) from that date.
[22] POCSO Act 2012, s 21(1).
[23] POCSO Act 2012, Preamble.

punishments range from five years to seven years' imprisonment. They criminalise the representation of sexual organs of a child, usage of a child engaged in real or simulated sexual acts, or the indecent or obscene representation of a child. Section 15, POCSO Act, criminalises the storage of pornographic material and can apply to adolescents storing their own sexually explicit images or sharing such images with their consensual sexual partners. Punishments range from fines to imprisonment up to seven years. Additionally, Sections 11 and 12, POCSO Act, dealing with sexual harassment *inter alia* prohibits any form of communication with a child with sexual intent and can be construed to apply where adolescents share sexually explicit material or texts with a sexual/romantic partner or engage in sexual acts through videocalls or ask their adolescent partner for sexually explicit content.

Creation of texts or digital images depicting a child, including oneself, in an 'obscene, indecent or sexually explicit manner' also constitutes an offence under Section 67B(b), IT Act. Publishing or transmitting such images to a sexual or romantic partner constitutes an offence under Section 67B(a), IT Act and browsing and downloading this material by the partner constitutes an offence under Section 67B(b), IT Act. While the term 'publishes' is not defined in this provision, Section 66E, IT Act defines 'publishes' for that section as 'reproduction in the printed or electronic form and making it available for public'. Thus, an adolescent posting pictures on social media platforms of a 'sexually explicit act' risks prosecution and punishment under Section 67B(a), IT Act.

The Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act) applies in cases where the accused is below 18 years on the date of commission of the offence. If the child is above 16 years and is accused of penetrative or aggravated penetrative sexual assault, the Juvenile Justice Board (JJB) can transfer the child for trial as an adult after a preliminary assessment.[24] Children tried and punished as adults can be sentenced to imprisonment with the exception of death penalty and life imprisonment without the possibility of release.[25] Further, minors who have eloped with or married their partner, may be dealt with as children in need of care and protection by the Child

[24] Juvenile Justice (Care and Protection of Children) Act 2015 (JJ Act), ss 15, 18(3).
[25] JJ Act 2015, s 21.

Welfare Committee (CWC) under the JJ Act, if they refuse to return to their parents or their parents refuse to take them home.

### *B. Child Marriage*

The Prohibition of Child Marriage Act, 2006 (PCMA) and provisions related to kidnapping under the BNS are applicable in cases entailing elopement and marriage. Under the PCMA, 'child' means a female below 18 years and a male below 21 years[26] and a marriage involving either or both is a child marriage.[27] Males above 18 marrying a female child, and families arranging a child marriage are offences punishable with imprisonment of up to two years.[28] The marriage is, however, valid and voidable at the option of the child party,[29] except in certain situations where it is void.[30] This results in a dichotomous situation wherein child marriage is valid, but sex within the marriage is unlawful and attracts stringent punishment. In Karnataka and Haryana, however, child marriages are void *ab initio*.[31]

### *C. Judicial Responses*

High Courts in several jurisdictions, most prominently the Madras, Meghalaya, Bombay, Karnataka, Madhya Pradesh, Allahabad, Delhi, Kerala, Himachal Pradesh and Gauhati High Courts, and more recently the Supreme Court, have questioned the appropriateness of criminalisation of adolescent relationships in the course of deciding bail applications, appeals, and petitions to quash such cases. They have highlighted the several harms of blanket criminalisation of normative sexual acts involving adolescents. Courts in some cases have also taken the interpretation that consensual acts may not meet the legal threshold of 'assault' required for the offence of penetrative sexual assault.[32] They have drawn attention to the conflation of consensual

[26] Prohibition of Child Marriage Act 2006 (PCMA), s 2(a).
[27] PCMA 2006, s 2(b).
[28] PCMA 2006, ss 9, 10, 11, 13(10).
[29] PCMA 2006, s 3.
[30] PCMA 2006, ss 12, 14.
[31] The Prohibition of Child Marriage Act (Karnataka Amendment) Act 2016, s 2; The Prohibition of Child Marriage (Haryana Amendment) Act 2020, s 2.; See also Pitre and Lingam 2021 (n 6) 10.
[32] *Shembhalang Rynghang v State of Meghalaya* 2022 SCC OnLine Megh 67 (Meghalaya HC); *Ananta Boro v State of Meghalaya*, Criminal Petition No 75 of 2022 (Meghalaya HC, 22 February 2023); *Teiborlang Kurkalang v State of Meghalaya* 2022 SCC OnLine Megh 65 (Meghalaya HC); *Silvestar Khonglah v State of Meghalaya and Anr* 2022 SCC OnLine Megh 575 (Meghalaya HC).

acts with rape[33] and observed that the acts in a consensual sexual relationship cannot be equated with assault based on the lack of 'cruelty' or 'depravity'.[34] Voicing the danger of applying a strict interpretation of the law in these cases, the Meghalaya High Court remarked '**the course or cause of justice may not have been served, but only the letter of the law fulfilled.**'[35]

## III. IMPLICATIONS OF CRIMINALISATION AND THE CASE FOR DECRIMINALISATION

This section sets out the case for decriminalisation based on the impact of blanket criminalisation on dignity and privacy, on liberty, on evolving autonomy and best interests, on sexual and reproductive health, and on the functioning of the criminal justice system itself. The arguments combine analysis of constitutional standards and relevant international standards, judicial observations which illustrate recognition of the problems with criminalisations, as well as empirical evidence.

Blanket criminalisation of all adolescent sexual activity unjustly penalises normative sexual exploration that is a natural and integral part of adolescent development and transition into adulthood.[36] Adolescence is universally recognised as a 'unique defining stage of human development', marking a transition between childhood and adulthood and 'characterized by rapid brain development and physical growth, enhanced cognitive ability, the onset of puberty and sexual awareness and newly emerging abilities, strengths and skills.'[37] Sexual exploration is also a part of their developmental journey of understanding boundaries, and their identity.[38]

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[33] *Anoop v State of Kerala*, Bail Application No 3273 of 2022 (Kerala HC, 8 June 2022).
[34] *Shambu Thilak v State*, Criminal Miscellaneous Case No 3810 of 2016 (Kerala HC, 6 January 2017). See also *Muhammed Fasil v Sabira and Ors* 2017 SCC OnLine Ker 5952 (Kerala HC).
[35] *Olius Mawiong v State of Meghalaya* 2022 SCC OnLine Megh 332 (Meghalaya HC).
[36] Anchan and others 2020 (n 18); Committee on the Rights of the Child, *General Comment No 20 on the Implementation of the Rights of the Child during Adolescence* (2016) CRC/C/GC/20, para 9 ('CRC General Comment No 20'); Deborah L Tolman and Sara I McClelland, 'Normative Sexuality Development in Adolescence: A Decade in Review, 2000–2009' [2011] Journal of Research on Adolescence; WHO Regional Office for Europe and BZgA, 'Standards for Sexuality Education in Europe' (WHO Europe 2010); Megan Price and others, 'Young Love: Romantic Concerns and Associated Mental Health Issues among Adolescent Help-Seekers' (2016) 6(2) Behavioural Sciences (Basel) 9; *Vijaylakshmi* (n 7).
[37] CRC General Comment No 20 (n 36), para 9.
[38] Report of the United Nations High Commissioner for Human Rights submitted to the Human Rights Council (28 June 2018) A/HRC/39/33, para 31; Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health submitted to the Human Rights Council (4 April 2016)

In 2016, the Committee on the Rights of the Child (CRC) expressly recommended that 'States should avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity.'[39] It urged States to 'introduce measures to help them to thrive, explore their emerging identities, beliefs, sexualities and opportunities, balance risk and safety, build capacity for making free, informed and positive decisions and life choices, and successfully navigate the transition into adulthood.'[40] In 2019, the CRC, in General Comment No. 24 on Children's Rights in the Justice System, reiterated that States should remove status offences, such as offences that criminalise 'adolescents who engage with one another in consensual sexual acts'.[41] This is also reflected in standards related to children's rights in the digital realm.[42] The blanket criminalization under the POCSO Act under the guise of protecting all persons below 18 years from sexual abuse, is thus not in alignment with India's obligations under the UNCRC.

Several High Courts, including the Madras, Bombay, Karnataka, Allahabad, Meghalaya, Madhya Pradesh and Delhi High Courts, have questioned the use of the POCSO Act – a law enacted to protect children from sexual abuse – to regulate adolescent sexuality[43] and the wisdom of criminalising such acts.[44] They have reiterated that adolescent love is not 'unnatural' or 'alien' and is a result of natural 'biological attraction'.[45] Some High Courts have called for a change in the law noting the inappropriateness of treating consensual adolescent sexual acts on par with rape and proposed a 'biosocial approach' that is informed by adolescent psychology and recognises the normative nature of adolescent romance.[46]

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A/HRC/32/32, paras 9–13 ('Report of the Special Rapporteur 2016'); World Health Organisation, *Assessing and supporting adolescents' capacity for autonomous decision-making in health-care settings* (WHO 2021) para 3.2.

[39] CRC General Comment No 20 (n 36), para 40.

[40] CRC General Comment No 20 (n 36), para 16.

[41] CRC General Comment No 20 (n 36), para 12; Committee on the Rights of the Child, *General Comment No 24 on Children's Rights in the Child Justice System* (2019) CRC/C/GC/24, para 12.

[42] Committee on the Rights of the Child, *General Comment No 25 on Children's Rights in relation to the Digital Environment* (2021) CRC/C/GC/25, para 4 ('CRC General Comment No 25').

[43] *Vijaylakshmi* (n 7); *Atul Mishra* (n 7); *Shembhalang* (n 32); *Kuldeep v State of Himachal Pradesh* 2019 SCC OnLine HP 2659 (Himachal Pradesh HC); *Roujalin Rout v State of Odisha* 2024 SCC OnLine Ori 1339 (Odisha HC).

[44] *Vijaylakshmi* (n 7) [28].

[45] *Sabari* (n 8); *Aarush* (n 7).

[46] *Vijaylakshmi* (n 7) [13]; *Atul Mishra* (n 7) [14].

The LCI Report acknowledged these concerns but instead of decriminalisation, proposed judicial discretion in sentencing. However, there are several rights violations inherent in the criminalisation of normative acts that merit consideration.

### *A. Undermining dignity and privacy*

The fundamental rights to dignity and privacy extend to all individuals, including adolescents.[47] The Supreme Court has recognised that privacy, inherently linked to dignity, encompasses personal spheres such as family, procreation, and marriage, and the ability to make intimate decisions.[48] High Courts have also highlighted the disproportionate intrusion of the criminal law into the personal sphere particularly when the adolescent in question does not seek criminal intervention in POCSO cases.[49] The Madras High Court in *Vijayalakshmi v State Rep. the Inspector of Police*,[50] emphasised that the use of the POCSO Act could lead to irreversible damage to the reputation and livelihood of youth whose actions were only a consequence of 'biological attraction',[51] emphasising the deleterious impact of excessive criminalisation on the dignity and worth of the individual accused. In *Veekesh Kalawat v State of Madhya Pradesh*,[52] the Madhya Pradesh High Court also noted the 'oppressiveness' of the POCSO Act against marginalised sections already affected by illiteracy and poverty. By ignoring normative adolescent development, social realities, and diverse tribal and cultural practices that accept adolescent sexuality,[53] the law disproportionately impacts adolescents and places those in inter-caste and inter-faith relationships at significant risk of being criminalised.

The ensuing police interrogation, arrest, detention, invasive medical examinations, and interface with child protection authorities aggravates the intrusion and exposes young persons to

[47] JJ Act 2015, s 3(xi); *Justice K S Puttaswamy v Union of India* [2017] 10 SCR 569 (Supreme Court); *Navtej Singh Johar v Union of India* (2018) 10 SCC 1 (Supreme Court); *X v The Principal Secretary, Health and Family Welfare Department, Government of National Capital Territory of Delhi* [2022] 7 SCR 686 (Supreme Court) ('X v Principal Secretary').
[48] *Puttaswamy* (n 47), Justice Chandrachud [142], [169] and Justice Sanjay Kishan Kaul [78].
[49] *Pooja and Ors v State of UP and Ors*, Application under Section 482 No 136 of 2016 (Allahabad HC, 29 February 2024) [17]; *Parampreet* (n 9).
[50] *Vijaylakshmi* (n 7).
[51] ibid [28].
[52] *Veekesh Kalawat* (n 10).
[53] M Santhanaraman, 'Branded a criminal for following custom' *The Hindu* (13 April 2022); Saritha S Balan, 'How POCSO Act continues to unfairly impact tribal communities in Kerala' *The Newsminute* (19 December 2022); *Roujalin* (n 43); Juvenile Justice Committee of Madhya Pradesh High Court, 'Madhya Pradesh State Level Multi-Stakeholders Consultation on Effective Implementation of POCSO Act, 2012 Manthan' (5–6 November 2022) 20.

moral judgment, humiliation, and loss of liberty.[54] Both accused persons and victims experience stigma, shame, erosion of self-worth[55] and disruption at every stage, significantly hindering their development, education, and employment. For those convicted, the consequences are even more severe, and include lengthy imprisonment and inclusion in the Sex Offenders Registry. In *State v Hitesh*,[56] the Delhi High Court observed '[l]ove is a fundamental human experience, and adolescents have the right to form emotional connections. The law should evolve to acknowledge and respect these relationships, as long as they are consensual and free from coercion.'

A comparable dignity-based analysis has been articulated by the South African Constitutional Court. In *Teddy Bear Clinic for Abused Children and Anr. v Minister of Justice and Constitutional Development and Anr.*,[57] the South African Constitutional Court held that legal provisions criminalising consensual sex amongst adolescents offended their dignity, even if rarely enforced. It concluded that '[i]f one's consensual sexual choices are not respected by society, but are criminalised, one's innate sense of self-worth will inevitably be diminished.'

In the Indian context, labelling acts of normative adolescent sexuality as a sexual offence, especially rape, essentially punishes adolescents for seeking human connection and engaging in developmentally appropriate behaviour. It subjects adolescents to legal scrutiny and humiliation for private experiences that are central to their growth and identity, striking at the core of their right to life which encompasses dignity, bodily integrity, and autonomy. It is also a violation of the constitutional obligation under Article 39(f) to ensure that children have opportunities and facilities 'to develop in a healthy manner and in conditions of freedom and dignity' while ensuring that childhood and youth are protected against exploitation, moral and material abandonment.'

### *B. Deprivation of Liberty*

The law's unintended consequence has been the gross deprivation of the liberty of adolescents and young persons in consensual relationships. While male parties are invariably treated as accused persons, facing arrest and incarceration, the female parties are treated as victims

[54] Enfold and P39A 2024 (n 6) 149–152; *Kajendran J v Superintendent of Police*, Habeas Corpus Petition No 2182 of 2022 (Madras HC, 7 July 2023 and 15 July 2024).
[55] See *Teddy Bear Clinic for Abused Children and Anr v Minister of Justice and Constitutional Development and Anr* (CCT 12/13) [2013] ZACC 35 (Constitutional Court of South Africa).
[56] *State v Hitesh* 2025 SCC OnLine Del 962 (Delhi HC) [30].
[57] *Teddy Bear Clinic* (n 55).

facing institutionalisation. Even where both are minors, the law remains gendered in its application and minor boys above 16 years face the risk of being tried and punished as adults.

Though convictions are rare in consensual cases,[58] the accused persons are arrested and taken into custody as rape is a non-bailable offence.[59] Regardless of the outcome of the trial, the arduous processes they are subjected to during investigation and trial and the threat of conviction inflicts significant suffering.[60] Where, however, courts have applied the law strictly, disregarding the consensual nature of the relationship, convictions have resulted in the imposition of minimum mandatory sentences ranging from 10 years to 20 years.[61]

High Courts have taken note of the adverse impact of prolonged incarceration,[62] the exposure to hardened criminals,[63] and standing trial,[64] including the disruption of the education and livelihood of the accused[65] and exercised their inherent power to quash ongoing trials and provided other reliefs in consensual cases. The Madras High Court has noted that the accused person's 'youthful life comes to a grinding halt'[66] and that '[a]n adolescent boy who is sent to prison in a case of this nature will be persecuted throughout his life.'[67] Recognising the deprivation of liberty and disruptions caused by arrests in such cases, the Juvenile Justice Committee and the POCSO Committee of the Madras High Court passed a resolution directing the Tamil Nadu Police to issue a notice of appearance to the accused in 'mutually consensual' cases under the POCSO Act, rather than arresting them. Based on this resolution, the Tamil Nadu Police issued a circular implementing this directive, which is now followed in practice.[68]

Adolescent girls are also deprived of their liberty as cases under the POCSO Act invariably result in their institutionalisation in Children's Homes when they refuse to return to their parents

[58] Ramakrishnan and Raha 2022 (n 6) 28.
[59] BNSS 2023, sch I; CrPC 1973, sch I.
[60] *Rama @ Bande Rama v State of Karnataka,* 2022 SCC OnLine Kar 1717 (Karnataka HC) [9].
[61] *State of Gujarat v Ashokbhai* 2018 SCC OnLine Guj 1123 (Gujarat HC); *Vijayakumar v State*, Criminal Appeal Nos 56 of 2023 and 368 of 2025 (Madras HC).
[62] *Vrushabh* (n 7).
[63] *Imran Iqbal Shaikh v State of Maharashtra*, 2023 SCC OnLine Bom 1040 (Bombay HC).
[64] *Rama* (n 60).
[65] *Aarush* (n 7).
[66] *Vijayalakshmi* (n 7) [18]. Also see *Anandan* (n 10).
[67] *Anandan* (n 10) [10].
[68] Tamil Nadu Police, Circular Memorandum, Rc.No.009464/Crime-4(3)/2022 (3 December 2022).

and insist on being with their partner.[69] Alternatives are rarely explored and institutionalisation is deemed as being 'in the best interest of the child,' as the girl is not allowed to remain with her partner. Institutionalisation is also used as a form of punishment and judgment of the girl's choices for entering into a relationship. Further, confusion about the authority responsible for ordering their release and concerns about release to their 'accused' partner or his family has resulted in prolonged detention of girls, sometimes even after they have attained 18 years. In the absence of periodic reviews, institutionalisation deprives girls of education, employment, and personal liberty, and compromises their physical and mental health. It also leaves pregnant girls or those with children with limited access to sexual and reproductive health services and familial care. Over-criminalisation has thus resulted in the unjust loss of liberty of adolescent boys and girls for engaging in normative sexual behaviour.

### *C. Disregard for Evolving Autonomy and Best Interests*

The law diminishes the identity of adolescent girls by reducing them to 'victims,' and negates their best interests and evolving autonomy.[70] Though the age of majority is set at 18 years,[71] the Indian legal system recognises the concept of evolving capacities with varying age thresholds specified for access to free and compulsory education, labour, consent for medical examination, giving a statement under oath, and culpability for heinous offences,[72] among others. The POCSO Act, however, blurs the developmental differences between children and adolescents.

Incidentally, the POCSO Bill, 2011, acknowledged that adolescents above 16 years enter into consensual sexual relationships.[73] The National Commission for Protection of Child Rights (NCPCR) in its separate draft of the POCSO Bill, 2010, included provisions recognising consensual

[69] See *Javed v State of Haryana and Ors*, Criminal Writ Petition No 7426 of 2022 (Punjab and Haryana HC, 30 September 2022).
[70] Ramakrishnan and Raha 2022 (n 6) 60; Raha 2021 (n 3); Enfold Proactive Health Trust, 'Trends in Child Marriage: Insights from Judgments under the Prohibition of Child Marriage Act, 2006 in Assam, Maharashtra and Tamil Nadu' (2024) 20 ('Enfold Proactive Health Trust 2024'); Partners for Law in Development, 'Why Girls Run Away to Marry – Adolescent Realities and Socio-Legal Responses in India' (2019) 31, 37 ('PLD 2019'); Medha Shukla and Biraj Swain, 'The Unintended Victims: How POCSO Affects Adolescents' Autonomy and Access to Health' (LiveLaw, 14 November 2024) ('Shukla and Swain 2024').
[71] The Indian Majority Act 1861.
[72] There are constitutional concerns about the treatment of adolescents above 16 years accused of heinous offences as adults, as well concerns about its compatibility with the UNCRC and other international standards. This is, however, beyond the scope of this paper.
[73] Protection of Children from Sexual Offences Bill 2011, as introduced in the Rajya Sabha.

non-penetrative acts among children above 12 years of age who are of the same age or within two years of each other, and consensual penetrative acts between persons above 14 years who are of the same age or within three years of each other.[74] It also recognised consensual penetrative acts by children between 16-18 years and specified circumstances of force, violence, coercion, threats, intoxication, impersonation, and the like, in which the consent would be vitiated.[75] Despite this, the POCSO Act takes a 'one size fits all' approach that has prompted Courts to question its alignment with ground realities. For example, the Meghalaya High Court recognised the evolving autonomy of adolescents, maturity of parties, and the ability of the victim for rational thinking and decision-making.[76] It has also held sexual relationships between two consenting persons cannot be termed as 'sexual assault' in the absence of any threat or attempt to inflict offensive physical contact or bodily harm.[77]

UN treaty-bodies and special mechanisms have consistently recognised the unique nature of adolescence as a development phase that entails physical, behavioural, emotional and neurological changes.[78] Observing that '[a]dolescence is a life stage of intrinsic value, not merely a transition between childhood and adulthood',[79] the Special Rapporteur on the Right to Health emphasised the evolution, development and learning that takes place during adolescence and observed that:

> '....while adolescents under 18 years of age continue to be entitled to protection from violence, abuse and exploitation, as well as to consideration of their best interests, under the Convention on the Rights of the Child, the nature of those protections and their application must reflect the emerging competencies acquired throughout adolescence.'[80]

Courts have recognised several elements of best interests such as the views of the 'child', the significance of preservation of family relationships, particularly when parties are married and

[74] National Commission for Protection of Child Rights (NCPCR), Protection of Children from Sexual Offences Bill 2010, Exception to Clause 3A.
[75] ibid Clause 3B.
[76] *Teiborlang* (n 32); *Biju Marak v State of Meghalaya*, Criminal Petition No 70 of 2022 (Meghalaya HC, 15 March 2023); *John Franklin Shylla* (n 9); *Rahul Kumar Choudhury and Ors v State of Meghalaya and Ors* 2023 SCC OnLine Megh 366 (Meghalaya HC).
[77] *Shembhalang* (n 32); *Ananta Boro* (n 32); *Teiborlang* (n 32).
[78] CRC General Comment No. 20 (n 36), para 9.
[79] Report of the Special Rapporteur 2016 (n 38) para 19.
[80] ibid, para 11.

have children, and the overall adverse impact of criminalisation on their safety and well-being. They have observed that criminalisation is counterproductive and effectively punishes the victim, making her more vulnerable to exploitation, contrary to the objective of the POCSO Act.[81] Criminalization also strains ties with families of both parties and often results in girls having to navigate difficult circumstances such as criminal processes, pregnancy, institutionalisation, and arranging bail for their partner, with negligible support. Recognising the complexities involved, the Supreme Court *In Re: Right to Privacy of Adolescents*[82] refused to sentence the accused-husband emphatically noting that 'if we send the accused to jail, the worst sufferer will be the victim herself' and deciding that 'in order to do real justice to the victim, the only option left before us is to ensure that the accused is not separated from the victim.'[83] While reliefs purely on the consideration of marriage are problematic, it reflects attempts to mitigate the law's far-reaching disruptive impact on the lives of young couples.

These observations illustrate how the POCSO Act's overwhelmingly protectionist approach disregards the evolving autonomy of adolescents, and erodes the identity, agency, feelings, and desires of adolescents – ultimately victimising them in the criminal justice system.

### *D. Implications on the Right to Sexual and Reproductive Health*

The criminalisation of consensual adolescent sexual acts combined with mandatory reporting requirements under the POCSO Act has aggravated the barriers for adolescents of all genders seeking confidential sexual and reproductive health (SRH) information and services.[84] Many POCSO cases are reported when a pregnancy is detected by healthcare providers and shifts the focus from treatment to prosecution. It also conflicts with Indian health and education policies

[81] See *Roujalin* (n 43); *Balaji @ Panai Balaji v State*, Criminal Original Petition No 8025 of 2024 (Madras HC, 4 April 2024); *In Re: Right to Privacy of Adolescents*, 2025 INSC 778 [25], [26]; *Pradeep Yadav v State of UP and Ors* 2024 SCC OnLine All 392 (Allahabad HC). See also *Ankit Kumar v State of UP and Ors*, Application under Section 482 No 9944 of 2023 (Allahabad HC, 22 December 2023).
[82] *In Re: Right to Privacy of Adolescents* (n 81).
[83] ibid [25], [26].
[84] CCL 2018 (n 18) 14–15; Aparna Chandra and others, 'Legal Barriers to Accessing Safe Abortion Services in India: A Fact Finding Study' (Centre for Reproductive Rights and National Law School of India University, Bangalore, 2021) 140–142 ('Chandra and others 2021'); Pitre and Lingam 2021 (n 3); International Planned Parenthood Federation, 'Over-protected and under-served: A multi-country study on legal barriers to young people's access to sexual and reproductive health services' (2014).

such as the Rashtriya Kishor Swasthya Karyakram (RKSK), School Health Program (SHP),[85] and Adolescence Education Program (AEP) that acknowledge adolescent sexuality and emphasise the provision of confidential and barrier-free access to SRH services. It is also incompatible with CRC's recommendation to India that measures be taken 'to ensure that adolescent girls and boys have effective access to confidential sexual and reproductive health information and services such as modern contraception as well as girls' access to legal abortions in practice.'[86]

The climate of fear deters adolescent girls, including married and/or pregnant adolescent girls from accessing reproductive health or abortion services,[87] seeking mental health support, diagnostic tests for pregnancy or sexually transmitted infections, or contraception for fear of triggering criminal proceedings against their partners.[88] This results in grave consequences for their physical and mental health[89] and may push them to seek unsafe abortions,[90] a fact acknowledged by the LCI.[91]

Adolescent boys, especially, are overlooked in SRH research and interventions,[92] despite evidence that they engage in risky sexual behaviours,[93] sometimes as an exploration of their

[85] Ministry of Human Resource Development and Ministry of Health and Family Welfare, 'Operational Guidelines on School Health Programme under Ayushman Bharat' (Government of India 2018) 3.
[86] Committee on the Rights of the Child, 'Concluding Observations on the Consolidated Third and Fourth Periodic Reports of India' (13 June 2014) CRC/C/IND/CO/3-4, para 66(b).
[87] Susheela Singh and others, 'The incidence of abortion and unintended pregnancy in India, 2015' (2018) 6(1) The Lancet Global Health e111 ('Singh and others 2018'); Shukla and Swain 2024 (n 70); Vrinda Grover, 'Criminalisation of even consensual sex between adolescents obstructs access to safe abortion for girls' *Times of India* (19 October 2019) ('Grover 2019').
[88] CCL 2018 (n 18) 14–15; Chandra and others 2021 (n 84) 140–142; Pitre and Lingam 2021 (n 3).
[89] *State of Maharashtra v Mohsin Basuddin Pakhali and Ors*, Special Case POCSO No 24/2019 (Special Court, Kolhapur, 20 July 2019); '17-yr-old girl delivers baby watching YouTube videos in Kerala, lover arrested under POCSO Act' *Onmanorama* (27 October 2022); 'Minor hospitalised after illegal abortion' *Times of India* (3 June 2019); 'Minor girl dies after taking abortion pills' *Times of India* (9 June 2019).
[90] Singh and others 2018 (n 87); Grover 2019 (n 87); Dipika Jain and Anubha Rastogi, 'Beyond Bars, Coercion and Death: Rethinking abortion rights and justice in India' (2024) 14(1) Oñati Socio-Legal Series 99, 108; Dipika Jain and Anubha Rastogi, 'Adolescent abortions in the Covid-19 landscape: Exposing the legal Achilles' heel' (2024) 9(32) Indian Journal of Medical Ethics 50; Chandra and others 2021 (n 84) 45; Dipika Jain, 'Time to rethink criminalisation of abortion? Towards a gender justice approach' (2019) 12 NUJS Law Review 21.
[91] LCI Report 2023 (n 13) paras 13.7, 15.5, 18.11.
[92] Neeraj M Srivastava, 'Adolescent health in India: Need for more interventional research' (2016) 4 Clinical Epidemiology and Global Health 101.
[93] Santosh K Sharma and Deepanjali Vishwakarma, 'Transitions in adolescent boys and young men's high-risk sexual behaviour in India' (2020) 20 BMC Public Health 1089; Surendran U Maheswari and S Kalaivani, 'Pattern of sexual behavior in adolescents and young adults attending STD clinic in a tertiary care center in South India' (2017) 38(2) Indian Journal of Sexually Transmitted Diseases and AIDS 171.

sexuality.[94] This leaves them vulnerable to STIs and yet their access to accurate SRH information and services remains limited, due to taboos around pre-marital sex.[95] The social barriers may be further compounded by legal barriers in the form of mandatory reporting and criminalisation.

Mandatory reporting requirements also conflict with doctor-patient confidentiality.[96] A WHO Rapid Programme Review of Adolescent Reproductive and Sexual Health Programme and RKSK noted that the mandatory reporting of even consensual sexual activity between minors led to confusion among service providers who are 'inclined to deny SRH services to young people in some states.'[97] The Supreme Court recognised the conflict in *X v Principal Secretary, Health and Family Welfare Department*,[98] and clarified that in the case of minors below 18 years engaging in consensual sexual activity and seeking a termination of pregnancy, the registered medical practitioner 'on request of the minor and the guardian of the minor, need not disclose the identity and other personal details of the minor in the information provided under Section 19(1) of the POCSO Act.'[99] However, its operationalisation is fraught with confusion and the exception is limited to adolescents seeking termination and requires parental involvement, which may not be forthcoming in such cases. It does not cover the full spectrum of sexual and reproductive health needs, including for those who wish to continue with the pregnancy or require other health services.

As long as the law continues to criminalise all sexual activity below 18, and adopts a punitive approach instead of a help-oriented one,[100] access to sexual and reproductive health services remains complicated and compromises the health and well-being of adolescents.

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[94] Beena Joshi and Sanjay Chauhan, 'Determinants of youth sexual behaviour: program implications for India' (2011) 16 Eastern Journal of Medicine 113.
[95] Arundhati Char, Minna Saavala and Teija Kulmala, 'Assessing young unmarried men's access to reproductive health information and services in rural India' (2011) 11 BMC Public Health; MKC Nair and others, 'ARSH 5: Reproductive health needs assessment of adolescents and young people (15–24 y): a qualitative study on perceptions of community stakeholders' (2013) 80(2) Indian Journal of Paediatrics 214; Shubhangi Nayak and others, 'A study on knowledge about sexually transmitted infections (STIs) and AIDS among adolescents of rural areas of Jabalpur district' (2016) 5(8) International Journal of Medical Science and Public Health.
[96] Chandra and others 2021 (n 84) 147–148; Ekatha Ann John, 'Child sex abuse: More TN kids queue up in clinics to treat sexually transmitted infections' *Times of India* (19 April 2018).
[97] Alka Barua and others, 'Adolescent health programming in India: a rapid review' (2020) 17 Reproductive Health 87.
[98] *X v Principal Secretary* (n 47) [79-82].
[99] ibid [81].
[100] Paulo Sérgio Pinheiro, *World Report on Violence Against Children* (United Nations Secretary-General's Study on Violence against Children 2006) 85.

### *E. The 'Justice' Cost*

According to *Crime in India, 2023,* 86.6% of POCSO cases are pending disposal,[101] highlighting the severe burden on an overstretched and under-resourced justice system. Empirical studies of judgments reveal that at least one in four cases under POCSO Act is 'romantic' in nature.[102] The significant strain arising from criminalisation of such cases diverts limited institutional capacity away from the investigation and trial of actual cases of sexual violence, and delays justice for survivors.[103]

The burden extends to higher courts that are inundated with appeals, petitions to quash proceedings, bail applications, and habeas corpus petitions related to consensual cases. High Courts themselves have considered the impact upon the justice system lamenting on the futility of the criminal proceedings when victims do not support the case,[104] the lack of any purpose served in these cases,[105] waste of time of the courts,[106] the 'personal'[107] nature of the cases, the lack of any overriding public interest or any harm to society's interests,[108] and concluded that the continuation of proceedings would amount to an abuse of the legal process.[109]

The absurdity of using criminal law to regulate adolescent sexuality is further evinced by the high acquittal rates in such cases.[110] In a study of 1,715 'romantic' cases, 93.8% resulted in an acquittal,[111] with the 'victim' herself stating that she was in a romantic relationship with the accused

[101] Crime in India 2023 (n 5) 357.
[102] Ramakrishnan and Raha 2022 (n 6) 6.
[103] Karthik Muralidharan, *Accelerating India's Development* (Penguin Random House India 2024) 438 ('Muralidharan 2024').
[104] *Shambu Thilak* (n 34); *Arun Babu v Xxx and Ors*, Criminal Miscellaneous Case No 7310 of 2023 (Kerala HC, 25 October 2023); *Mohit* (n 9); *Sarbjit Singh v State of Punjab and Ors*, Criminal Main-39252-2022 (Punjab and Haryana HC, 23 November 2022); *Karan* (n 9).
[105] *Xxxxxx v State of Kerala*, Criminal Miscellaneous Case No 3141 of 2022 (Kerala HC, 16 October 2023); *Karan* (n 9); *Aarti and Ors v State of Uttar Pradesh and Ors*, Miscellaneous Bench No 5503 of 2018 (Allahabad HC, 30 May 2018); *Mohit* (n 9); *Kailash Sharma v State of Madhya Pradesh and Ors* 2023 SCC OnLine MP 2074 (Madhya Pradesh HC).
[106] *Amit Kumar and Ors v State of Himachal Pradesh and Ors*, Criminal Miscellaneous Petition (Main) No 384 of 2020 (Himachal Pradesh HC, 17 December 2020).
[107] *Anandan* (n 10); *Kothandapani* (n 10).
[108] *Sachin Thakur and Ors v State of Himachal Pradesh and Ors*, Criminal Miscellaneous Petition (Main) No 1101 of 2022 (Himachal Pradesh HC, 19 December 2022).
[109] *Jameel Jabbar v State of Karnataka* 2017 SCC OnLine Kar 3712 (Karnataka HC).
[110] Enfold and P39A 2024 (n 6); Ramakrishnan and Raha 2022 (n 6).
[111] Ramakrishnan and Raha 2022 (n 6) 39.

in 87.9% of the cases.[112] In another study of 264 cases of aggravated penetrative sexual assault under POCSO Act, 67 cases (25.4%) were 'romantic', and the acquittal rate in these cases was 97%.[113] Further, the rate of testimony against the accused was significantly lower in 'romantic cases' (9%) as compared to other cases (36%).[114]

These outcomes highlight the futility of prosecutions of factually consensual and non-exploitative sexual acts under the POCSO Act. They also distort overall POCSO Act conviction statistics, creating the impression that cases of child sexual abuse routinely go unpunished. This erodes public trust in the criminal justice system,[115] fuels panic in public discourse about the failure of the system in dispensing justice in sexual violence cases, and leads to more punitive responses.

Rather than regulating adolescent sexuality through criminal law, normative acts should be distinguished from sexual violence to ensure optimal utilisation of limited resources and strengthening of investigation, prosecution and disposal of cases of actual sexual violence against children.

### *F. Case for Decriminalisation of Adolescent Sexuality*

The criminalisation of factually consensual and non-exploitative sexual acts involving adolescents is fundamentally misguided, both as a matter of principle and policy. It comes at the severe cost of violating the fundamental rights of the adolescents that outweighs any purported benefits. There is, thus, a need for decriminalisation while continuing to protect all persons below 18 years from sexual abuse.

### *G. Proposed Framework for Decriminalisation of Adolescent Sexuality*

Balancing evolving autonomy with protection concerns will require identifying an age threshold above which adolescents' autonomy should be given greater weightage and they should not be prosecuted for factually consensual and non-exploitative sexual acts. It is proposed that

[112] Ramakrishnan and Raha 2022 (n 6) 14.
[113] Enfold and P39A 2024 (n 6) 100, 104.
[114] Enfold and P39A 2024 (n 6) 103.
[115] Muralidharan 2024 (n 103) 438.

factually consensual and non-exploitative sexual acts involving adolescents between 16 to 18 years be decriminalised, while the term 'child' continues to be defined as a person below 18 years.

Notably, the age of consent for sexual intercourse in India was 16 years from 1949-2012 (a period of 63 years), till the POCSO Act came into force. While there is no scientific basis for 16 years, and the age of consent varies across jurisdictions, the age of 16 appears to be the common threshold across different countries[116] including South Asian countries such as Sri Lanka,[117] Bangladesh,[118] and Bhutan.[119] The Justice Verma Committee also recommended that the age of consent for sexual acts under the POCSO Act be lowered to 16 years.[120]

However, all protections available under the POCSO Act, including trial by Special Courts and child-friendly procedures should continue to apply to those between 16-18 years. Consensual sexual acts with persons above 16 years should not constitute an offence unless it falls under specific grounds that vitiate consent or amount to exploitation. For example, a penetrative sexual act with a person above 16 years and below 18 years would amount to penetrative sexual assault in circumstances where the sexual act:

- is against their will;
- is without their consent;
- is based on consent obtained by putting them or any person in whom they are interested, in fear of death or of hurt;
- is with a person who is in a position of trust or authority like a public servant, staff of a child care institution or facility, school, religious institution, or institution providing services to children;
- is with a person with whom the 16-18-year-old person is in a relationship of dependency;
- is committed in the context of hiring, employing, engaging or using a child for sexual exploitation or child sexual abuse material;

[116] Legal age of consent by country is available at <https://www.ageofconsent.net/world>. The age of consent is 16 years in the United Kingdom, Norway, Canada, South Africa and Spain, as well as several states in Australia and the USA.
[117] Penal Code 1883, s. 363(e) [Sri Lanka].
[118] The Penal Code 1860, s. 375 [Bangladesh].
[119] Penal Code (Amendment) Act of Bhutan 2021, s. 183 [Bhutan].
[120] Justice Verma Committee on Amendments to Criminal Law, 'Report of the Committee on Amendments to Criminal Law' (23 January 2013) 443–444.

- is with their consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration of any stupefying or unwholesome substance, they are unable to understand the nature and consequences of acts to which they give consent;
- is committed when they are unable to communicate consent.

The explanation of 'consent' in Section 63, BNS may be adapted[121]- a person is said to consent when they express unequivocal voluntary agreement, by words, gestures or any form of verbal or non-verbal communication, their willingness to participate in the specific sexual act. Absence of physical resistance to the act of penetration shall not by the reason only of that fact, be regarded as consent to the sexual activity.

Suitable modifications will also have to be made to the framing of rape under the BNS, and non-penetrative sexual offences under the POCSO Act and BNS, as well as the IT Act to recognise factually consensual and non-exploitative sexual acts involving persons above 16 years and below 18 years. Further, the presumption as to the absence of consent under Section 120 of the Bhartiya Sakshya Adhiniyam, 2023 in certain prosecution for rape, may be extended to victims above 16 years and below 18 years. The presumption states that 'where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.'

There is a concern that recognition of consent will shift the focus of criminal trials under the POCSO Act on the victim and result in re-victimisation and lengthy cross-examination. To protect against this, judicial officers and prosecutors should strongly enforce the prohibition on questions during cross-examination that are aggressive, assassinate the character of the child victim, or undermine their dignity under Section 33(6), POCSO Act, and questions as to the general immoral character, or previous sexual experience, of the victim with any person for proving such consent or the quality of consent under Section 149, Bhartiya Sakshya Adhiniyam.

[121] BNS 2023, s 63.

The police, prosecutors, judges, doctors, and child protection officials should be trained on respecting adolescents' dignity and autonomy, recognising grounds that vitiate consent, age-appropriate communication, and non-judgmental provision of services and information.

Decriminalisation also has to be accompanied by provision of comprehensive sexuality and life skills education, and barrier-free SRH information and services. It is also important to understand the limitations of close-in-age provisions and sentencing discretion while considering policy alternatives to criminalization.

### *H. Limitations of Close-in-age Exceptions*

Some countries have incorporated close-in-age exceptions, also referred to as 'Romeo and Juliet laws', which prescribe proximate age-gaps ranging between one to five years, within which consent is recognised and are in the form of a legal defence or exception. Notably, in countries with close-in age exemptions, the age of consent is already low – ranging from 14 to 16 years[122] – which is much lower than the age of consent in India. Further, close-in-age exceptions will not prevent the criminal investigation and trial or inquiry. Adolescents falling within the prescribed age gap will still be subjected to criminal proceedings until Special Courts or JJBs determine that the parties fall within the age limits specified and the act was consensual. Legal complexities connected to establishing the age of parties beyond reasonable doubt during trial will also have to be considered as they will inevitably protract trials and increase the period of detention for both parties.

It is also essential to note that multiple factors contribute to coercion within adolescent sexual relationships, and that age difference is only one such factor.[123] A sound approach would be to comprehensively consider the circumstances that vitiate consent, respect adolescents' views on the nature of the relationship, and focus on their empowerment through comprehensive sexuality education.

[122] Age of consent is 14 years in Germany, Italy, Austria, Bolivia, Hungary, Chile, 15 years in Sweden, Greece, Croatia, Romania, France, Costa Rica, and 16 years in Canada, South Africa, Spain, Israel, Switzerland, Antigua and Barbuda, Trinidad and Tobago, Norway, Belgium, Finland, Moldova, Netherlands, Japan, Philippines. These countries have a close-in-age-exception.

[123] Z Essack and J Toohey, 'Unpacking the 2-Year Age-Gap Provision in Relation to the Decriminalisation of Underage Consensual Sex in South Africa' (2018) 11(2) South African Journal of Bioethics and Law 86.

### *I. Concerns regarding Sentencing Discretion*

Judicial discretion in sentencing, as proposed by LCI, is also not a viable solution as it will neither spare adolescents from the humiliation and trauma that result from arrest, deprivation of liberty, institutionalisation, medical examination, and a trial, nor reduce the workload of the court and the police. Both close-in-age exceptions and sentencing discretion do not recognise the inherently harmful effects of criminalisation of and may result in the arbitrary use of discretion.

## IV. CHILD PROTECTION CONCERNS RELATED TO DECRIMINALISATION OF ADOLESCENT SEXUALITY AND POTENTIAL SOLUTIONS

The strongest objections to decriminalising consensual adolescent sexual activity have come from those concerned that it will undermine ongoing efforts to combat child marriage, child trafficking, and online sexual harm against children. These objections are taken seriously, both in the LCI Report and in submissions made during the consultations on which this paper draws. This section addresses each in turn. For each concern, the analysis distinguishes between adolescent sexual conduct that is normative and non-exploitative and conduct that bears the markers of exploitation, coercion, or organised harm; identifies the specific legal provisions already available to address the harm in question; and considers what additional structural, supportive, and non-punitive measures are required. The framework proposed in Section 3.6 is constructed precisely with this distinction in mind: factually consensual conduct between adolescents of similar ages is distinguished from conduct that indicates exploitation, or trafficking, both of which remain firmly within the reach of the criminal law.

## V. IMPLICATIONS ON CHILD MARRIAGE

Child marriages have been on the decline in India, and the percentage of women between 20-24 years who married before the age of 18 years has dropped from 47.4% in 2004-2005[124] to 23.3% in 2019-2021.[125] There is, however, a concern that decriminalisation of consensual and non-

[124] International Institute for Population Sciences (IIPS) and ICF, 'National Family Health Survey (NFHS-4), 2015–2016, India' (Ministry of Health and Family Welfare, Government of India) vol I, 3.
[125] NFHS 5 (n 4) 3.

exploitative sexual acts involving adolescents could undermine efforts to reduce child marriage, and adversely impact girls' education, health, and well-being.[126]

### *A. Socio-economic measures more effective than criminal laws*

Child marriages are 'driven by poverty … crises and shocks, and social norms that deem girls a 'burden on the household'.'[127] Globally, progress toward eliminating child marriage is threatened by a polycrisis, marked by the interplay of health crises, climate change, conflict and economic instability.[128] The prevalence of child marriage in India is strongly correlated with poverty and lack of access to education.[129] The economic impact of COVID-19 and school closures has further exacerbated the risk of child marriage.[130] Evidence shows that cash or in-kind schemes for education, and programmes and policies addressing the underlying causes of child marriage such as poverty and gender inequality through structural interventions are most effective at reducing child marriage.[131] They also have a 'greater indirect impact, and come with less risk of causing harm to girls' as opposed to '[d]irectly engaging on child marriage laws'.[132]

The LCI, however, emphasised a penal approach, noting that the PCMA is a 'weak law' as it does not address sexual acts with a minor spouse and the POCSO Act 'fills this void' as it deters

[126] LCI Report 2023 (n 13) paras 14.2, 14.3, 17.7.
[127] UNICEF and UNFPA, 'Ending Child Marriage: A profile of progress in India' (UNICEF 2022) 3; See also Shireen Jejeebhoy, *Ending Child Marriage in India, Drivers and Strategies* (UNICEF 2019) 17–20 ('Jejeebhoy 2019').
[128] UNFPA-UNICEF Global Programme to End Child Marriage, 'Sustaining the Gains in the Polycrisis Era Annual Report' (2022).
[129] United Nations Children's Fund, 'Ending Child Marriage: A profile of progress in India' (UNICEF, 5 May 2023).
[130] United Nations Children's Fund, 'COVID-19: A threat to progress against child marriage' (UNICEF 2021); Girls Not Brides, 'Girls' Education and Child Marriage' (September 2022) 6; Shireen Jejeebhoy, 'Child Marriages During the Pandemic' (The India Forum, 14 June 2021); See also United Nations Children's Fund, UN Women and Plan International, 'Girl Goals: What has changed for girls? Adolescent girls' rights over 30 years' (2025) 34 ('UNICEF, UN Women and PI 2025').
[131] United Nations Children's Fund and United Nations Population Fund, 'Evidence Review: Child marriage interventions and research from 2020 to 2022' (UNICEF and UNFPA 2023) 6 ('UNICEF and UNFPA 2023'); Manahil Siddiqi and Gillian Mann, 'A synthesis of what we know works to prevent and respond to child marriage: Evidence Paper for UNFPA-UNICEF Global Programme to End Child Marriage Phase III' (UNFPA and UNICEF 2024); Anju Malhotra and Shatha Elnakib, '20 Years of the Evidence Base on What Works to Prevent Child Marriage: A Systematic Review' (2021) 68(5) Journal of Adolescent Health 847; Jejeebhoy 2019 (n 127) 41; Susan Lee-Rife and others, 'What works to prevent child marriage: a review of the evidence' (2012) 43(4) Studies in Family Planning 287; The Centre for Development and Population Activities, 'Adolescent Girls in India Choose a Better Future: An Impact Assessment' (2001); Anju Malhotra and others, 'Solutions to End Child Marriage: What the evidence shows' (International Centre for Research on Women 2011).
[132] ibid 22; See also United Nations Children's Fund and United Nations Population Fund, 'Child Marriage and the Law: Technical Note for the Global Programme to End Child Marriage' (November 2020) 2–3 ('UNICEF and UNFPA 2020').

child marriage through grave punishments for sexual intercourse with a child.[133] Use of the POCSO Act, a stringent legislation aimed at child sexual abuse, to address the complexities of child marriage will be counterproductive as it will result in over-criminalisation of vulnerable populations without bringing any shift in their lived realities or social norms. Importantly, the Supreme Court in *Society for Enlightenment and Voluntary Action v Union of India*,[134] has noted that criminal prosecution is 'ineffective at bringing about social change'[135] in the context of child marriage and emphasised prioritising 'prevention before protection and protection before penalisation'.[136]

### *B. Distinction between Age of Consent for Sexual Acts and Age of Marriage*

There are views that the age of consent for sexual acts should be the same as the legal age of marriage. However, the considerations for sexual consent and age of marriage are fundamentally different and should not be conflated. While adolescent exploration of sexuality raises questions about the threshold for consent and autonomy, marriage entails significant additional responsibilities and legal obligations, justifying different ages for the two. Historically, the legal age of marriage has not always aligned with the legal age of consent. Notably, for 34 years until 2012, the age of consent for girls was 16 years while the age of marriage was 18 years. Even now men can consent to sex at 18 years but cannot marry till they are 21 years. Decriminalising adolescent sexuality is necessary given the normative nature of sexual behaviour during adolescence, and does not preclude the enforcement of laws against underage marriage.

### *C. Criminalisation Operates Against Adolescents*

Criminal sanctions, even when they act as a deterrent, have not fundamentally changed the way parents or adolescents view the institution and they continue to enter into child marriages.[137] Often, cases are reported not because they are child marriages per se, but due to associated factors such as elopement, forced marriage, pregnancy, domestic violence, or family disputes.[138] The assumption that the POCSO Act and PCMA are being used for the benefit of child victims of forced marriages is not supported by evidence. Instead, studies reveal that they are disproportionately used

[133] LCI Report 2023 (n 13) para 14.5.
[134] *Society for Enlightenment and Voluntary Action v Union of India* 2024 INSC 790 (Supreme Court).
[135] ibid [211].
[136] *Society for Enlightenment and Voluntary Action* (n 134) [210].
[137] ActionAid Karnataka Projects, 'Teenage Pregnancy and Motherhood in India' (2024) 55–57 ('AKP 2024').
[138] ibid 58; Enfold Proactive Health Trust 2024 (n 70) 20–21.

against self-initiated marriages stemming from consensual relationships against the wishes of the families, including inter-faith and inter-caste unions, as opposed to family-arranged In a three-state study of 174 judgements in PCMA cases between 2015 and 2023, nearly half of them (49.4%) involved self-initiated marriages.[139] The girl's family was the informant in 80.2% of self-initiated marriages, whereas they approached the police in only 30.9% of cases with arranged marriages/forced marriages.[140] Another study based on 83 PCMA cases between 2008 and 2017 found that the PCMA is used twice as much against self-arranged marriages, than arranged marriages.[141] Thus, criminal law is primarily used to enforce parental control over the choices of adolescent girls to maintain social and cultural norms, and caste boundaries, rather than protecting them from the harm of early or forced marriages.[142]

While consent may be factually present in self-initiated underage marriages, it may nevertheless be influenced by social realities and pressures. The context in which self-initiated marriages takes place is also significant as such marriages are sometimes a means to escape abusive natal family circumstances or marriages arranged by their families against their wishes.[143] The taboo around pre-marital sex that fuels the fear of being separated from their partner combined with the lack of educational and employment opportunities for girls, and oppressive conditions at home, push young people into elopements and early marriages.[144] In some cases, the eloping couple may view pregnancy as a way to legitimise the relationship[145] and in others, marriage may emerge as a way to legitimise a pregnancy.[146]

In such cases, criminalisation of adolescent sexuality reinforces these taboos, notions of sexual purity and parental control over the intimate choices of young persons, driving these

[139] Enfold Proactive Health Trust 2024 (n 70) 14. Arranged or forced marriages constituted 31.6% and data on the type of marriage was unavailable in 19% of the cases.
[140] ibid 19-20.
[141] Partners for Law in Development, 'Who uses the Prohibition of Child Marriage Act 2006 (PCMA) Most and Why?'; Madhu Mehra and Shweta Maheshwari, 'Child marriage: Why laws alone don't suffice' (Partners for Law in Development 2021) 56–57 ('Mehra and Maheshwari 2021').
[142] PLD 2019 (n 70) 33; Mehra and Maheshwari 2021 (n 141) 56; Neetika Vishwanathan, 'The Shifting Shape of the Rape Discourse' (2018) 25(1) Indian Journal of Gender Studies; Swagata Raha, 'Child Marriage and the Protection of Children from Sexual Offences Act, 2012' (Centre for Child and the Law, National Law School of India University, Bangalore 2013) 2–3; AKP 2024 (n 137) 56; Enfold Proactive Health Trust 2024 (n 70) 14; ANANDI India, 'The Early Marriages in Conflict with Law & Society: The case of young girls in Gujarat' (2017) 4.
[143] PLD 2019 (n 70) 22–23; Ramakrishnan and Raha 2022 (n 6) 9.
[144] PLD 2019 (n 70) 35; AKP 2024 (n 137) 32–33.
[145] AKP 2024 (n 137) 33.
[146] UNICEF and UNFPA 2020 (n 132); PLD 2019 (n 70) 25, 34.

relationships underground and becoming a tool for enforcing patriarchal norms.[147] Criminal law operates disproportionately against those from marginalised communities making them more vulnerable to institutionalisation. It creates barriers to sexual and reproductive health, and, in some cases, drives adolescents in consensual relationships to early marriage in an attempt to avoid criminal sanctions under the POCSO Act.

### *D. Criminal Law cannot Ensure Healthy Relationships or Mitigate Adverse Health Consequences and Teenage Pregnancies*

Adverse consequences of early marriage for girls include early pregnancy and associated health complications, maternal mortality, increased risk of domestic violence and disruption in education.[148] The POCSO Act, however, does not prevent or deter teenage pregnancies or promote adolescent health**.** Teenage pregnancies and health risks associated with early pregnancy can be effectively addressed through health and educational measures such as comprehensive sexuality education, timely access to reproductive health services, accessible contraception, and adequate nutrition, irrespective of the girls' age and marital status.[149]

Adolescent mothers often face additional barriers in accessing government schemes for nutrition and healthcare, either because these schemes exclude minors ostensibly to deter child marriage or due to a lack of required documentation.[150] Criminalisation also exacerbates the barriers to their sexual and reproductive health, creates an environment of risk and isolation for the girl,[151] deters pregnant adolescent girls from accessing medical care for fear of triggering the criminal justice system.[152]

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[147] Pitre and Lingam 2021 (n 3) 468; PLD 2019 (n 70) 66. See also Sarah Baird and others, 'A call to action: the second Lancet Commission on adolescent health and wellbeing' (2025) 405 The Lancet Commissions 1945, 1981, 2007.
[148] AKP 2024 (n 137) 1–2; UNICEF, UN Women and PI 2025 (n 130) 37–39; LCI Report 2023 (n 13) paras 14.2, 14.3, 17.7.
[149] UNICEF, UN Women and PI 2025 (n 130) 43–44, 48; SAARC, UNICEF, UNFPA and WHO, 'Re-shaping the future for at-risk, married, pregnant and parenting girls: Regional technical brief and action plan on adolescent pregnancy in South Asia' (2024) 5.
[150] AKP 2024 (n 137) 57–58.
[151] Pitre and Lingam 2021 (n 3) 471; *X v Principal Secretary* (n 47).
[152] Vidya Reddy and Sannuthi Suresh, 'Assam government's drive against child marriage a ham-handed attempt' *Frontline* (23 February 2023); Sukrita Baruah, 'Assam cracks down on child marriages, over 2,000 arrested across the state' *Indian Express* (5 February 2023).

Intimate partner violence and the inability of adolescent girls to negotiate healthy relationships or make decisions about their reproductive health stem from deeply entrenched gender norms accepted by both men and women that normalise control and violence by men.[153]

Addressing these norms is essential for all intimate relationships and relying primarily on criminal law to enforce a minimum age of marriage does not dismantle these underlying power dynamics. If the primary concerns are exposure to domestic violence, disruption in education, and maternal health, the criminal law cannot alleviate these concerns and will only aggravate them.

There is a need to address the wider context of poverty and structural inequalities that underpin early and child marriages. Rather than over-relying on the POCSO Act, efforts should focus on strengthening prevention measures and the effective implementation of the PCMA. Moving beyond penal law, positive remedies such as the option of annulment need to be operationalised. Interventions should be designed to recognise and address the unique drivers of early, forced, and self-initiated marriages. Where families justify child marriages on the basis of cultural norms or consent of the adolescent party, the response should prioritise strengthening Village and Block-level Child Protection Committees, engaging with religious and local leaders, and improving access to Child Marriage Prohibition Officers. Structural interventions, such as ensuring functional Child Marriage Prohibition Officers, poverty alleviation schemes, access to free and compulsory education till 18 years, conditional cash transfers, and gender transformative approaches, are more effective than punitive laws in reducing child marriage.

The emphasis must shift from punitive criminal sanctions to supportive mechanisms that empower adolescents to resist, delay, and exit child marriages, without causing further harm to adolescents, particularly girls and their families.

### *E. Implications on Child Trafficking*

There is a concern that decriminalisation of factually consensual and non-exploitative sexual acts involving adolescents will impede the efforts to combat child trafficking. This specifically stems from the 'very real possibility of young girls being easily seduced in love traps

[153] UNICEF, UN Women and PI 2025 (n 130) 35, 44.

and then sold off in trafficking' and that a legal recognition of consent provides a legitimate pathway and defence for traffickers.[154]

### *F. Separating Exploitation from Adolescent Relationships*

Sex with and among adolescents occurs in a variety of contexts – some normative and non-exploitative while others exploitative. Trafficking can occur through various means, for a variety of purposes, and while some relationships may act as conduits for trafficking, policies cannot be framed on the assumption that all adolescent relationships or self-initiated child marriages will inevitably result in trafficking.[155]

Children may be pushed into trafficking by persons known to them including their family members.[156] While it would be absurd to assume that all familial relationships are inherently exploitative of children, it is a similar leap to assume that all adolescent relationships are invariably exploitative and for the purpose of trafficking. This blurs the distinction between sexual acts that are normative and those that are in the context of trafficking for the purpose of sexual exploitation.

The risk of adolescents being enticed and groomed into exploitative sexual relationships and later being trafficked, owing to the imbalance of power, is a compelling concern. However, criminalisation of all sexual acts without consideration of factually consensual non-exploitative acts causes more harm than good. Viewing all relationships solely from the lens of inherent or potential exploitation undermines evolving autonomy, infantalises adolescents, and places them at greater risk of marginalisation for normative expressions of love and connection.

### *G. Distinct Harms require Distinct Approaches*

There is no official data available on the interplay between the POCSO Act and trafficking related offences, and empirical studies based on judgments under the POCSO Act do not indicate a strong intersection either.[157] Despite the low intersection between trafficking and POCSO cases,

[154] LCI Report 2023 (n 13) paras 14.4, 14.7.
[155] Ajwang Warria, 'Forced Child Marriages as a Form of Child Trafficking' (2017) 79 Children and Youth Services Review 274, 275; See also Catherine Turner, *Out of the Shadows: Child Marriage and Slavery* (Anti-Slavery International 2013) 8, 15.
[156] LCI Report 2023 (n 13) 75.
[157] Enfold and P39A 2024 (n 6) – this study, based on 264 judgments under s 6 of the POCSO Act between 2019 and 2022, found no cases with charges under s 370, IPC (offence of trafficking) and only one case with charges under the

and the fact that the POCSO Act was not enacted to address trafficking, the LCI report observed that:

> 'To address a specific undesirable situation that has arisen, thousands of children, especially girl children who are in particular danger of being trafficked or abused, cannot be deprived of the protective edifice that exists on account of strict provisions of the POCSO Act, which may be their only armour.'[158]

However, with laws framed specifically to address trafficking, especially of minors, the POCSO Act is neither the appropriate, nor the only protection afforded to those vulnerable to trafficking. Sexual abuse and trafficking for sexual exploitation are distinct harms and require different frameworks for the effective prosecution of the offences.

Child trafficking is an organised crime that entails exploitation of children for different purposes such as labour, sexual exploitation, removal of organs, among others. The basis for criminalisation is that commodification of children for sexual purposes is exploitative, inherently wrong and harmful.[159] The prosecution has to establish the act, means and purpose for the offence of trafficking, and the consent of the victim is entirely irrelevant.[160] Under the POCSO Act, the establishment of the commission of a sexual assault against a child is sufficient for prosecution – the means and purpose are entirely irrelevant. If a minor is trafficked for sexual exploitation, those involved can be charged with aiding and abetting a sexual offence under the POCSO Act.[161] However, a strategy that relies only on the POCSO Act to address trafficking ignores the liability of different actors involved and the multiple wrongs caused during the different stages of trafficking.

### *H. Consent is Not a Defence for Trafficking*

Immoral Traffic (Prevention) Act 1956; Ramakrishnan and Raha 2022 (n 6) 6 – this study of 1,715 'romantic' cases decided by Special Courts in Assam, Maharashtra, and West Bengal between 2016 and 2020 indicated that the trafficking charge was applied in only three cases.

[158] LCI Report 2023 (n 13) 67.

[159] Shared Hope International, 'Child Sex Trafficking is Distinct from Statutory Rape: The Critical Importance of Using Sex Trafficking Laws to Combat Child Sex Trafficking Crimes' 4.

[160] BNS 2023, s 143(1) Explanation 2; IPC 1860, s 370(1) Explanation 2.

[161] POCSO Act 2012, ss 16–17.

The LCI noted that if the POCSO Act recognised consent of children, perpetrators of child marriage and child trafficking may take the defence of consent, even when such consent may be obtained through coercion or manipulation. They expressed concern that reducing the age of consent will provide a 'safe harbour provision' for perpetrators to more easily coerce minor girls into 'subjugation, marital rape and other forms of abuse, including trafficking',[162] concluding that legal recognition of consent may also result in evasion of liability by traffickers.[163]

The age of consent for sexual intercourse has no bearing on the prosecution of trafficking as both children and adults can be victims of trafficking. The apprehension that consent of a minor can act as a valid defence in trafficking-related acts is misplaced as the offence of trafficking under Section 143, BNS expressly states that 'consent of the victim is immaterial in determination of the offence of trafficking'.[164] Accordingly, courts and prosecutors have to ensure that all claims of consent as a defence are disregarded. Further, the police have to be trained in identifying the presence of factual circumstances that signal exploitation or elements of trafficking, regardless of consent.

Blanket criminalisation of adolescent sexuality cannot insulate girls from the risk of trafficking and overlooks the larger socio-economic context in which trafficking occurs. Factors such as poverty, uneven development, lack of employment opportunities, weak law enforcement, and harmful gender norms fuel trafficking and also underpin relationships and early marriages. The answer lies in strong community-based preventive systems, functional child protection response systems, accessible schools, access to social security schemes, and life skills and comprehensive sexuality education. Efforts and investment must also be intensified to advance effective investigation and prosecution of trafficking. Protection cannot come at the cost of the dignity, self-esteem, liberty, and well-being of children and by exacerbating their vulnerabilities. 4.3. Implications on online harm against children.

Adolescents and children today are digital natives, and for many, digital spaces are not separate from their real lives. There is a concern that ‘romantic’ relationships will further expose

[162] LCI Report 2023 (n 13) 97.
[163] LCI Report 2023 (n 13) 75–76.
[164] BNS 2023, s 143(1) Explanation 2; IPC 1860, s 370(1) Explanation 2. See also The Warnath Group, 'The Consent Defense in Trafficking in Persons Cases' (2020) 3–5.

adolescents, particularly girls, to risks of online sexual abuse, including grooming, sextortion, and the circulation of child sexual abuse material (CSAM).[165]

### *I. Distinction between Adolescent Normative Behaviour Online and Technology-facilitated Violence*

Apart from using the internet for various purposes, studies from different jurisdictions reveal that adolescents, in particular, are using it for romantic and sexual exploration,[166] for relationship maintenance and coping with the dissolution of a romance,[167] and to access sexual and reproductive health information.[168] While exchanging sexually explicit text messages, including photographs, is normalised amongst adolescents,[169] it brings with it risks of bullying, coercion, and non-consensual sharing of images.[170]

Existing laws criminalise a plethora of online harms such as generation, storage, and transmission of CSAM, as well as cultivating, enticing, or inducing 'children to online relationship',[171] online harassment and stalking.[172] The recognition of consent of adolescents above 16 years will not preclude the application of existing laws to non-consensual and/or exploitative technology facilitated violence. On the contrary, existing laws fail to adequately consider the complexities of adolescent sexuality in the digital age and conflate self-generated sexual material (SGSM) with CSAM. Adolescents can be held liable for consensually creating and sending SGSM, or viewing/downloading SGSM sent by other minors.

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[165] LCI Report 2023 (n 13) para 13.1; UNICEF, UN Women and PI 2025 (n 130) 17, 36.
[166] Daniel C Semenza, 'Dating and Sexual Relationships in the Age of the Internet' in Thomas Holt and Adam Bossler (eds), *The Palgrave Handbook of International Cybercrime and Cyberdeviance* (Palgrave Macmillan 2020) 1067; Shelley Walker and others, 'Sexting: young women's and men's views on its nature and origins' (2013) 52(6) Journal of Adolescent Health 697.
[167] Ian Kwok and Annie B Wescott, 'Cyberintimacy: A Scoping Review of Technology-Mediated Romance in the Digital Age' (2020) 23(10) Cyberpsychology, Behavior, and Social Networking 657.
[168] Laura Simon and Kristian Daneback, 'Adolescents' Use of the Internet for Sex Education: A Thematic and Critical Review of the Literature' (2013) 10(4) International Journal of Sexual Health 305; Enfold Proactive Health Trust, 'Pathways for Healthy Digital Engagement: Perspectives of Children and Adult Stakeholders from Karnataka, India' (31 August 2024) 9, 93.
[169] Jessica Dully and others, 'Adolescent Experiences of Sexting: A Systematic Review of the Qualitative Literature, and Recommendations for Practice' (2023) 95(6) Journal of Adolescence 1077.
[170] Caoimhe Doyle, Ellen Douglas and Gary O'Reilly, 'The Outcomes of Sexting for Children and Adolescents: A Systematic Review of the Literature' (2021) 92(1) Journal of Adolescence 86.
[171] Information Technology Act 2000 (IT Act), s 67B(c).
[172] BNS 2023, s 78; IPC 1860, s 354D; BNS 2023, s 95; IT Act 2000, s 67B; POCSO Act 2012, ss 11(iii)–(vi), 12–15.

In *Just Rights for Children Alliance v S. Harish*,[173] the Supreme Court held that mere possession is enough to attract the offence of storage of pornographic material involving a child unless there are circumstances that make it clear that there was no intention to share the images.[174] Sharing and transmission of the material that is stored in one's device is an offence.[175] No distinction was made by the apex court between non-exploitative consensual storage and exchange of SGSM among minors and exploitative or non-consensual content.[176] Thus, adolescents creating and storing sexually explicit images of themselves on their device, sending such material, or storing the material while intending to send it, can technically be prosecuted. Further, adolescents who approach authorities for the non-consensual sharing of their private images face the risk of being prosecuted themselves, for creating those images and sharing them in the first place.

Notably, consensual sexual activity by adolescents in the digital realm was considered by an ad-hoc Committee of the Rajya Sabha in December 2019, constituted to examine issues arising out of the increased accessibility of pornographic material and its effect on society.[177] It observed that minors/young adults are engaged in exchanging selfies or sexting and, in this context, considered the introduction of an exception clause in Section 15 as follows:

> 'Exceptions under this Act include (a) minors who cannot be prosecuted for child pornography offences if the child takes or stores or exchanges with another minor, indecent images of oneself; (b) if the individual is under 18 years and (i) no person in the image is more than two years younger than the individual; (ii) the image does not show an act that is a serious criminal offence.'[178]

Some members of the Committee felt that 'young adults between the age-group of 16-19 years should also be covered under this exception, while other members felt that the possession of any sexual material of whatever kind by minors must be banned outright'.[179] Although sexting

[173] *Just Rights for Children Alliance v S. Harish*, 2024 INSC 716 (Supreme Court).
[174] ibid [98].
[175] *Just Rights for Children Alliance* (n 173) [89].
[176] Siddharth P and Uma Subramanian, 'SC Ruling on Child Sexual Exploitation Material Could Criminalise Normal Adolescent Behaviour' *Indian Express* (26 September 2024).
[177] 'Report of the Ad Hoc Committee of the Rajya Sabha to Study the Alarming Issue of Pornography on Social Media and its Effect on Children and Society as a Whole' (Rajya Sabha 2020) ('Ad Hoc Committee Report 2020').
[178] ibid, para 1.3.
[179] Ad Hoc Committee Report 2020 (n 177) para 1.3.

amongst minors is typically criminalised under child pornography laws in most jurisdictions, exceptions have been carved out in some countries (See Box) such as treating consensual sexting separately, allowing police discretion, reducing penalties, applying close-in-age exemptions, offering affirmative defences, or diverting such cases from the criminal system.

Criminalisation of an adolescent for non-exploitative and consensual SGSM offends their right to privacy as interpreted in *Justice K.S. Puttaswamy v Union of India*[180] to include 'at its core the preservation of personal intimacies….'[181] While acknowledging the risks related to sexting such as sexualised images of children being disseminated beyond the child's control, difficulty in taking down such images, and the possibility of the material being used for bullying or sexual extortion,[182] the Committee on the Rights of the Child has cautioned that:

> 'A distinction must be made between… 'child pornography', which constitutes a criminal offence, and the production by children of self-generated sexual content or material representing themselves. The Committee is concerned that the self-generated aspect of such material could increase the risk that the child is considered responsible instead of being treated as a victim, and underscores that children should not be held criminally liable for producing images of themselves.'[183]

Further, in General Comment No. 25 (2021) on Children's Rights in relation to the Digital Environment, the CRC emphasised the need to balance the agency of children based on their competence and understanding, with protection from risks,[184] stating:

> 'Self-generated sexual material by children that they possess and/or share with their consent and solely for their own private use should not be criminalised. Child-friendly channels should be created to allow children to safely seek advice and assistance where it relates to self-generated sexually explicit content.'[185]

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[180] *Puttaswamy* (n 47).
[181] ibid [844].
[182] Committee on the Rights of the Child, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 'General Comment on the implementation of the Optional Protocol' (2019) CRC/C/GC/OP3.
[183] ibid para 67.
[184] CRC General Comment No. 25 (n 42) para 20.
[185] ibid para 118.


At the regional level, the Lanzarote Committee under the Council of Europe's Convention on Protection of Children against Sexual Exploitation and Sexual Abuse, emphasised the right to privacy in the context of self-generated sexual material by children for their private use and urges States to 'relieve them from offences related to 'child pornography'...'.[186] It also re-emphasised that such acts do not constitute criminal offences, and criminal prosecution should be the last resort.[187] The African Committee of Experts on the Rights and Welfare of the Child also states that children should not be held criminally liable for producing images of themselves[188] and such material should not be regarded as child sexual abuse material if it is made consensually and for private use, unless such images are a result of coercion, blackmail or any other undue pressure on the child.[189]

Concerns related to risks faced by adolescents online are best addressed through age and culturally-appropriate comprehensive sexuality education programs at an early age in schools and public campaigns that address the risks associated with SGSM, and include aspects such as respect, confidentiality, body image, consent, bullying, harassment, and the difference between healthy and

[186] Lanzarote Committee, 'Opinion on Child Sexually Suggestive or Explicit Images and/or Videos Generated, Shared and Received by Children' (Council of Europe, adopted 6 June 2019) 3.
[187] ibid 4.
[188] African Committee of Experts on the Rights and Welfare of the Child, 'General Comment No 7 on Article 27 of the ACRWC: Sexual Exploitation' (1 July 2020) 26.
[189] ibid 26.

harmful online behaviours.[190] Content also needs to be user friendly, customised and efforts must be made to reflect the lived realities and reach out to all children including those in rural areas, children with disabilities, children in shelters, and out of school children.[191] Teachers and parents should also be included in these interventions, so as to ensure they can respond to children in a non-judgmental and effective manner.[192] Technology companies must moderate their platforms, and respond effectively to reports of threatening behaviour,[193] along with development of tools and protocols that enable timely removal of abusive material.[194] Capacities of child protection functionaries need to be built on the rapidly changing characteristics of technology facilitated exploitation, abuse and coercion, and for them to respond in an empathetic, trauma-informed manner.[195]

Existing laws should recognise adolescent behaviour online and ensure that non-exploitative and consensual SGSM is not criminalised. The unintended consequence of criminalisation is that adolescents will be prevented from seeking help for technology-facilitated violence for fear of prosecution.

## VI. CONCLUSION

Criminalisation of factually consensual and non-exploitative sexual acts among adolescents and young people denigrates their right to life, dignity and privacy under the Indian Constitution, undermines their best interests and evolving capacities, deters them from seeking sexual and reproductive health services, and results in the deprivation of their liberty.[196] Viewing all adolescent

[190] Clara Rübner Jørgensen and others, 'Young people's views on sexting education and support needs: findings and recommendations from a UK-based study' (2019) 19(1) Sexuality, Society and Learning 25; Alexandra Kushner, 'The Need for Sexting Law Reform: Appropriate Punishments for Teenage Behaviors' (2013) 16 University of Pennsylvania Journal of Law and Social Change 281.
[191] ECPAT International, 'Promising Government Interventions Addressing Online Child Sexual Exploitation and Abuse' (End Violence Against Children 2022) 6.
[192] WeProtect Global Alliance, 'Global Threat Assessment 2021' (WeProtect 2021) 65.
[193] Thorn, 'Self-Generated Child Sexual Abuse Material: Attitudes and Experiences' (2020) 45.
[194] WeProtect Global Alliance, 'Child Self-Generated Sexual Material Online: Children and Young People's Perspectives' (WeProtect 2022).
[195] WeProtect 2021 (n 192) 65.
[196] Ramakrishnan and Raha 2022 (n 6) 60; Raha 2021 (n 3); UNICEF and UNFPA 2020 (n 132) 3; UNFPA, 'Technical Brief: Criminalization of Consensual Sexual Acts among Adolescents in East and Southern Africa' (2020). See also *Teddy Bear Clinic* (n 55); *Vijaylakshmi* (n 7) [28]; *Pooja* (n 49) [17]; *Parampreet* (n 9); *Anandan* (n 10).

relationships from the prism of potential exploitation blatantly disregards the harm it causes to the adolescents the law seeks to protect.

International standards emphasise approaches that balance protection with respect for adolescents' evolving capacities and autonomy. They caution against criminalising consensual, non-exploitative sexual activity and self-generated sexual content among adolescents. It is necessary for laws to reflect the reality and normalcy of adolescent sexual behaviour and support young people in their choices,[197] rather than criminalising them for normative acts that are a reflection of their evolving autonomy. [198]

Continued criminalisation of adolescents cannot be justified as a measure to combat child marriage, child trafficking for sexual purposes, and online child sexual abuse and exploitation. There are laws to address these distinct issues and any lacunae in their design or implementation cannot justify the blanket criminalisation of all adolescent sexual behaviour. While the concerns related to early marriage and trafficking are real and pressing, they are driven by deep-rooted socio-economic inequalities, patriarchal norms, poverty, and lack of access to education and employment. Factors that make children vulnerable to under-age marriage, early motherhood, and child trafficking require an empowering approach that involves investment in socio-economic measures, functional community-based child protection systems, free and accessible education till 18 years, life-skills, comprehensive sexuality education (CSE), confidential access to sexual and reproductive health services, gender transformative approaches and robust enforcement systems. Recent judgements of the Supreme Court on child marriage[199] and CSAM[200] have also acknowledged the critical role of sexuality education in empowering adolescents.

The proposal to decriminalise sexual acts involving persons above 16 years and below 18 years is consonant with their fundamental rights to life, liberty, dignity, and privacy, and their best interests and evolving autonomy. This approach ensures that adolescents are recognised as individuals undergoing a critical developmental phase who should not be subject to the trauma of criminalisation for normative sexual acts under the garb of protection. It also ensures that all

[197] UNICEF and UNFPA 2020 (n 132) 2; AKP 2024 (n 137) 64–65.
[198] UNICEF and UNFPA 2020 (n 132) 7.
[199] *Society for Enlightenment and Voluntary Action* (n 134) [158], [195].
[200] *In Re: Right to Privacy of Adolescents* (n 81) [18].

protections under the POCSO Act remain in place to address non-consensual or exploitative acts against them. Such decriminalisation will not impact other protection laws regarding under-age marriage, trafficking, and cybercrimes which remain independently enforceable.

Protecting adolescents from harm cannot come at the cost of subjecting them to unjust criminalisation. Instead, there is a need to invest in supportive, rights-based interventions that foster healthy, informed, and empowering transitions into adulthood.

# FINFLUENCERS IN INDIA: TO REGULATE OR NOT TO REGULATE?

*Anik Bhaduri & Rudresh Mandal*[*]

**ABSTRACT**

*With the rising prominence of finfluencers in shaping the investment decisions of retail investors, the question of whether and how to regulate their activities has become of increasing concern. While the dissemination of financial advice in comprehensible and lucid language has led to a drastic increase in the inclusivity and accessibility of the capital markets, many investors have incurred substantial losses, often exhausting their savings through gambling on the stock market. The large scale of losses faced by individual investors, coupled with the increasing volatility in the securities market on account of finfluencer-driven investing, has raised concerns among policymakers across the world. As legislators and securities authorities across the world are deliberating on the introduction of novel regulatory mechanisms aimed at addressing the risks posed by finfluencers, this essay examines the measures taken so far by the Securities and Exchange Board of India ("SEBI") and argues for a balanced approach that fosters the growth of the finfluencer ecosystem without unduly compromising the interests of retail investors.*

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## I. INTRODUCTION

Dinesh Kumar, an insurance professional from Chennai, India, had purchased 10 shares of Gensol Engineering at INR 935 each in June 2024, relying on the advice on a handle on X named @Sovrennofficial. A few months later, he purchased a few more shares, investing a total of approximately INR 11,000. In April, the total value of his holding stood at INR 1,410, reflecting an overwhelming 95% loss.[1] Mr. Kumar's harrowing experience is by no means unique, and reflects a broader phenomenon of retail investors basing their financial decisions solely on the advice received from online investment advisors, colloquially termed as '*finfluencers*'. While some have earned profits, many others, like Mr. Kumar, incurred harrowing losses. The risks of investing based on the advice of finfluencers, and more importantly, the likelihood of being deliberately deceived by such finfluencers, has raised a variety of questions on whether the securities regulatory framework is adequate to safeguard the interests of the retail investors.

Until recently, equity capital markets across the world were largely dominated by large institutional investors with the expertise as well as the resources to undertake rigorous market analyses and to earn profits on the equity market.[2] Retail investors, often derided on the Wall Street as 'dumb money', were inconsequential, and likely to incur losses in volatile and unpredictable share markets.[3] However, over the last few years, two distinct phenomena have made it easier for retail investors to enter, and thrive in capital markets. *First,* the advent of online trading platforms that allow individuals to purchase and sell shares at little to no transaction fees has made it easier for retail investors to enter the market and to undertake transactions as frequently as they deem fit.[4] *Second,* the emergence and growing popularity for online sources of investment advice, including finfluencers, which tells retail investors which stocks to buy or sell, making investment decisions easy.[5] Cumulatively, these two

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[1] Kayezad E Adajania, 'Gensol Crisis: The Finfluencer Hype That Led to 95% Losses for Retail Investors' The Economic Times (18 April 2025) <https://economictimes.indiatimes.com/industry/banking/finance/gensol-crisis-the-finfluencer-hype-that-led-to-95-losses-for-retail-investors/articleshow/120402457.cms?from=mdr> accessed 22 June 2026.

[2] Sergio Alberto Gramitto Ricci, Daniel J.H. Greenwood & Christina Sautter, *The Shareholder Democracy Lie,* (Eur. Corp. Governance Inst., Law Working Paper No. 854/2025, 2025).

[3] Matt Phillips and Taylor Lorenz, 'Dumb Money is on GameStop and it's beating Wall Street at its own game' *New York Times* (27 January 2021) <https://www.nytimes.com/2021/01/27/business/gamestop-wall-street-bets.html> accessed 22 June 2026.

[4] Sergio Alberto Gramitto Ricci & Christina M. Sautter, Corporate Governance Gaming: The Collective Power of Retail Investors, (2021) 22 Nev. L.J. 51.

[5] Sergio Alberto Gramitto Ricci and Christina M Sautter, 'The Educated Retail Investor: A Response to "Regulating Democratized Investing"' (2022) 83 Ohio St LJ Online 205.

developments have propelled the meteoric rise in retail investing, with 120 million new investors registering with the National Stock Exchange between 2019 and 2023.[6]

However, as Mr. Kumar's experience demonstrates, reliance on online investment advice may not yield the expected benefits and may in fact lead to disastrous losses. While they have provided individuals from all walks of life with the fundamental know-how of investments, finfluencers often lack the necessary expertise to advise on personal finance, and more importantly, often deliberately mislead gullible retail investors into purchasing stocks of certain companies in return for a commission.[7] The potential risks posed by finfluencers to retail investors, and to the stability of capital markets, in general, has caught the attention of securities regulators worldwide.[8] In India, the Securities and Exchange Board of India ('SEBI') has prohibited all registered entities from entering into commercial agreements with finfluencers not registered as an Investment Advisor ('IA') or Research Analyst ('RA'), and has imposed penalties on finfluencers not registered with the SEBI.

This article examines the emerging regulatory response to the increasing risks posed by finfluencers and argues that the steps taken by the SEBI are legally questionable and economically inefficient. Drawing on existing models of regulation in other aspects of corporate governance and the global best practices, we advocate a cautious approach to regulating finfluencers, which fosters the inclusivity and accessibility of capital markets without exposing retail investors to undue financial risk. Part I of this article describes the rise of finfluencers in the wake of the GameStop frenzy and the ongoing discussions on rethinking securities regulation. Part II outlines the growing prominence of finfluencers in India and the risks they pose, while part III outlines the regulatory responses initiated by the Securities and Exchange Board of India ('SEBI'). Part IV of this article sets out the roadmap for a cautious regulatory approach that balances the necessity of addressing the risks posed by finfluencers against the benefits of increased participation in securities markets. Part V concludes.

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[6] Hemant Kakka, 'Retail investors driving India's stock market surge: What has changed over the years?' *The Economic Times* (16 February 2024) <https://economictimes.indiatimes.com/markets/stocks/news/retail-investors-driving-indias-stock-market-surge-what-has-changed-over-the-years/articleshow/107742841.cms> accessed 22 June 2026.

[7] Mia Stefanou, 'Finfluencers in the Wild: A Call for Regulation Addressing the Growth of Online Investment Advice' (2023) 88 Brook L Rev 959.

[8] Akshaya Kamalnath, 'Finfluencers and Other Tech Disruptions to Corporate Law – Insights from South Korea and India' (2025) 13 Chinese J Comp L cxaf002.

## II. FINFLUENCERS AND THE RISE OF THE RETAIL INVESTORS

Over the last few decades, the involvement of retail investors in the equities market had generally been intermediated by investment funds, retirement plans and professional advisors. The costs involved in trading directly on the share market, coupled with the informational asymmetries and the high risks involved in trading in shares, deterred most retail investors from engaging directly with the market.[9] As a result, institutional investors expanded in their scale and in their abilities, and now hold substantial voting power in a majority of listed companies, effectively becoming the *de facto* rule-makers in capital markets. Several commentators have observed that large investment funds now cumulatively have the power to determine board structures,[10] influence corporate governance practices,[11] and form stable industry-wide cartels that reduce output and raise prices.[12]

On the other hand, retail investors have hardly been discussed in academic or policy circles. Often derided on Wall Street,[13] individual investors have traditionally played a miniscule role in the functioning of capital markets, and have largely been described in legal policy only as gullible victims who need protection from the market.[14] However, as discussed below, the GameStop frenzy turned this narrative on its head, and demonstrated that retail investors could radically disrupt capital markets, and raised new issues that questioned existing theory as well as regulatory frameworks.

### *A. THE RISE AND RISE OF ONLINE FINANCIAL ADVICE*

In early 2021, as the world was still reeling under the shock of the Covid-19 pandemic, equity capital markets witnessed a sudden twist. Within a few weeks in January, the stocks of *GameStop Corp.,* an American video game company listed on the New York Stock Exchange, witnessed an overwhelming 1700% rise in value.[15] The value of the company rose from USD

[9] Jill E Fisch, 'Corporate Democracy and the Intermediary Voting Dilemma' (European Corporate Governance Institute, Law Working Paper No 685, 2023).
[10] Michal Barzuza, Quinn Curtis and Daniel Webber, 'Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance' (2020) 93 Southern California Law Review 1243.
[11] Danielle A Chaim, 'Investor Coalitions through an Antitrust Lens' (forthcoming 2025) UC Irvine Law Review.
[12] Eric A Posner, Fiona Scott Morton and E Glen Weyl, 'A Proposal to Limit the Anticompetitive Power of Institutional Investors' (2017) 81 Antitrust Law Journal 669.
[13] Phillips and Lorenz (n 3).
[14] Donald C Langevoort, 'The SEC, Retail Investors, and the Institutionalization of the Securities Markets' (Georgetown University Law Center Legal Studies Research Paper No 2008-2, 2008).
[15]Phillips and Lorenz (n 3).

2 billion to USD 24 billion within a few weeks, and increased by an overwhelming USD billion within two days.[16]

The core force driving this meteoric rise in the price of GameStop stock was an online chat room on Reddit titled r/WallStreetBets, where numerous individual retail investors discovered an online community and encouraged each other to keep on purchasing GameStop shares.[17] The emergence of commission-free online trading platforms such as RobinHood and WeBull made it easy to invest in shares, making capital markets more accessible to retail investors.[18] Confined within their homes by the Covid-19 pandemic, and *"flush with stimulus checks seeking a form of engagement and entertainment",* individuals with idle money began investing heavily into the securities markets to try their luck.[19]

While large hedge funds and other titans on the Wall Street had placed their bets on the prediction that GameStop shares were bound to decline,[20] this eclectic group of online investors decided to turn that prediction on its head and invest consistently into GameStop. The key inspiration and encouragement came from Keith Gill, who went by the nickname *'Roaring Kitty'.* Gill posted frequent videos on YouTube, where he spoke about purchasing GameStop shares and the profits he made from holding on to them.[21] His observations and advice were further discussed on Reddit, where Gill himself went by the username *DeepF-----Value*.[22] Online forums such as Reddit provided a collective sense of identity, where individuals, especially millennials and GenZ, developed a sense of camaraderie involving the exchange of jokes and memes.[23] GameStop was not the only company that benefitted from the sudden interest of retail investors. A variety of other companies like AMC, BlackBerry, Bed Bath &

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[16] ibid.
[17] Sue Guan, 'The Rise of the Finfluencer' (2023) 19 NYU Journal of Law and Business 489.
[18] Jill E Fisch, 'GameStop and the Reemergence of the Retail Investor' (European Corporate Governance Institute, Law Working Paper No 637, 2022).
[19] ibid.
[20] Laurence Fletcher, 'Hedge fund that bet against GameStop shuts down', (The Financial Times, 22 June 2021) <https://www.ft.com/content/397bdbe9-f257-4ca6-b600-1756804517b6> ; Kelly, Kate, and Matthew Goldstein**,** **'**Wall Street Short Sellers Find GameStop Is No Easy Bet,' (New York Times, 8 February 2021) <https://www.nytimes.com/2021/02/08/business/wall-street-short-sellers-game-stop.html>.
[21] Yun Li, 'Markets Reddit user who helped inspire GameStop mania says he lost $13 million on Tuesday, but is still holding on', (*CNBC* 2 February 2021) <https://www.cnbc.com/2021/02/02/reddit-user-who-helped-inspire-gamestop-mania-says-he-lost-13-million-on-tuesday-but-is-still-holding-on.html#:~:text=Despite%20the%20losses%2C%20the%20investor,and%2Dmortar%20video%20game%20retailer>.
[22] ibid.
[23] Gramitto Ricci & Sautter, Corporate Governance Gaming, (n 5).

Beyond, Koss Corporation, and Express, Inc. also witnessed a massive rise in their stock value.[24]

However, in February, the frenzy was over, and the stock prices began to fall. GameStop shares lost 60% of their value on 2nd February, 2021 and soon it was reported that USD 27 million in value had been erased.[25] After a sporadic rise in share prices again in March, the prices fell again, resulting in catastrophic losses for many retail investors who had invested heavily into the stocks, and had held on to the stocks despite the declining value.[26] People had invested their retirement savings into GameStop stock, students had invested their stipends and pocket money, and many even took out loans to participate in the ongoing frenzy, only to witness most, if not all, of their investments, disappearing overnight.[27]

The phenomenon of retail investors relying on online financial advice to collectively boost stock prices is not limited to the US alone. In 2021, South Korea witnessed the emergence of a number of YouTube channels providing financial advice and retail investors accounted for 60% of the daily stock market turnover.[28] Although not as meteoric as the GameStop frenzy, the stock prices of EcoPro, a battery company, and its subsidiary, EcoPro BM grew by 9 times in 2023, driven by the recommendations of local finfluencers like Park Soon-Hyuk.[29] However, the decisions of the retail investors in South Korea seemed to be based on a rational calculus, relying largely on the understanding that *"South Korean battery makers and material producers will benefit from a booming market in electric vehicles and US president Joe Biden's landmark programme of subsidies for clean energy."*[30] This suggests that finfluencer-driven retail participation, when grounded in fundamentals rather than speculation, may offer valuable lessons for India in designing a regulatory framework that protects investors without stifling informed market engagement.

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[24] Katrina Compoli and Matt Turner, 'Meme Rally Fades as Bed Bath & Beyond, Koss Lose Luster', (*Bloomberg* 3 June 2021) <https://www.bloomberg.com/news/articles/2021-06-03/bed-bath-beyond-koss-drop-as-meme-stock-rally-begins-to-fade>.
[25] Matt Phillips, Plunging GameStop Stock Tests the Will of Investors to Stick with the Ride, (*New York Times* 2 February 2021) <https://www.nytimes.com/2021/02/02/business/gamestop-investors-plunging-shares.html>.
[26] Jesse Pound, 'GameStop plunges 60%, has lost more than 70% of its value since Friday', (*CNBC* 1 February 2021) <https://www.cnbc.com/2021/02/01/gamestop-slide-continues-after-hours-trading.html>.
[27] Bailey Lipschultz, 'GameStop Rout Erases $27 Billion as Reddit Favorites Lose Steam', (*Bloomberg News* 2 February 2021)<https://www.bloomberg.com/news/articles/2021-02-02/gamestop-extends-pullback-with-short-interest-and-volume-sinking>.
[28] Song Jung-a, 'South Korea's Retail Investor Army Declares War on Short-sellers' *Financial Times* (London, 25 April 2021) < https://www.ft.com/content/060b527e-8f8c-48f8-9809-8f0e6d60fc37> accessed 22 June 2026.
[29] Song Jung-a and Christian Davies, 'South Korean "ant" Traders Battle Hedge Funds in Swarm on Battery Shares' *Financial Times* (London, 17 July 2023) <https://www.ft.com/content/dbaf5e89-289c-4a34-b8db-a29ef3bfeae4> accessed 22 June 2026.
[30] ibid.

### *B. (IR)RATIONAL INVESTING: THE SOCIO-POLITICAL DYNAMICS OF RETAIL INVESTING*

Historically, the purchase of shares and stocks has been an efficient investment strategy which yields a substantial increase in value over time.[31] However, it has often been socially divisive. Participation in the securities markets inherently carries a high degree of risk, which deters large section of the society from investing in shares directly. In addition, a variety of regulatory prohibitions make it difficult for retail investors with limited means to trade directly on the market.[32] Cumulatively, these factors fostered a long-term resentment among retail investors, who have been excluded from the financial benefits of participating in the stock market.[33]

While this *us-versus-them* mentality and anger against the titans of Wall Street had been brewing for quite some time, it was not possible for retail investors to come together and implement a meaningful change towards making the financial markets more inclusive.[34] The emergence of online forums like r/WallStreetBets during the pandemic allowed these angry retail investors to come together in an attempt to collectively take down Wall Street. The key rationale driving the investment strategy of the group was not a motive to profit from the investments, but to drive large hedge funds to bankruptcy. A comment on the group from 2021 reads *"*It's not about the money for most, but sending a message. I don't care if I don't make my few hundreds….as long as you other retards make thousands and millions *while bankrupting the hedge funds*." (emphasis added)[35]

At the peak of the pandemic, as deep-seated economic fault lines were rupturing, these online forums fostered a sense of solidarity among retail investors from across the world who rallied together to make the financial markets more accessible. Financial influencers like Keith Gill, who reduced the informational barriers to participating in the stock markets and encouraged people to invest, emerged as leaders of this movement. As many investors started earning profits and the news of hedge funds incurring large losses became public, their conviction in the social and political message of their investments deepened, with most

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[31] Hester M Peirce, 'Prosperity's Door' (21 July 2021) <https://www.sec.gov/newsroom/speeches-statements/peirce-prosperity-door-072121> accessed 22 June 2026.
[32] Fisch (n 19).
[33] Lynn Stout and Sergio Gramitto, 'Corporate Governance as Privately-Ordered Public Policy: A Proposal' [2018] 41 *Seattle University Law Review* 551.
[34] Phillips and Lorenz (n 4).
[35] PB-and-Slay, 'Attack on Wall Street pt. 1 (SUB)' *Reddit* (31 January 2021) <https://www.reddit.com/r/wallstreetbets/comments/l7mma6/attack_on_wall_street_pt_1_sub/> accessed 22 June 2026.

investors holding on to their stocks even after the sharp decline in stock value in the early weeks of February 2021.[36] In fact, the texts on various social media groups made it clear that many investors were not *rationally* seeking profits, but instead saw their investment decision as a form of social, political and aesthetic expression.[37]

While speculation has been a common feature of financial markets since centuries, the GameStop frenzy was the first instance of collective action by dispersed retail investors towards taking down the existing socio-economic barriers and hierarchies. The rise of finfluencers and the increasing accessibility of securities markets, coupled with the growing prominence of non-financial considerations in investment decision-making prompted conjectures, questions and criticism as to whether the current regulatory framework adequately addresses the risks emerging from the conduct of finfluencers and retail investors.

### *C. RETHINKING REGULATION?*

The rise of finfluencers and the unprecedented surge in retail investing has drawn a variety of questions and comments, with most securities regulators questioning whether the existing securities law framework is sufficient and what changes (if any) are needed to respond to this new phenomenon. While excessive trading by retail investors poses risks to both retail investors and jeopardizes the stability of the market, the increased accessibility of the financial markets fosters economic development and inclusivity. The contradictory aims of protecting retail investors and enhancing financial inclusivity necessitates cautious regulatory approach that balances these contradictory aims without compromising either.

#### *(i) THE RISKS OF FINFLUENCER-LED INVESTMENT STRATEGIES*

The first concern, and perhaps the more widely discussed, revolves around the risk incurred by retail investors.[38] As discussed above, many individuals and households incurred substantial losses, with many losing savings they had accumulated over several years.[39] Most retail investors, especially those engaging with the securities markets for the first time, do not

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[36] Alicia Adamczyk, '"I Thought I Realistically Could Make $25,000 Off of This": Why Redditors Are Holding GameStop' *CNBC Make It* (1 February 2021) <https://www.cnbc.com/2021/02/01/why-redditors-are-holding-gamestop-stock.html> accessed 22 June 2026.
[37] John P Anderson, 'GameStop, Social Media, and the Phenomenon of Expressive Trading' *CLS Blue Sky Blog* (24 March 2021) <https://clsbluesky.law.columbia.edu/2021/03/24/gamestop-social-media-and-the-phenomenon-of-expressive-trading/> accessed 22 June 2026.
[38] Fisch (n 19).
[39] Nathaniel Popper, 'Robinhood Has Lured Young Traders, Sometimes with Devastating Results' *New York Times* (8 July 2020) <https://www.nytimes.com/2020/07/08/technology/robinhood-risky-trading.html> accessed 22 June 2026.

possess the expertise and/or resources to assess whether the stocks they invest in are likely to yield profits, and instead relied heavily on the advice of finfluencers. The vulnerability of these investors was further enhanced by the growing popularity of margin trading, i.e., trading with borrowed funds rather than with cash available in their accounts.[40] The peer pressure and social frenzy around app-based investing is often addictive, causing many to invest excessively in stocks and exposing themselves to the risk of losing more than what they can afford.[41] The inexperience and lack of familiarity with technical terms and the nuances of stock markets causes retail investors to over-estimate their chances of winning money, and to react without understanding the implications of their investment decisions. Alexander Kearns, a 20-year old student from Napeville, Illinois, committed suicide after the Robinhood app showed him that his balance was negative USD 730,165. Kearns mistakenly read the negative balance to imply to understand that he owed the entire amount, while the user interface of the app only displayed the temporary balance until all stocks underlying his assigned options settled into the account.[42] This experience underscores that the harm from excessive trading by inexperienced retail investors following online investment advice extends far beyond financial losses, and can in fact, be fatal.

The second concern identified by several academic commentators revolves around the stability and efficiency of financial markets.[43] In a perfectly efficient securities market, trading facilitates price discovery and the shares are traded at the value they are worth, making it impossible to beat the market.[44] While informational asymmetries and various forms of transaction costs make it impossible to accomplish perfectly efficient markets, share prices are

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[40] Simon Constable, 'Massive Margin Call Strikes Again in the Stock Market' *Forbes* (29 March 2021) <https://www.forbes.com/sites/simonconstable/2021/03/29/massive-leverage-strikes-again-in-the-stock-market/> accessed 22 June 2026; US Securities and Exchange Commission, 'Investor Bulletin: Understanding Margin Accounts' (10 June 2021) <https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins-29> accessed 22 June 2026.

[41] Lance Roberts, 'This Won't End Well – Gen Z'ers Take on Debt to Invest' *Real Investment Advice* (27 August 2021) <https://realinvestmentadvice.com/resources/blog/this-wont-end-well-gen-zers-take-on-debt-to-invest> accessed 22 June 2026.

[42] Sarah Jackson, 'Robinhood Has Settled a Lawsuit over the Death of a 20-Year-Old Who Died by Suicide Last Year Thinking He Lost $730,000 on the Stock-Trading App' *Business Insider* (1 July 2021) <https://www.businessinsider.com/robinhood-settled-suit-suicide-20-year-old-trader-alex-kearns-2021-7> accessed 22 June 2026.

[43] Gary Gensler, Chair, US Securities and Exchange Commission, 'Prepared Remarks at the Global Exchange and FinTech Conference' (9 June 2021) <https://www.sec.gov/news/speech/gensler-global-exchange-fintech-2021-06-09> accessed 22 June 2026
("*I've asked staff to make recommendations for the Commission's consideration on best execution, Regulation NMS, payment for order flow (both on-exchange and off-exchange), minimum pricing increments, and the NBBO, with the aim of continuing to make our markets as efficient as possible.*").

[44] Andrew W Lo, 'Efficient Markets Hypothesis', *The New Palgrave Dictionary of Economics* (2nd edn, 2008) 3543 <https://link.springer.com/rwe/10.1057/978-1-349-95189-5_42> accessed 22 June 2026.

generally close to their actual value. However, with unrestricted speculation, share prices can skyrocket to abnormally high prices which do not reflect the true valuation of the company, and allows companies to raise their stock price without any corresponding increase in their productive capacity.[45] Such inflated prices are bound to drop at some point, resulting in widespread losses. Recognizing the inevitable fall of this stock prices, the AMC prospectus expressly warned potential investors *"against investing in our Class A common stock, unless you are prepared to incur the risk of losing all or a substantial portion of your investment."*[46] These concerns are amplified with the rising prominence of trading with borrowed funds. If the investors cannot pay for their trades, these losses are passed on to brokerage firms and in turn, affect the markets as a whole. Legislators in the US have warned that finfluencer-led speculation on the stock markets may fuel systemic risk, necessitating immediate intervention and regulation.

### *(ii) RETAIL INVESTOR ENGAGEMENT AND THE WAY TO FINANCIAL DEVELOPMENT*

In spite of the potential risks to the financial safety of inexperienced retail investors and the financial stability of the economy, increased participation of retail investors in the securities markets has several benefits. The first and most prominent benefit in the overwhelming increase in the accessibility and inclusivity of the capital markets ecosystem. Investment in shares has been an effective means to generate wealth, and the liquidity of capital markets has been directly linked to the economic development of a country.[47] However, until recently, large sections of the society have been excluded from the capital markets because of the lack of adequate knowledge, and the high costs of investing. In particular, women and minority communities often could not relate to the male well-off financial advisors and remained aloof from the capital markets, deepening and worsening the existing economic disparities.[48] The emergence of finfluencers has substantially simplified the functioning of capital market. In particular, content tailored to women and black communities has made the

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[45] Fisch, (n 20).
[46] Steve Goldstein, 'Here's AMC's Blunt New Warning to Prospective Buyers of Its New Stock Offering' *MarketWatch* (3 June 2021) <https://www.marketwatch.com/story/heres-amcs-blunt-new-warning-to-prospective-buyers-of-its-new-stock-offering-11622724514> accessed 22 June 2026.
[47] Hester M Peirce, Commissioner, US Securities and Exchange Commission, 'Prosperity's Door' (FINRA Certified Regulatory and Compliance Professional Program, Georgetown University, 21 July 2021) <https://www.sec.gov/newsroom/speeches-statements/peirce-prosperity-door-072121?utm_=> accessed 22 June 2026.
[48] Lynn A Stout and Sergio Gramitto, 'Corporate Governance as Privately-Ordered Public Policy: A Proposal' (2018) 41 Seattle U L Rev 551, 559-69.

advice relatable and provided a means to alleviate gender and racial wealth inequalities that has plagued the economy for decades.[49]

*Second,* an increase in direct ownership of stock by retail investors has the potential to change the relationship between ordinary individuals and large corporations. As more and more people at the grassroots own stock and have the potential to influence corporate decision-making, it is expected that retail shareholders can collectively use their voting power to hold the management accountable, and to drive corporations towards ESG and other meaningful initiatives.[50] For instance, in South Korea, retail investors supported a campaign by an activist fund to appoint an independent auditor on the board of SM Entertainment, and were ultimately able to put an end to related party transactions that the company was involved in.[51] Retail investors also weighed in heavily in favour of the management in relation to the cancellation of treasury stocks om Samsung C&T and Kumho Petrochemical.[52] Such involvement of retail investors in corporate decision-making appears to have eliminated on at least mitigated the agency costs between the ownership and the management, paving the way towards efficient corporate governance.

*Third*, the growing direct participation of retail investors, often mobilized by finfluencers, dilutes the traditional dominance of institutional intermediaries such as hedge funds and large asset managers.[53] As seen in the U.S. meme-stock episode, collective retail action can occasionally counterbalance the market-moving power of professional investors, challenging information asymmetries and reducing reliance on gatekeepers for investment decisions. For India, this trend signals a gradual democratization of capital markets, where financial literacy and direct engagement can curb the outsized influence of a few institutional players over market outcomes. It also highlights the need for SEBI to design regulations that protect retail investors without undermining this shift toward more participatory and less intermediated markets.

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[49] Adam S Hayes and Ambreen T Ben-Shmuel, 'Under the Finfluence: Financial Influencers, Economic Meaning-Making and the Financialization of Digital Life' (2024) 45 Econ & Soc'y 478 <https://www.tandfonline.com/doi/full/10.1080/03085147.2024.2381980#abstract> accessed 22 June 2026.
[50]Sergio Alberto Gramitto Ricci & Christina Sautter, *Wireless Investors and Apathy Obsolescence*, 100 WASH. U. L. REV. 1653 (2023).
[51] Song Jung-a and Christian Davies, 'Activist Investors Smoke Out South Korea's Undervalued Companies' *Financial Times* (London, 27 August 2024) <https://www.ft.com/content/9c58c90d-9a9d-46d5-8e57-5d2fffd8acf0> accessed 22 June 2026.
[52] Akshaya Kamalnath, 'Finfluencers and Other Tech Disruptions to Corporate Law — Insights from South Korea and India' (2025) 13 Chinese J Comp L.
[53] Fisch, (n 20).

## III. FINFLUENCERS IN INDIA

Over the last few years, India has witnessed the emergence and rising popularity of finfluencers across various social media platforms, including X (formerly Twitter), Instagram and YouTube.[54] While the simple and lucid investment advice offered by these finfluencers has encouraged many retail investors to invest in shares, finfluencers have been found to be involved in pump-and-dump schemes, advertising under the guise of offering impartial advice and other fraudulent activities that jeopardize both consumer protection as well as the stability of the financial markets in India.

In India, like in other jurisdictions, finfluencers rose to prominence during the pandemic. While a few channels providing online financial advice had existed prior to 2020, the number of followers skyrocketed during the pandemic, with several new finfluencers to enter the market.[55] The easy availability of financial advice, coupled with commission-free trading apps like Zerodha and Groww, encouraged individuals and households across India to invest their savings into shares.[56] Reflecting this surge, the number of demat accounts jumped from 3.6 crore in 2019 to 19.4 crore in 2025, while retail investors' share in the market capitalisation of NSE-listed companies increased from 10.9% in 2014 to 17.6% in 2025.[57]

Indian citizens have typically been reluctant to invest in shares on account of the unpredictability of the markets, the lack of financial literacy, and the procedural and technical barriers involved in trading on the stock market. However, the advent of finfluencers marked a radical transformation by providing financial advice through short videos in simple comprehensible language. Highlighting the role played by finfluencers in enhancing financial literacy and making the financial markets more inclusive, the Business Times noted, "*first-time investors, especially from far-flung towns and cities, are drawn to these finfluencers. This also*

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[54] Aakriti Bansal, 'Parliament Panel Calls for Verified Tick on Finfluencers, SEBI Oversight; Priyanka Gandhi Seeks Mandatory Disclosures' *Medianama* (27 August 2025) <https://www.medianama.com/2025/08/223-parliament-panel-sebi-finfluencer-regulation-india/> accessed 22 June 2026.

[55] Purva Chitins, 'Meet the Finfluencers Straddling Tightrope between Self-Regulation, Racking Up More Followers' *The Print* (New Delhi, 13 October 2024) <https://theprint.in/economy/meet-the-finfluencers-straddling-tightrope-between-self-regulation-racking-up-more-followers/2309182/> accessed 22 June 2026.

[56] Ashish Rukhaiyar, 'Rise of the Finfluencers' *Business Today* (India) <https://www.businesstoday.in/interactive/immersive/rise-of-the-finfluencers> accessed 22 June 2026.

[57] PTI, 'Retail Participation in Capital Mkt Increases; Demat Accounts Surge to 19.4-cr in 2025' *Mint* (15 July 2025) <https://www.livemint.com/market/stock-market-news/retail-participation-in-capital-mkt-increases-demat-accounts-surge-to-19-4-cr-in-2025-11752577575976.html> accessed 22 June 2026; *Retail Power: Retail holdings rise more than 10x over the last decade*, Moneycontrol News, 'Retail Power: Retail Holdings Rise More than 10x over the Last Decade' *Moneycontrol* (January 2024) <https://www.moneycontrol.com/news/business/markets/retail-power-retail-holdings-rise-more-than-10x-over-the-last-decade-12901840.html> accessed 22 June 2026.

*explains why some of their most viewed videos are "How to buy your first share", "Get regular income from gold", or even "Earn 2.5 crores in 20 years! How?"*[58]

In particular, Indian finfluencers appeal to millennials and individuals residing in far-flung areas of the country who were earlier often hindered from investing in the financial markets by technical and well as informational barriers. 60% of finfluencers are aged under 29, and disseminate their content through a variety of social media platforms like Instagram and LinkedIn, making them accessible and easy to consume. Further, several finfluencers disseminate their content in vernacular languages, allowing vast majorities of Indian investors to understand the functioning of financial markets, and to invest in them.[59] More importantly, the advice offered by finfluencers is generally right. In a survey conducted by the CFA institute, an overwhelming 72% of investors relying on the advice of finfluencers earned profits, enhancing the appeal of finfluencer-driven investment strategies among the Indian population.[60]

## IV. FINFLUENCERS UNDER INDIAN LAW

The continued rise of finfluencers in India and the increasing reliance on their advice by retail investors across India has drawn the attention of the Securities and Exchange Board of India ('SEBI'). Through a series of Consultation Papers and circulars, SEBI has sought to expand the scope of the existing legal framework to adequately capture the risks posed by finfluencers. Simultaneously, SEBI has also imposed penalties on a number of finfluencers involved in deceptive practices, with a view to deterring others from attempts to mislead consumers or manipulate the financial markets. However, as discussed below, these regulatory interventions are incoherent, and may lead to a chilling effect on the nascent finfluencer ecosystem.

### *A. THE EXISTING LEGAL FRAMEWORK*

The securities markets in India are governed primarily by the Securities and Exchange Board of India ("SEBI"), which is tasked with protecting the *"interests of investors in securities and [promoting] the development of.... the securities market"*.[61] The SEBI Act

[58] Serena Espeute and Rhodri Preece, *The Finfluencer Appeal: Investing in the Age of Social Media* (CFA Institute Research Foundation 2024) <https://rpc.cfainstitute.org/sites/default/files/-/media/documents/article/industry-research/finfluencer-report.pdf> accessed 22 June 2026.
[59] ibid.
[60] ibid.
[61] Securities and Exchange Board of India Act, 1992, preamble.

envisages a wide regulatory mandate, empowering the SEBI to regulate and intervene in all aspects of the securities markets, and to undertake any measures as may be necessary.[62] Over the years, SEBI has issued a variety of regulations that specify the applicable legal standards for various activities relating to securities.

The provision of financial advice in India is governed largely by the Securities and Exchange Board of India (Investment Advisor) Regulations, 2013 ("IA Regulations"), which defines *"investment advice"* as *"advice relating to investing in, purchasing, selling or otherwise dealing in securities and advice on investment portfolio containing securities, whether written, oral or through any other means of communication…"*[63] However, the IA Regulations clarify that *"investment advice given through newspaper, magazines, any electronic or broadcasting or telecommunications medium, which is widely available to the public shall not be considered as investment advice for the purpose of these regulations".*[64] The Regulations further define an investment adviser as a person who provides investment advice *"for consideration….to clients or other persons",* making it amply clear that the dissemination of investment advice for free over the internet does not constitute investment advice.[65]

Further, the Securities and Exchange Board of India (Research Analyst) Regulations ("RA Regulations") define a "*research report*" as *"any written or electronic communication that includes research analysis or research recommendation …. providing a basis for investment decision and does not include …. internal communication that are not given to current or prospective clients."*[66] The financial advice disseminated by finfluencers on social media does are generally addressed to the public at large and not to any current or prospective clients. As such, finfluencers do not come within the purview of the RA Regulations either.

### *B. MODIFICATIONS TO ADDRESS THE RISKS POSED BY INFLUENCERS*

In August 2023, SEBI published a Consultation Paper on *Association of SEBI Registered Intermediaries/Regulated Entities (including Finfluencers)* where it outlined the risks posed by finfluencers, as well as the proposed regulatory intervention aimed at disrupting the revenue model for unregistered finfluencers. The Consultation Paper defines *"finfluencers"*

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[62] Securities and Exchange Board of India Act, 1992, s 11.
[63] Securities and Exchange Board of India (Investment Advisers) Regulations 2013, reg. 2(l).
[64] ibid.
[65] Securities and Exchange Board of India (Investment Advisers) Regulations 2013, reg. 2(m).
[66] Securities and Exchange Board of India (Research Analysts) Regulations 2014, reg. 2(w).

as *"persons who provide information and/or advice on various financial topics such as investing in securities, personal finance, banking products, insurance, real estate investment, etc. through social/digital media platforms/channels, and have the ability to influence the financial decisions of their followers."*[67] SEBI observed that finfluencers often do not disclose conflicts of interest such as their associations with the products and/or services that they promote, and may not have the requisite expertise to disseminate financial advice.[68] With a view to mitigating the risks posed by finfluencers, SEBI recommended that no entity registered with SEBI, including companies, stock exchanges, intermediaries, etc., should have any relationship/association with an unregistered finfluencer, and must not share any confidential information with an unregistered finfluencer.[69]

On 27 June 2024, SEBI's board signalled a turn toward a more structured approach to finfluencers by approving "norms" that define them as individuals who provide information and/or advice on financial topics through social/digital channels and can influence followers' decisions.[70] The post-meeting framework leans on SEBI's consultation paper: it discourages associations between SEBI-regulated advertisers and unregistered finfluencers and channels activity toward RA/IA registration. At the same time, no binding regulatory change has yet been implemented, and the boundary between 'education' and 'advice' remains fuzzy, raising risks that protective measures could also constrict investor-education content. The recommendations in the Consultation Paper were approved by the SEBI, and in August 2024, the Securities and Exchange Board of India (Intermediaries) Regulations, was amended to prohibit all registered intermediaries (including stockbrokers, clearing houses, foreign portfolio investors, etc.) from entering into any association with any person providing explicit stock recommendations or promising returns from investments into the stock market.[71]

In January 2025, SEBI again issued a landmark circular further tightening rules around finfluencer conduct. It mandated that anyone delivering financial education must refrain from

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[67] Securities and Exchange Board of India, *Consultation Paper on Association of SEBI Registered Intermediaries/Regulated Entities with Unregistered Entities (including Finfluencers)* (25 August 2023) <https://www.sebi.gov.in/reports-and-statistics/reports/aug-2023/consultation-paper-on-association-of-sebi-registered-intermediaries-regulated-entities-with-unregistered-entities-including-finfluencers-_75932.html> accessed 22 June 2026.

[68] ibid.

[69] ibid.

[70] <Securities and Exchange Board of India, *SEBI Board Meeting, Press Release No 37/2024* (27 June 2024) https://www.sebi.gov.in/media-and-notifications/press-releases/jun-2024/sebi-board-meeting_84448.html> accessed 22 June 2026.

[71] Securities and Exchange Board of India (Intermediaries) (Amendment) Regulations 2024 <https://www.sebi.gov.in/legal/regulations/aug-2024/securities-and-exchange-board-of-india-intermediaries-amendment-regulations-2024_86338.html> accessed 22 June 2026.

using live stock-market data in their analysis or presentations. Instead, educators are limited to referencing data at least three months old, explicitly prohibiting implications that might hint at future price movements or investment advice.[72] The circular also reiterated that registered entities, brokers, advisors, mutual funds, etc., cannot engage with unregistered finfluencers in any compensated manner. These measures aim both to constrict disguised advisory activities and to reinforce the boundary between permissible education and unregistered advisory services.

The regulatory innovation was also complemented by continued enforcement actions under the existing legal framework. In October 2023, SEBI initiated an inquiry into the videos posted by Mohammad Nasiruddin Ansari under the name '*Baap of Chart.*[73]' In an interim ex parte order, SEBI observed *inter alia* that through his videos and his posts on social media, Ansari has tried to lure potential investors to join his 'workshops' and 'courses', where Ansari would provide a wide range of financial advice, including recommendations on which stocks to buy / sell. In particular, SEBI noted that Ansari had himself posted on social media several screenshots which showed him providing explicit stock recommendations to his clients on private WhatsApp and Twitter chats in exchange for a fee. SEBI concluded that such provision of recommendations to clients in exchange for a fee amounts to investment advisory services under the IA Regulations, and held that the provision of these services by Ansari without a valid registration amounts to a contravention of these regulations.

Accordingly, SEBI issued an *interim order* directing Mohammad Nasiruddin Ansari and seven others from *"acting or holding themselves out to be investment advisors."* The Baap of Chart order also invoked the Prohibition of Fraudulent and Unfair Trade Practices (PFUTP) Regulations, 2003, but SEBI stopped short of clarifying how PFUTP could apply to finfluencers. Since PFUTP already covers fraudulent or unfair practices carried out knowingly or recklessly, SEBI had an opportunity to interpret whether misleading "educational" content, coded signals, or parasocial trust exploited by finfluencers could amount to such recklessness.

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[72] Securities and Exchange Board of India, *Details/Clarifications on Provisions Related to Association of Persons Regulated by the Board, MIIs, and Their Agents with Persons Engaged in Prohibited Activities, Circular No SEBI/HO/MIRSD/MIRSD-PoD-1/P/CIR/2025/11* (29 January 2025) <https://www.sebi.gov.in/legal/circulars/jan-2025/details-clarifications-on-provisions-related-to-association-of-persons-regulated-by-the-board-miis-and-their-agents-with-persons-engaged-in-prohibited-activities_91356.html> accessed 22 June 2026.

[73] Interim Order-cum-Show Cause Notice, *In re Mohammad Nasiruddin Ansari/ "Baap of Chart*", Sec. & Exch. Bd. of India (Oct. 25, 2023) (India). <https://www.sebi.gov.in/enforcement/orders/oct-2023/interim-order-cum-scn-in-the-matter-of-unregistered-investment-advisory-activities-of-mohammad-nasiruddin-ansari-baap-of-chart_78333.html>.

A reasoned application here would have strengthened the doctrinal basis for bringing influencer misconduct squarely within PFUTP, rather than relying only on registration breaches under the IA Regulations.

Similarly, in its decision against *Asmita Patel,*[74] SEBI noted that Asmita Patel used her social media presence to entice investors to join her courses in exchange for a fee, and during these courses, explicit trading tips and recommendations were shared with participants of these courses. In her videos, Patel claimed that the investment strategies shared with the participants of these courses would yield definite profits. However, despite paying the full fees and applicable taxes, several subscribers to these courses incurred substantial losses, and complained to the SEBI. The interim order observed that Patel was acting an unregistered investment advisor in contravention of the IA Regulations. Further, the order notes that Patel is an authorised person of a registered stock-broking entity, and the continued association of a registered stock-broker with an unregistered advisor contravenes the recently introduced prohibition on *associations between registered entities and unregistered influencers.* Together, these decisions show a tilt from soft signalling to rules-plus-enforcement, while leaving open the doctrinal line between robust education and unlawful solicitation.

While these decisions and/or circulars reflect that the dissemination of online financial advice is an enforcement priority for the SEBI, they do not reflect any practical shift in the law regarding the provision of investment advice for free on the internet. The SEBI orders make it clear that the provision of investment advice to *a select group of clients in exchange for a consideration* amounts to investment advice, and as such, must comply with the IA Regulations. As such, the legal position surrounding the dissemination of financial advice by influencers on the social media *without charging fees from the viewers* remains unclear.

## V. EVALUATING THE SEBI RESPONSE: DOES IT REALLY WORK?

While the regulatory responses from SEBI have drawn wide media attention and have sparked a nationwide conversation on the pros and cons of finfluencer-based investing, their effect on the market, and their potential to deter potential risks posed by finfluencers remains questionable. SEBI has never clearly articulated the nature and extent of the risks, and in the absence of any surveys or evaluations undertaken by SEBI, the extent of risks to consumer

[74] Unserved Show Cause Notices, *Asmita Patel Global Sch. of Trading Pvt. Ltd*., Sec. & Exch. Bd. of India (Feb. 7, 2025) (India) <https://www.sebi.gov.in/enforcement/unserved-summons-notices/feb-2025/unserved-show-cause-notices-dated-february-07-2025-in-the-matter-of-asmita-patel-global-school-of-trading-private-limited_92654.html>.

harm appears conjectural at best. In addition, the regulatory reforms introduced by SEBI are often contradictory to existing legal provisions, and ignore the crucial role played by finfluencers in reducing the barriers to financial markets, and making the markets more inclusive. As elaborated below, the regulatory reforms are incoherent, inconsistent, and may lead to more harm than benefit in the longer run.

*First,* through its consultation paper as well as through the amendments to various regulations, SEBI has consistently harped on the ills of *'unregistered'* influencers.[75] It is, however, not clear which provisions under the SEBI Act or the regulations thereunder allow for the registration of influencers. As discussed above, the IA regulations apply only to investment advice provided *in exchange for a fee,* and explicitly provide that dissemination of information of public fora like newspapers *does not constitute "investment advice".* Similarly, the RA regulations do not apply to the dissemination of financial advice online. Accordingly, the requirement of registration may only apply if the existing regulations are amended to include publicly available investment advice within the scope of their regulation, and until such amendments are introduced, the discourse on *'unregistered'* finfluencers appears vague and inconsistent with the applicable law.

*Second,* the requirement of registration undermines the fundamental purpose and objective of finfluencers. The IA and RA regulations currently require professional qualifications in finance, and minimum capital requirements, respectively, which operate as regulatory barriers to entering the market for financial advisory services.[76] The high costs of registration, coupled with the requirement of mandatory professional qualifications and the net capital requirements, preclude many from pursuing a career as an investment advisor, effectively limiting the financial markets to the upper echelons of the society. On the other hand, finfluencers come from all walks of life, and are therefore able to share their advice in comprehensible easy-to-understand videos that resonate with their viewers. Departing from the conventional nature of investment advice which includes financial specifics and technical details, finfluencers convey their advice through simple videos like *"how to buy your first share".*[77] With a view to enhancing their client base and to make their advice relatable,

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[75] *Consultation Paper on Association of SEBI Registered Intermediaries/Regulated Entities with Unregistered Entities (including Finfluencers*), Securities & Exch. Bd. of India, Aug. 25, 2023) (India).
[76] Securities & Exchange Board of India (Investment Advisers) Regulations, § 7 & 8 2013 (India); Securities & Exchange Board of India (Research Analysts) Regulations, § 7 & 8 2013 (India).
[77] Krithi D. Ramaswamy, 'Finfluencers in India: New Paradigms of Financial Trust and Authority' in S de and others (eds), *Social Media and Society in India* (University of Michigan Press 2023) 133, 136.

finfluencers are continuously innovating in the mode and style of their delivery to the extent of pioneering new genres like '*finfluencer comedy*'.[78] Registration imposes an undue regulatory burden that would hinder the organic growth of the finfluencer ecosystem, and the gradual reduction in informational barriers to financial inclusivity.

*Third,* with ever-evolving socio-economic and linguistic dynamics of the digital media, it is difficult to distinguish online financial advice from other forms of communication and information-sharing. Recent U.S. commentary[79] argues that traditional "reasonable investor" tests fail to reflect how modern retail investors consume financial information. The Bed Bath & Beyond litigation illustrated this gap: the court treated even a simple moon emoji by a well-known finfluencer as potentially material because, in meme-stock culture, such symbols carry actionable meaning for retail traders. Applying a hard-line rule in the Indian context would require a careful assessment and delineation of what may be considered online financial advice, and is likely to result in protracted litigation that would strain administrative resources.

*Fourth,* the proposed regulatory framework extends into the domains on other regulatory authorities and legal frameworks, paving the way for jurisdictional tussles and contradictory requirements. While the SEBI has exclusive regulatory jurisdiction over securities capital markets, debt capital markets and pension funds fall within the jurisdiction of the Reserve Bank of India (RBI) and the Pension Fund Regulatory and Development Authority (PFRDA) respectively. However, despite this clear demarcation in jurisdiction, the Consultation Paper on finfluencers discusses the risks arising in financial markets at large, potentially exceeding SEBI's regulatory mandate. Further, deceptive marketing by influencers is prohibited under the Consumer Protection Act, which vests the Central Consumer Protection Authority (CCPA) with broad powers to prosecute and penalize all forms of deceptive advertising. In particular, the CCPA Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements explicitly mandates due diligence by endorsers in relation to the products and/or service that they are endorsing,[80] and also requires endorsers to disclose any material connection between the endorser and the provider of a service "*that might materially affect the value or credibility of the endorsement and the connection is not reasonably expected by the audience*."[81] From a literal reading of these

[78] ibid.
[79]Sue S. Guan, "Finfluencers and the Reasonable Retail Investor', (2024) 172 U Pa L Rev Online 43.
[80]Consumer Protection (Misleading Advertisements) Guidelines, 2023 Para No. 13.
[81] Consumer Protection (Misleading Advertisements) Guidelines, 2023 Para No. 14.

provisions, it is clear that finfluencers recommending investment through particular intermediaries or entities must fully disclose their financial or professional relationships to such intermediaries (if any), and accordingly, the SEBI prohibition on *association* between finfluencers and registered entities appears redundant. Similarly, a finfluencer recommending investment into particular companies under the guise of financial advice in return for compensation from such companies falls foul of the Consumer Protection Act. The Consumer Protection Act, however, does not preclude the dissemination of erroneous, negligent or misleading advice by finfluencers for free, and curiously, SEBI has not taken any steps to address the risks from such erroneous advice. In sum, it appears that in its hurry to intervene and regulate, SEBI has introduced regulatory measures to mitigate risks that are already addressed under other legal frameworks, while ignoring the risks of erroneous advice that loom large.

In light of these issues, the regulatory interventions of SEBI appear inconsistent from both legal as well as policy perspectives, and their effectiveness in addressing the risks posed by finfluencers remains questionable.

## VI. DISCLOSURES AND THE WAY AHEAD

As discussed above, the emergence and growing popularity of finfluencers in India is a relatively new phenomenon, and the attempts by SEBI to mitigate the risks from finfluencers are rather ambiguous. It is not clear what risks are anticipated by SEBI, and how the amendments to the regulations address such risks. In this context, we argue that a *command-and-control* model of enforcement with hard legal rules made unduly jeopardize the finfluencer ecosystem, and SEBI should instead consider a disclosure-based regime which mitigates the potential risk to retail investors without deterring finfluencers from providing financial advice.

A disclosure-based regime, which requires finfluencers to prominently disclose their affiliations to any products they endorse, as well as their expertise and qualifications, provides several advantages over a strict regulatory framework requiring registration of finfluencers, as discussed below. *First,* disclosure-based enforcement is easier to implement and involves lower administrative costs than the *command-and-control* model of registration of all finfluencers, backed by administrative sanctions for unregistered advisors.[82] A disclosure-based mechanism allows potential viewers to assess the advice provided by the finfluencer in

[82]Robert M. Baldwin, Martin Cave & Martin Lodge, *Understanding Regulation* (2nd edn, OUP 2011) 151-152.

light of all material facts, and to make an informed decision regarding whether to invest in the securities recommended by the market.

*Second,* a disclosure-based regime departs from the paternalistic regulation which seeks to protect retail investors by excluding them from the market and instead seeks to mitigate informational asymmetries to retail investors a level playing field. As more and more investors are pursuing objectives other than financial gains, and may even be willing to forego financial gains for various social causes, investment decisions have become more complicated and involve a wide variety of factors.[83] In particular, since numerous investors have indicated that they would champion the cause of diversity or sustainability at the cause of financial gain, a financial 'loss' on the stock market does not necessarily imply that the retail investor fell a victim to misleading advice received from a finfluencer. In light of this emerging polycentric nature of investment decisions, it becomes crucial to depart from the paternalistic forms of regulatory supervision, and work towards empowering retail investors to make informed choices.

*Third,* disclosure-based regime provides an educational opportunity to both the market participants and the regulator to better understand the scope of stewardship duties expected by the Indian investors.[84] At the moment, it is difficult to understand the nature and extent of details in financial advice expected by Indian investors, making it difficult to frame hard rules in that regard. The introduction of a disclosure-based enforcement mechanism allows finfluencers as well as the regulators to analyze the reaction of the investor community, and to gradually distill the expectations of retail investors and design appropriate regulatory standards.

## VII. CONCLUSION

Finfluencers now mediate retail investors' access to ideas and confidence, complicating long-standing assumptions about information and advice. India's response, visible in SEBI's 2024 norms architecture, the Baap of Chart interim order, and the 2025 action against Asmita Patel with a three-month data-lag rule, signals a firmer shift toward rules-plus-enforcement while leaving meaningful ambiguity at the education/solicitation boundary. Comparative work counsels balance: general emphasis on definitional clarity and education, and the U.S. move away from the traditional 'reasonable investor' standard all point to a layered design. A

[83] Konstantinos Sergakis, 'Shareholder Stewardship: Autonomy and Sociality', (2023) 23 J Corp L Stud 497.
[84] Anik Bhaduri, 'Fostering Socially Responsible Stewards: CSR and Investment Funds in India', (2023) 23 J Corp L Stud 567.

calibrated Indian framework would (i) set bright-line scope and disclosure obligations, (ii) manage conflicts and paid promotions, (iii) coordinate with platforms on oversight, and (iv) fund sustained financial-literacy initiatives. That blend protects vulnerable investors without extinguishing the participatory upside that makes finfluencer-era markets more accessible.

# THE REAL AND POTENTIAL IMPACTS OF TRUMP 2.0 POLICIES ON THE INDIAN SERVICES INDUSTRY

*Kamal Malhotra**

## ABSTRACT

*This article examines the impacts of Trump 2.0 policies on India's services industry, which constitutes a critical pillar of the Indian economy. Given that the United States is India's primary services market, recent Trump 2.0 policy shifts pose significant threats to India's services exports to the United States. Examples of recent policy changes that India has been forced to make under US pressure include its decision to eliminate its "Google Tax" and its announcement of tax holidays for foreign cloud service providers, which disproportionately advantage US companies. In this evolving context, the article analyses two major challenges. The first is the September 2025 H1B visa policy reforms, which increased application fees twentyfold (while these were recently pronounced as an illegal tax by a US federal court, they are likely to be appealed by the Trump Administration and 'stayed' for at least a few more months) and introduced a salary-based tier system, disadvantaging Indian professionals who comprised 73% of H1B recipients in 2023. It discusses not only the fee based challenges but also the challenges relating to H1B stamping and visa delays which have begun to significantly negatively impact Indian H1B applicants as well as the likely flow-on impacts on both future H1B and student applications to the US. The second is a proposed Congressional legislation, the HIRE Act, which seeks to impose a 25% excise tax on US companies that outsource services to foreign providers, in addition to removing some of their tax benefits, thereby significantly raising outsourcing costs for US companies, many of whom are Indian outsourcing clients and beneficiaries. These current and possible developments threaten India's Information Technology (IT)-enabled services, emerging Global Capability Centres as well as its inward remittances from the US, the main, most important and fastest growing source of such remittances to India in recent years. Such*

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*US origin remittances have been critical in helping balance both India's trade deficits and balance of payments situation, and have become even more important especially since the West Asia crisis has threatened the flow and sustainability of inward remittances from the Middle East and West Asia regions starting March 2026. The paper argues that India must urgently pursue long delayed strategic structural reforms as the way forward, primarily by building robust domestic high-tech employment sectors, diversifying export markets beyond the US toward the EU, UK, and RCEP (Regional Comprehensive Economic Partnership) member nations and expanding offshore operations while simultaneously managing the risks of potential political backlash.*

## I. BACKGROUND AND CONTEXT

### *A. INDIA'S SERVICES EXPORTS*

Indian services exports, valued at a record $387.5 billion in 2024-25,[1] and $418.31 billion in 2025-26 (a 7.98% increase over the previous year), far eclipse its "goods" exports.[2] The sector generated a significant trade surplus of $213.89 billion in 2025-26, helping manage the Indian merchandise goods trade deficit.[3] They have been driven by continuous global demand for India's information technology (IT), business, financial and travel services (e.g. telecom, computer and information services, other business services, transport). These services areas have demonstrated consistent growth, making a significant contribution to India's economy (the country's total services exports were also up by 13.6% in fiscal year FY- 2024-25 from $341.1 billion in FY

[1] Ministry of Commerce and Industry (Government of India), 'India's Total Exports Touch All-Time High of USD 824.9 Billion in Financial Year 2024–25' (*Press Information Bureau*, 2 May 2025) <https://www.pib.gov.in/PressReleasePage.aspx?PRID=2126119> accessed 12 June 2026.

[2] Ministry of Commerce and Industry (Government of India), 'The Cumulative Exports (Merchandise & Services) During FY 2025–26 (April–March) is Estimated at US$ 860.09 Billion' (*Press Information Bureau*, 15 April 2026) <https://www.pib.gov.in/PressReleasePage.aspx?PRID=2252272> accessed 12 June 2026.

[3] ibid.

2023-24).[4] The Government of India aims to achieve USD 1 trillion in services exports by 2030 by providing increased policy support and investment in the sector.[5]

The US is by far India's major customer for such services, primarily through the purchase of software and IT-enabled and other professional services. Overall, Indian services were estimated to account for 60-65% of all Indian exports to the US in FY 2024-25, while "goods" accounted for around 20% of exports to the US in the same period.[6] This was before the 50% tariffs came into effect on August 27, 2025. In value terms, India's overall services exports totalled almost 5 times its goods exports to the US before September 2025 (both their percentage and importance significantly exceeded their pre-September 2025 levels after October 2025 when the practical impact of the US 50% import tariffs on "goods" began to be felt). It should be clear, therefore, that India's services exports have been very important for its economy for the last few decades and assumed even greater significance after the Trump Administration's 50% tariffs on goods, first imposed in August 2025. This remained the case when the US import tariffs were reduced to 18% as of February 6th, 2026 and to an interim 10% after the US Supreme Court ruling on February 20, 2026, pending final and formal completion of the USTR Section 301 investigation and implementation of its new proposed tariffs after July 24, 2026 when the interim tariffs are due to expire.[7] This assumes that the long-drawn India-US Bilateral Trade Agreement (BTA) negotiations have not concluded by then with a different reciprocal tariff structure mutually agreed.

### *B. India as an Emerging Global Hub for Global Capability Centres*

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[4] 'India's Total Exports Grow by 6.01% to Reach Record $824.9 Billion in 2024–25, Up from $778.1 Billion in 2023–24: RBI Report' *Press Information Bureau* (New Delhi, 2 May 2025) <https://www.pib.gov.in/PressReleasePage.aspx?PRID=2126119> accessed 4 February 2026.

[5] 'Export Surge: India Steps Up on Global Stage' *Press Information Bureau* (New Delhi, 7 October 2025) <https://www.pib.gov.in/PressReleasePage.aspx?PRID=2175702&reg=3&lang=2> accessed 28 January 2026.

[6] *Press Information Bureau* [n 2].

[7] 'Fact Sheet: The United States and India Announce Historic Trade Deal', (The White House, 9 February 2026) <https://www.whitehouse.gov/fact-sheets/2026/02/fact-sheet-the-united-states-and-india-announce-historic-trade-deal/> accessed 11 June 2026; 'US Supreme Court rejects tariffs highlights | Government studying implications of US tariff, says Commerce Ministry' *The Hindu* (The Hindu Bureau, 21 Februrary 2026 ) <https://www.thehindu.com/news/international/us-supreme-court-rejects-president-donald-trumps-global-tariffs-february-20-2026-live-updates/article70657247.ece> accesed 11 June 2026.

India's services industry and exports have also taken on additional national and global importance after the country began emerging as a hub for multinational company powered Global Capability Centres (GCCs) which have boosted exports in the "Other Business Services" category. While they are an important development for India, both because they are a recognition of its global competitiveness in this area and represent a silver lining in an otherwise challenging landscape for India's future services exports, their overall domestic employment impact is likely to be limited to a relatively few skilled professionals who would have found employment either in India or overseas in their absence. Hence, while they represent a significant new area of higher value-added global competitiveness for India and a source of potentially significant revenue, their overall employment impact should not be overstated, especially for average low-end, IT skilled Indian manpower.

## II. Threats to India's Services Exports to the United States During Trump 2.0

In this context, and looking into the future, there are at least two non-Artificial Intelligence (AI) related significant threats to the Indian services exports sector from the US during Trump 2.0. The jury is still out on AI's likely impact on India's software industry and exports in terms of their magnitude, despite the huge Sensex crash after predictions of severe AI related disruptions to this industry in early February 2026,[8] and more recent developments relegating India's stock market to fall behind both Taiwan and South Korea because of its lack of heft in the AI computing area.[9]

One of these two challenges has already become reality while the threat of the other remains credible in the longer term. Singly, together, as well as cumulatively over time, they will lead to serious consequences both for India's services exports and for the future structure of the Indian services sector, regardless of and in addition to any AI related disruptions and substitutions. Given the disproportionate dependence of the

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[8]Anupama Ghosh, 'Sensex, Nifty barely end in green after AI fears trigger IT stock crash' The Hindu BusinessLine (4 February 2026) <https://www.thehindubusinessline.com/markets/it-stocks-crash-6-as-ai-fears-grip-markets-sensex-ekes-out-marginal-gains/article70591520.ece> accessed 6 February 2026.
[9]Blaine Rodrigues, 'India File: India overtaken as South Korea, Taiwan ride AI wave' Reuters (9 June 2026) <https://www.reuters.com/world/india/india-file-india-overtaken-south-korea-taiwan-ride-ai-wave-2026-06-09/> accessed 10 June 2026.

Indian economy on the services sector both for its gross domestic product (GDP) as well as its exports, especially to the US market which remains its main services export destination, all already discussed in this paper, it is wise to explore both these threats and the structural domestic reforms and changes they are likely to both necessitate and entail.

The two US Trump 2.0 real and potential threats to both India's services industry and exports are:

- The new US White House September 2025 (core Make America Great Again base pressured) H1B visa policy, announced through a Presidential Proclamation. It cannot, unfortunately, be legally argued that this proclamation is a violation of the WTO-GATS Mode 4 ("Temporary Entry and Stay of Natural Persons") since the US has made no commitments ("Unbound") on Market Access or National Treatment. In WTO parlance, this means that the US is not legally bound and can freely impose restrictions on market access for workers from other WTO member states or discriminate against them compared to US citizens once inside the US.[10]
- Recently proposed Congress legislation, also backed by the MAGA core base, of taxing US back-office services provided by individuals and corporations based in India and other countries. Before this actually happens if it does, it would be wise to investigate whether this will be WTO-GATS Mode 1 compliant if enacted. This WTO obligation is about the cross-border provision of services.

A third more distant threat needs mention but is not as urgent to ponder, since its likelihood depends on how the US based subsidiaries of the big Indian tech companies respond to the H1B visa policy changes. This threat is of increased taxes on the Big Four Indian IT Companies which have US based subsidiaries: Tata Consulting Services (TCS), Hindustan Computers Limited (HCL), WIPRO and Infosys. Since the reported and ostensible reason for such threatened action is largely because of the substantial number of H1B visas these four companies have relied on to bring in low-end tech

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[10]Ansari Salamah and R. Rajesh Babu,'The H-1B Visa and US GATS Market Access Commitments: Options and Strategies for India', (2022) 13(1) IIM Kozhikode Soc. Manag. Rev. <https://doi.org/10.1177/22779752221104930> accessed 6 February 2026.

Indian staff from the home base, it is assumed that if the number of such visa requests now substantially reduces as they already had in recent years, even before the new US H1B September 2025 policy, that the possibility of this threat will also reduce.

This threat now appears even less likely after India provided a tax holiday for US and other data centers located in India through its February 1, 2026 Union Budget 2026-27. Nevertheless, nothing is impossible under the Trump 2.0 Administration and experience over the last year and a half has shown that it is better to take all his threats and those of his loyalist administration officials seriously. However, given the extreme unlikehood of the third threat becoming reality in the foreseeable future, the rest of this paper will only focus and elaborate on the first two threats.

### *A. US H1B Visas: Emerging Developments*

President Trump announced significant policy changes to the H1B visa in September 2025.[11] As announced then, and before the very recent June 2026 US court ruling discussed below, these had and still continue to have (because the Government will no doubt appeal the court ruling) significant cost and compliance implications. The application payment requirements from the H1B visa requesting US employers were increased around twentyfold in September 2025: from around an average one-off application fee of $5,000 per applicant to $100,000.[12] These fees became effective and were to be paid by US-based employers applying for H1B visas for foreign nationals after September 21, 2025.[13] The new policy is being implemented by the US Citizenship and Immigration Services (USCIS). These new fees were applicable only to new filings starting on or after that date, not to existing holders who were out of the country on that date or those with valid H1B visas on that date when they reapply.

An important potential recent development is the invalidation of the $100,000 fee by the federal district court in Massachusetts on June 8, 2026 which described it as a

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[11] 'Restriction on Entry of Certain Nonimmigrant Workers', (The White House, 19 September 2025) <https://www.whitehouse.gov/presidential-actions/2025/09/restriction-on-entry-of-certain-nonimmigrant-workers/> accessed 29 January 2026.

[12] 'H-1B FAQ', (*US Citizenship and Immigration Services*, 4 February 2025) <https://www.uscis.gov/newsroom/alerts/h-1b-faq> accessed 3 February 2026.

[13] ibid.

tax that the US Department of Homeland Security (DHS) is not authorized to levy since only the US Congress can approve taxes. It rejected the Trump Administration's argument that it is an immigration restriction related penalty fee, calling it an unlawful tax.[14] Before Indians start celebrating this court ruling, a number of words of caution are in order.

First, a legal challenge from the Trump Administration is expected. It has 30 days to file an appeal and could simultaneously seek a stay of the ruling till its appeal is decided. If the stay is granted as is probable based on past experience during Trump 2.0, the ruling will not come into effect for at least a few months. Therefore, the huge fee, unpredictability and disincentive created by the September 2025 policy change will all remain for the foreseeable future.

Second, a lot of the damage has already been done. In the Indian case, professionals on H1B and Science, Technology, Engineering, Mathematics (STEM) Optional Practical Training (OPT) status which has been a traditional pathway to H1B visas, the two largest and most directly impacted categories of Indians by the new policy, have already felt the impact over the last nine months. This is because many employers became reluctant to sponsor foreign workers on H1B visas once the fee was announced last September. While fewer companies were willing to hire Indian nationals, HIB visa employee terminations simultaneously rose together with uncertainties for many laid off workers who had only 60 days to find another job. The negative consequences were particularly severe for workers who had already obtained their H1B visas but were laid off. Most were forced to leave the US. Moreover, for many of these people who had H1B visas but had lost their jobs and were forced to leave the US if they wanted to legally return to seek new employment, the fee was prohibitive since they would have had to pay the $100,00 themselves without employer sponsorship. Many of them and their families were already in significant debt from unpaid student loans which they had hoped their new US-based professional salaries would help gradually repay.

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[14] Kelly Phillips Erb, 'The $100,000 H-1B Trump Fee Case Is Really A Tax Case', (*Forbes*, 9 June 2026) <https://www.forbes.com/sites/kellyphillipserb/2026/06/09/the-100000-h-1b-trump-fee-case-is-really-a-tax-case/> accessed 11 June 2026.

Third, many H1B aspirants still in India who were planning to apply for this visa did not do so. An added disincentive and reason for this has been the simultaneous and accompanying visa stamping and processing delays which have reportedly significantly increased from before September 2025. These delays have left many professionals stranded in India, adding to mobility and employment uncertainties both for Indian workers and H1B service providers. Such uncertainties, delays, rejections and bureaucratic hurdles will remain, regardless of how the US courts finally rule on the fee issue since US Embassies, the US State Department and the US Department of Homeland Security (DHS) have full control over visa processing and approvals overseas and they have all been given explicit instructions by the Trump 2.0 Administration to reduce the number of new H1B approvals and even review and perhaps reject or at least delay approval stamps for those who have been granted in principle approval but need the visa stamped in their passport in their home country before they re-enter if they have had to leave the US for any reason.

Fourth, the fee, overall, has also suppressed demand for new H1B sponsorships for overseas citizens both from India and elsewhere and this is bound to continue till at least then end of 2026 despite the recent court ruling declaring the fee illegal, given the likelihood of a government appeal and stay order demand which will both lead to continuing uncertainty. The suppressed demand from US employers has also at least partly been because of the alternative local employment arrangements they have been forced to make, especially for entry and middle level H1B aspirant positions and those of previous H1B occupants who have either been laid off or encountered delays in India and other overseas locations in the processing of their visa stamps.

Fifth, OPT as a close to guaranteed route for many Indian students after graduation from US Universities has also been dramatically negatively impacted. This was a major pathway after graduation for H1B entry level, not just for STEM students but others as well.

The new policy has also signalled the replacement of the current H1-B lottery-based system with a more selective model from 2026. This favours more experienced and/or higher skilled/earning applicants. A proposal incorporating a 4-tier salary-based

system was first placed on the table in 2020 during Trump 1.0 but was killed by the Biden Administration.[15] A somewhat modified version of it was reportedly resuscitated and approved by the White House Information and Regulatory Affairs Bureau in early August 2025 prior to being approved by President Trump on September 19, 2025 through his new H1B visa policy Proclamation entitled *Restrictions on Entry of Certain Nonimmigrant Workers.*[16] The White House cited national security grounds and the Proclamation was presented as only an initial step to reform the H-1B non-immigrant visa program.

The proposed tiered salaried based system for the modified H1B speciality occupations is based on the US Department of Labor's (DOLs) Occupational Employment and Wage Statistics (OEWS) survey. The wage is broken down into four tiers (Levels 1-4) based on the education, experience and complexity required for the job. Level 1 is Entry Level for which the baseline wage is provided. Level 2 (Qualified) is for moderately complex jobs, Level 3 (Experienced) for fully competent professionals and Level 4 (Fully Competent) covers high level, senior roles requiring advanced skills, complex problem-solving and significant experience.[17]

The USCIS utilizes a wage-weighted selection process for the H1B cap, implying that a candidate's registration weight depends directly on their OEWS wage level. Under this system, Level 4 salaries receive 4 lottery tickets, level 3, three; level 2 two; and level 1, only one.[18] Moreover, employers are required to pay whichever is higher: the OEWS prevailing wage for the specific Standard Occupational Classification (SOC) in the intended work area or the actual wage paid by the employer to other employees in the organization.[19]

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15 Leslie Demon, 'The Biden Administration Is Already Supporting Employment-Based Immigration, But Uncertainty Remains', (*American Immigration Council*, 5 February 2025) <https://www.americanimmigrationcouncil.org/blog/business-immigration-h1b-biden/> accessed 3 December 2026.

16 *The White House* [n 13].

17 Improving Wage Protections for the Temporary and Permanent Employment of Certain Foreign Nationals, 91 FR 15450 (27 March 2026).

18 *Weighted Selection Process for Registrants and Petitioners Seeking To File Cap-Subject H-1B Petitions*, 90 Fed Reg 45986 (24 September 2025).

19 'Prevailing Wage Information and Resources', (*US Department of Labour)* <https://www.dol.gov/agencies/eta/foreign-labor/wages> accessed 11 June 2026.

This is particularly significant for India and its citizens interested in going to the US through the H1B lottery because they have dominated this category of US visas since at least 2010, if not longer. Of the total annual cap of approximately 85,000 such visas in recent years, (the cap excludes a few exceptional categories such as university professors which do not have a cap), the Pew Research Foundation estimated that approximately 73% such visa-approvals in 2023 were issued to Indians, especially in the STEM fields, making them both the most significant and visible recipients by far with China coming a very distant second.[20]

The proposed new high income based tier-system will also work against the bulk of Indian professionals and students because they are either straight out of post-graduate education or relatively early in their careers and earn lower salaries than senior US hires. Indeed, the vast majority of Indians would probably fit into the Level 1 or 2 tiers (eg. recent graduates, IT coders) which is the focus of the greatest pressure from MAGA and the Trump Administration for replacement by local US hires. These are also, by definition, the two categories in which US citizen replacements for young Indian IT and other professionals are likely to be found more easily and quickly.

The September 2025 H1B policy shift cannot be understood without recognizing that the roll-back of the H1B visa system has been an ongoing major issue in the context of the broader anti- immigration push which has been a core issue for the Trump MAGA base since even before Trump 1.0. However, it became increasingly politically charged in August and September 2025 and has remained so even after the September 2025 Presidential Proclamation.

Quotes in August 2025 from prominent Republican figures who have been long-standing supporters of Trump, illustrate this. The US Commerce Secretary, Howard Lutnick, who has been and continues to be integrally involved in the overhaul of the H1-B program called it a "scam" telling US-based businesses that they should be

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[20] Carolyne Im, Alexandra Cahn and Sahana Mukherjee, 'What we know about the US H-1B visa program', (*Pew Research Center*, 4 March 2025) <https://www.pewresearch.org/short-reads/2025/03/04/what-we-know-about-the-us-h-1b-visa-program/> accessed 4 February 2026.

focused on hiring American workers instead of foreigners.[21] Florida Governor Ron De Santis "echoed" Lutnick by calling it a "cottage industry" benefiting Indian workers.[22] Marjorie Taylor Greene, a key Republican MAGA Congresswoman (who more recently, in November 2025, had a falling out with the President on the matter of the release of the explosive and damning Epstein files but it still hard-core MAGA) also called for ending H1-B visas, portraying Indian workers as taking American jobs.[23]

More broadly, foreign talent continues to be framed as a threat to American jobs by core MAGA supporters who have particularly singled out Indians in the US whom they accuse of "cheap labour under cutting." This Trump base has simultaneously been promoting a "Hire America" policy, reinforcing anti-immigrant sentiment. In August, this was exacerbated by Trump's warnings to Silicon Valley companies not to hire Indians despite widespread knowledge in the tech world that such action would be self-defeating, for both the US' tech industry and its economy. The difficulty of separating Indian high-tech talent from American high-tech innovation, in both start-ups and BigTech, has been widely acknowledged over the last several decades, even by the likes of Elon Musk.[24] This continues, including for the US' high techAI companies. Indeed, many of these professionals have been and continue to be central to American's tech and innovation sectors, powering everything from Silicon Valley start-ups to critical infrastructure products. This is well known to Elon Musk and, perhaps, even to President Trump, given some of his statements.

Notwithstanding this, and because the politicized and polarized political environment on this in the US is worsening in many respects, the livelihoods and security of millions of skilled Indian professionals and their families stand threatened.

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[21] Arjun Sengupta, 'Explained: The H-1B visa debate in the US', (*The Indian Express*, 28 August 2025) <https://indianexpress.com/article/explained/explained-economics/explained-the-h-1b-visa-debate-in-the-us-10215185/> accessed 4 February 2026.

[22] Times of India World Desk, 'Republican Governor slams H1-B, India' *Times of India* (New Delhi, 27 August 2025) <https://timesofindia.indiatimes.com/world/us/cottage-industry-mostly-from-one-country-republican-governor-slams-h-1b-india/articleshow/123546085.cms> accessed 30 January 2026.

[23] Surbhi Gloria Singh, 'H-1B visa must end? Even US' AI needs 'brown hands', says tech entrepreneur' *Business Standard* (New Delhi, 7 August 2024) <https://www.business-standard.com/immigration/h-1b-visa-must-end-even-us-ai-needs-brown-hands-says-tech-entrepreneur-125080700806_1.html> accessed 1 February 2026.

[24] Shashank Bhatt, 'Trump's "No More India Hiring" Ultimatum: What It Means for India-US Tech Ties' Outlook Business (New Delhi, 25 July 2025) <https://www.outlookbusiness.com/explainers/trumps-no-more-india-hiring-ultimatum-what-it-means-for-india-us-tech-ties> accessed 30 January 2026.

As a result, the statements mentioned above could not and still cannot be dismissed as just fiery rhetoric, especially given the high profile MAGA proponents of these views. They must be viewed as dangerous words which could quite easily translate into both physical harm and discriminatory workplace practices not just for Indian H1B visa holders in the politically charged and socially and racially divisive climate which currently prevails in the US, but also for Indian Americans more broadly. Sporadic, still random, physical attacks on Indians such as one in Texas in October 2025 illustrate this.[25]

While not the cause, it should be accepted and recognized that this growing anti-India and anti-immigrant narrative in the US has, unfortunately, been reinforced and fuelled by Indian self-congratulatory boasts, including at the highest Indian official levels, about how many Indian-origin American CEOs of Fortune 500 and Silicon Valley BigTech companies began their careers on H1-B visas, either before or after their post-graduation OPT.

There has always been a split and multiple contradictions between the white working class MAGA and techno-feudalist bases of President Trump, not just on the H1B visa issue, but on many other issues. While the split on the H1B visa policy was papered over initially till the September 19 Proclamation had taken place, the implications of the new policy now appear to be widening the split in President Trump's loyalist support base, with techno-feudalists such as Elon Musk supporting the continuation of H1B visas and many Republican supporting US companies opposing the steep $100,000 fee. In the case of Musk, for example, his opposition stems from the fact that the H1B visa has benefited both him personally and his companies which it continues to do.[26]

While President Trump vacillated on the H1B visa issue for months both before and after his September Proclamation, strangely, he came out more publicly in favour of

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[25] Shweta Sharma, 'Texas man arrested for fatal shooting of Indian student during violent rampage' *The Independent* (Hyderabad, 8 October 2025) <https://www.independent.co.uk/news/world/americas/crime/texas-fort-worth-chandrashekar-pole-indians-shooting-b2841419.html> accessed 3 February 2026.

[26] Press Trust of India, 'Elon Musk backs H-1B visas, says US benefited immensely from talented Indians' *The Economic Times* (New Delhi, 1 December 2025) <https://economictimes.indiatimes.com/tech/tech-bytes/elon-musk-backs-h-1b-visas-says-us-benefited-immensely-from-talented-indians/articleshow/125684945.cms> accessed 2 February 2026.

continuing H1B visas soon after signing the Proclamation which drastically constricts and alters the H1B system. He was reported as saying that many such visa holders at all salary levels play crucial roles in the US economy and that there are no American workers qualified enough to replace them, debunking the MAGA quest for such jobs even at tier Levels 1 and 2.[27] This has further angered the white working-class part of his MAGA base who are being told that most of them cannot be trained to take such IT or AI jobs. However, President Trump's and his loyalists' support for the new H1B policy would also have been because of the huge $100,000 fee he imposed. Now that this is in jeopardy due to the recent federal court ruling on June 8, 2026, the world will have to wait and see how the US President and his team react, both in their court appeal against the ruling and more broadly.

### *B. TAXING OFF-SHORE SERVICE PROVISION TO THE US*

The second Trump 2.0 focus area mentioned in this paper suggests that the offshoring backlash is growing stronger among the MAGA core base in the US, and will continue to grow, especially if increased offshoring in India and elsewhere (e.g. to Canada or parts of SE Asia) through Global Capability and data centers increases as a direct response to the September 2025 H1B policy change. Indeed, there is already proposed legislation in the US Congress to make such off-shoring more expensive and less attractive to US based companies and consumers who benefit from it.

In 2025, the HIRE (Halting International Relocation of Employment Act) was proposed by Republican Senator Bernie Moreno (Ohio) as legislation in the Finance Committee of the US Congress. The proposed Act seeks to place a 25% excise tax on US companies who are paying foreign service providers for outsourced services for work benefiting US-based consumers.[28] No tax deductions are proposed on such payments or fees. The objective is to make such services more expensive and thereby force US companies to hire domestically. Tax revenues earned by the US government in

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[27] Zoe Richards, 'Trump calls H-1B visas necessary to bring in 'certain talents' that he says the US lacks' *NBC News* (12 November 2025) <https://www.nbcnews.com/politics/immigration/trump-calls-h-1b-visas-necessary-bring-certain-talents-says-us-lacks-rcna243367> accessed 31 January 2026.

[28] Halting International Relocation of Employment Act, s 2(a).

this manner are proposed to be utilized through a new fund which is proposed to be established to fund a domestic worker training program.[29]

The Act frames cross-border service purchases as a problem to be taxed, not just regulated. The proposed Act is expected to apply to foreign affiliates of US companies as well as third-party vendors. In addition to the tax legislation, it is expected that the US government's procurement policy will steer demand towards domestic service providers in a "Buy American" consistent preference policy based on executive actions which determine how federal agencies reshape their purchases of services.

The proposed Act does not bind restrictions on offshore purchases but places tax levies on such offshore services. The proposed Act has been opposed by many US business interests and will undermine some US-India tech plans, if approved. As a result, it has faced an uphill battle in the US Congress so far, making little if any progress, as of mid-2026, at the time of writing. This indicates a proposal without significant legislative momentum (lacking co-sponsors or companion bills in the US Congress) and is yet to move out of the Senate Finance Committee. Indeed, its slow legislative path indicates that it will not pass quickly, if at all.

Nevertheless, it would be wise for Indian companies and the Government of India to monitor future developments in this regard closely and carefully since if it is passed, it will significantly affect India's IT and BPO sectors which rely heavily on US contracts and companies.[30] If enacted, it is estimated that the financial penalties could increase the effective cost of outsourcing by up to 46-58%, significantly affecting the US IT and business services which rely heavily on outsourcing, not least to India, even though the broad wording of the current proposed legislation makes it unclear whether intra-company operational expenses, such as the funding of foreign subsidiaries of US firms and GCCs will be covered by it.[31]

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[29] ibid.

[30] Deloitte Development LLC, '2025 Deloitte's Global Business Services (GBS) Survey' (2025), <https://www.deloitte.com/content/dam/assets-zone3/us/en/docs/services/2025/us-2025-deloitte-global-business-services-survey-results.pdf> accessed 3 February 2026.

[31] Maureen Monaghan, 'HIRE Act Proposes 25 Percent Excise Tax on Outsourcing Payments' (*Cullen & Dykman LLP*, 7 October 2025) <https://www.cullenllp.com/blog/hire-act-proposes-25-percent-excise-tax-on-outsourcing-payments/> accessed 12 June 2026.

### *C. Implications for India and Indians in the US of the new US H1B Policy and a Possible HIRE Act and Possible Ways Forward*

Despite the recent federal court ruling against the $100,000 H1B visa fee, the September 2025 Presidential Executive Order has created an uncertain environment for Indian STEM student professionals in the US for whom the H1B visa has been the traditional path to a lucrative and secure career in the US thus far. The H1B visa was also the well-trodden path for "brain circulation" for many Indians. It benefited both them and, to an extent in certain cases, the country as a whole. Neither is now clearly going to be the case going forward, leaving many students who have already embarked on tertiary education in the US propelled by significant loans with a huge burden of debt for them and their families to repay through unknown means - in addition to an uncertain future career path in India or elsewhere. Furthermore, India as a whole will not benefit from the investment, intellectual, knowledge and experience value that the H1B "brain circulation" paradigm has provided the country so far.

The new H1B policy also has significant negative implications for remittances to Indian families from their US based sons and daughters on which many rely, even though this will be felt gradually, not necessarily immediately. Significantly reduced inward remittances will also negatively impact the Indian government's macroeconomic balances and stability since such remittances have played an important role in counter-acting India's overall chronic trade deficits and balance of payments (BoP) challenges over the years.

Recent estimates indicate that India remained the world's top remittance recipient in 2024, a position it has held for over 25 years, with remittances from the US being particularly prominent in recent years.[32] State Bank of India (SBI) research projects overall Fiscal Year (FY) 2026 remittances to be between $137-140 billion, up

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[32] Dilip Ratha, Sonia Plaza and Eung Ju Kim, 'In 2024, Remittance Flows to Low- and Middle-Income Countries are Expected to Reach $685 Billion, Larger than FDI and ODA Combined' (*World Bank Blogs*, 18 December 2024) <https://blogs.worldbank.org/en/peoplemove/in-2024--remittance-flows-to-low--and-middle-income-countries-ar> accessed 2 Februrary 2026; Migration Data Portal (IOM GMDAC), 'Remittances' (*migrationdataportal.org*, 2024) <https://www.migrationdataportal.org/themes/remittances-overview> accessed 12 June 2026.

substantially from FY 2024 when they were estimated to be US$ 118.7 billion.[33] The US has recently been the single largest source of remittances to India, accounting for 27.7% of total inward remittances in FY 2024. Its share has also been increasing fast since it rose significantly in just three years in FY 2021 when it was 23.4%.[34]

This largely represents remittances from the high-skilled, high-wage Indian diaspora there, including those on H1B visas, who contribute substantially more per person than lower skilled labour in Gulf countries, which has been the traditional major source of most inward remittances to India. A significant reduction in both the number of US based professionally skilled H1B Indians and their till now growing per capita remittances in future fiscal years will have an outsize, disproportionate negative impact on India's balance of payments at the worst possible time for an already struggling economy as a result of both the West Asia/Gulf crisis and a significant depreciation of the Indian rupee. Remittances normally go up when the Indian rupee depreciates to compensate for its lower USD equivalency, but this likely will not happen over the next few years. It will also be harder to balance India's growing trade deficits which have traditionally relied on inward remittances to close the gap.

If professional Indian migration to the US slows (eg. H1B visa reductions and delays, Green Card delays whose backlogs have lengthened), the largest single relatively high-skill migration corridor that India and its citizens have globally relied on till now will suffer strong, negative, structural headwinds over a multi-year horizon. There will also be a significant negative impact on both the granting of student visas and new Indian enrolment in the US for both undergraduate and post-graduate education. This will partly occur because of an unwillingness on the part of many students to apply, especially those who had planned to go to the US to study STEM and join the US tech industry. While the true impact of this will take years and maybe a decade or more to be really felt, data for 2025 already suggested a significant drop in

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[33] Reserve Bank of India, *Sixth Round of India's Remittances Survey 2023–24* (RBI Monthly Bulletin, March 2025); ANI, 'India's Remittances to Reach Record USD 140 Billion in FY26: SBI Research' (ANI News, 10 April 2026) <https://aninews.in/news/business/indias-remittances-to-reach-record-usd-140-billion-in-fy26-sbi-research20260410151511/> accessed 12 June 2026.

[34] ibid.

both US student visas and enrolment for the Fall Semester 2025.[35] New international student enrollments in the US (not just from India) are estimated to have dropped significantly (down between 9-20%) for Fall 2026 due to tighter visa policies and changing US immigration laws.[36] Indian student enrollment in the US has also shifted significantly. According to the data shared in the Indian Parliament by the Minister of External Affairs, the total number of Indian students in the US dropped by 6.9%, falling to 352,644 by February 2026, down from 378,787 in 2025.[37] This drop was linked to stricter immigration rules and expanded screenings by the Trump 2.0 Administration, with the 2025-26 academic year marking the sharpest year-on-year drop in Indian student enrollement in the US and F-1 student visa approvals in over a decade.[38]

Through crisis comes opportunity and India and Indians will need to try and turn the emerging situation into one through appropriate domestic reforms. The first challenge and strategy will be for the Indian government to do what governments should have done many decades earlier. They will need to urgently build a much more conducive and enabling, well-resourced academic, research and high-tech services employment sector environment for students finishing high school. This should seek to address three current deficiencies: it should stem the increasing flow of students to the US, UK, Europe, Canada, Australia, Singapore and elsewhere at undergraduate level; it should create a conducive, well remunerated academic and high tech environment for jobs after graduation which will retain India's top talent in the country; and it should lure highly qualified Indians and Indian Americans, both in high tech industry and in top academic institutions already in the US and elsewhere back to their home country or country of origin to contribute directly to its economy and high tech industry.

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[35] Julie Baer and Sumerya Ekin, 'Fall 2025 Snapshot on International Student Enrolment', (*Institute of International Legal Education,* November 2025) <https://iie.widen.net/s/xd9xrsft6q/iie_fall-2025-snapshot_full-report> accessed 27 January 2026.

[36] Laura Spitalniak, 'The state of international enrollment in 6 charts' (*Higher Ed Dive*, 8 June 2026) <https://www.highereddive.com/news/the-state-of-international-enrollment-in-6-charts/821753/ accessed> accessed on 12 June 2026.

[37] Press Trust of India, 'Indian students enrolment to US institutions drops by 6.9%: Govt in RS' *The Economist* (New Delhi, 2 April 2026) , https://economictimes.indiatimes.com/nri/study/indian-students-enrolment-to-us-institutions-drops-by-6-9-govt-in-rs/articleshow/129980834.cms?from=mdr> accessed on 12 June 2026.

[38] ibid.

Creating the conditions for all these three objectives to be realized, especially top-class universities with full freedom to do globally cutting edge research in high-tech is a formidable ask and will not be easy, both given the limited resources prioritized by the government and private sector for R&D as a percentage of GDP and the current political environment in the country which has led to both controls on free speech by the Government on many Indian and Indian origin academics and Universities (with some academics being incarcerated without trial and Overseas Citizen of India (OCI) cards of Indian origin foreign academics being cancelled in some cases) and self-censorship by Universities out of fear of reprisal.

However, it is essential that India treats doing so as a top priority so as to enable our best Indian citizens and Indian origin American and other nationality IT, STEM and social sciences talent to return to India or stay home rather than migrate or shift to Canada, Europe, Australia or even China.[39] Many of these countries have established new visa programs to attract highly qualified individuals who no longer feel welcome in the US (e.g. China's K-visa, the UK and Canada's special openness to H1B visa holders in the US who wish to leave).[40]

In this context, the EU-India 2016 Common Agenda on Migration and Mobility (CAMM), newly strengthened by a January 2026 landmark pact to ease movements for students, researchers and professionals which was agreed as a foundational part of the broader EU-India strategic partnership which includes, but is distinct from although parallel to, the EU-India Free Trade Agreement (FTA) which concluded in January 2026 should be welcomed.[41]

While the January 2026 update to CAMM is a step in the right direction, neither it or the possible elimination of the $100,000 H1B visa fee should be viewed either as a

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[39] Fabian Grimm and Francesco Farne, 'Global talent finds new homes as the US loses its pull', (*IMD World Competitiveness Centre*, 31 September 2025) <https://www.imd.org/ibyimd/talent/global-talent-finds-new-homes-as-the-us-loses-its-pull/> accessed 4 February 2026.

[40] Eduardo Bapista, 'China's new K visa beckons foreign tech talent as US hikes H-1B fee', Reuters (Bejing, 29 September 2025) <https://www.reuters.com/sustainability/sustainable-finance-reporting/chinas-new-k-visa-beckons-foreign-tech-talent-us-hikes-h-1b-fee-2025-09-29/> accessed 26 January 2026.

[41] Press Trust of India, 'India, EU seal landmark mobility pact; Indian professionals, students set to benefit', *Economic Times* (27 January 2026) <https://economictimes.indiatimes.com/nri/study/india-eu-seal-landmark-mobility-pact-indian-professionals-students-set-to-benefit/articleshow/127642725.cms?from=mdr> accessed 6 February 2026.

convenient or an easy way out of the US H1B crisis, or even a short-term alternative. In the CAMM case this is because the FTA is still an "intent" and will not come into force for at least a year. In addition to a number of bureaucratic processes on both sides which remain incomplete, as well as formal endorsement by all 27 members of the EU, it also requires European Parliament endorsement which will not be straightforward or easy, especially in migration and mobility areas. While CAMM focuses on facilitating regular migration, offering "uncapped" mobility for Indian students, and managing irregular migration through a partnership approach,[42] both the Indian government and Indian citizens would be wise to be well aware of the deep-rooted and long-standing anti-migration sentiment in a large number of European countries which has only strengthened recently as a result of the growth of the far-right Make Europe Great Again (MEGA) movement across both Western and Eastern Europe which has been supported and encouraged by MAGA and President Trump and his Administration.[43]

These anti-migrant sentiments are the cause of and are reflected in the very recently approved European Union (EU) landmark Pact on Migration and Asylum which took effect on June 12, 2026. It overhauls the EUs border management, asylum processing and member-state responsibility sharing arrangements, tightening them. The legislation consists of 10 interconnected laws that introduce several major changes covering mandatory border screening (identity, security, health), accelerated asylum procedures including removals of failed applicants and crisis rules.[44]

A second challenge and strategy needed to address the Trump 2.0 induced challenges to the Indian services sector as a whole is the urgent diversification of markets to reduce its export dependency on the US market. This should particularly prioritize Canada, the European Union, United Kingdom (UK), China, East and Southeast Asia, Australia and New Zealand, in addition to India reconsidering its

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[42] ET Online, 'India-EU FTA: EU commits to uncapped mobility for Indian students', *Economic Times* (27 January 2026) <https://economictimes.indiatimes.com/nri/study/india-eu-mobility-pact-aims-to-ease-movement-of-indian-students/articleshow/127607591.cms> accessed 3 February 2026.

[43] David Latona, 'Orban, Le Pen hail Trump at far-right 'Patriots' summit in Madrid', *Reuters* (Madrid, 9 February 2025) <https://www.reuters.com/world/europe/orban-le-pen-hail-trump-far-right-patriots-summit-madrid-2025-02-08/> accessed 6 February 2026.

[44] European Commission, 'Questions and Answers on the Pact on Migration and Asylum' (MEMO/26/1286, 10 June 2026) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_26_1286> accessed 14 June 2026.

mistaken decision not to be a founding member of the Regional Comprehensive Economic Partnership (RCEP) in 2020, a strategic blunder which India will come to regret.[45] In this context, the recently agreed UK, New Zealand and EU FTAs with India should be welcomed and actively implemented as early as possible even though they are poor substitutes for not joining the RCEP, and even though the EU FTA will take at least a year to be formally put in place for the reasons already indicated.[46]

While it will not be easy to replace the US market for Indian services, given both India's high dependency for services exports into that market and the continuing dominance of the US in high-tech sectors, the India-US BTA covers mainly goods not services, and while some service concessions on India's part have been demanded and conceded by India, the proposed BTA remains an unlikely route for India to get either a reversion of US H1B visa policies or other service concessions from the US for reasons discussed later in this paper. It is essential, therefore, that India implements such a services export diversification strategy for the medium to long-term. Indeed, it was short-sighted not to have done so over the last decade.

A third challenge and strategy is to prioritize more off-shoring from India itself. The success of this will significantly depend on the success of some elements of the first set of strategies since it will require the creation of a much more enabling employment, research and tech environment in India. Expanding the number and roles of India's GCCs will be a critical element of this strategy.

## III. Services in the India-US Bilateral Trade Agreement (BTA) Negotiations

Digital Trade and services have not featured centrally in the ongoing protracted India-US BTA negotiations because of its focus on "goods," not services. Nevertheless, as the Indian Union Budget announcements for both Fiscal years 2025-26 and 2026-27

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[45] Aditi Ray Chowdhary, 'India May Consider Re-joining RCEP: What's Pushing India's Comeback to the Trade Bloc After 5 Years?' (*Outlook Business*, 21 August 2025) <https://www.outlookbusiness.com/economy-and-policy/india-may-consider-re-joining-rcep-whats-pushing-indias-comeback-to-the-trade-bloc-after-5-years> accessed 6 February 2026.

[46] 'India – New Zealand Free Trade Agreement: One of India's fatest-concluded FTAs' (*Press Information Bureau*, 22 December 2025) <https://www.pib.gov.in/PressNoteDetails.aspx?id=156654&NoteId=156654&ModuleId=3&reg=3&lang=1> accessed 6 February 2025.

have explicitly shown and the February 6, 2026 United States-India Joint Statement issued by the US White House even further indicates,[47] trade in services has crept into the BTA itself and is expected to be covered further in subsequent BTA clarifications over the next few months, but largely in the US' favour.

In the services trade context, the US has been pushing for greater access to Indian data, challenging India's strict data localisation norms which require such data to be stored within the country. This was a major source of friction between India and the US during Trump 1.0 and in anticipation of US pressure and retaliation during Trump 2.0 which began on January 20, 2025, India pre-emptively eliminated its 6% Equalisation Levy, colloquially termed the "Google Tax", on payments exceeding Rs 1 lakhs (approximately USD 1050) per annum to a non-resident services provider for online advertisements effective April 2025 (i.e. this refers to the equalization levy on online digital ads in force since 2016). This was part of India's amendments to the Finance Bill 2025.[48] This concession to the US in the services area was reinforced in the most recent Union budget announcement of February 1, 2026 in which Union Finance Minister Nirmala Seetharaman announced a 20-year tax holiday till 2047 for foreign companies which provide cloud services globally.[49] This will only be available for foreign companies who have established a MeitY-notified data center in India for whose global income there will henceforth, no longer be any risk of taxation in India.[50] This will disproportionately benefit US companies working in this area and is consistent with one of the US's demands in the still under (protracted) negotiation BTA.

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47 Briefings and Statements, 'United States-India Joint Statement', (*The White House*, 6 February 2026) <https://www.whitehouse.gov/briefings-statements/2026/02/united-states-india-joint-statement/> accessed 6 February 2026.

48Aftab Ahmed and Manoj Kumar, 'India to scrap digital ad tax, easing US concerns' *Reuters* (New Delhi, 25 March 2025) <https://www.reuters.com/world/india/india-proposes-remove-equalisation-levy-digital-services-government-source-says-2025-03-25/> accessed 4 February 2026.

49 Aditi Shah and Dhwani Pandya, 'India gives 20-year tax holiday to foreign firms using local data centres' *Reuters* (New Delhi, 1 February 2025) <https://www.reuters.com/world/india/india-gives-20-year-tax-holiday-foreign-firms-using-local-data-centres-2026-02-01/#:~:text=Those%20concerns%20were%20set%20to,data%20centre%20services%20from%20India.%22> accessed 6 February 2026.

50 Press Trust of India, 'No tax risk for foreign companies setting up data centres in India under new Budget proposal: Finance Ministry sources', *Economic Times* (4 February 2026) <https://economictimes.indiatimes.com/nri/study/india-eu-mobility-pact-aims-to-ease-movement-of-indian-students/articleshow/127607591.cms> accessed 6 February 2026.

Despite delays, negotiation suspensions and confusion in the India-US BTA, made even more complicated in the second week of June 2026 after three Indian civilian sailors were killed by the US navy on a commercial ship near the Hormuz Straits and Gulf of Oman, discussed in more detail below, these unilateral Indian concessions to the US have now already been made and enshrined and implemented through the Union Budget 2026-27. There is, therefore, no going back on them.

While the tentative conclusion of the BTA was prematurely announced shortly after the 2026-27 Union Budget announcement in early February 2026,[51] it has not, in fact, concluded. Furthermore, the US Supreme Court ruling, later in February 2026, declaring Trump's unilaterally imposed tariffs across the world under the US' 1977 International Emergency Economic Powers Act (IEEPA) a tax and, therefore, illegal because Congress had not approved them,[52] upended and effectively overruled not just the Trump Administration's illegal tariffs but the India-US BTA and many other country trade agreements with the US which were essentially based on the illegal tariffs.

The BTA has been in the doldrums for many months since February 2026 as a direct consequence of the US Supreme Court ruling and has yet to be revived and successfully concluded. While countries such as Malaysia backed out of their BTA with the US, India indicated it would continue to negotiate. After the ruling, the Trump Administration went back to a temporary flat across-the-board 10% tariff under Section 122 of the US Trade Act of of 1974. However, these new tariffs are allowed to be levied by Presidential authority only as an interim, temporary measure and they are set to expire on July 24, 2026.

Recognizing that, the United States Trade Representative (USTR) simultaneously started a two-part Section 301 investigation under the 1974 US Trade Act. The first part prioritized 16 major economies including China and India, accusing them of structural manufacturing overcapacity while the second part focuses on the

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51 T.C.A Sharad Raghavan, 'India-US trade deal: Joint statement in 'four to five days', legal agreement by mid-March, says Piyush Goyal' The Hindu (New Delhi, 5 February 2025) <https://www.thehindu.com/business/india-us-trade-deal-piyush-goyal-tariffs-joint-statement-legal-agreement/article70594904.ece> accessed 6 February 2026.

52 Congressional Research Service, 'Supreme Court Rules Against Tariffs Imposed Under the International Emergency Economic Powers Act' (Congress.gov, 23 February 2026) <https://www.congress.gov/crs-product/LSB11398> accessed 12 June 2026.

enforcement of labour standards and covers 60 countries, also including China and India, accusing them of not enforcing labour standards against forced labour.

The investigation on the first part had not concluded as of the time of writing, and no new levies or specific tariffs have been finalized or imposed. Neverthless, the probe is actively examining state policies, industrial subsidies and government interventions in 16 countries which include India. It focuses on key manufacturing sectors such as aluminium, steel, semiconductors, solar modules, automobiles, textiles and chemicals.

The USTR report on the second part evaluates whether the targeted nations are doing enough, in its view, to prevent the flow on the production of what the US regards as forced-labour goods which pose compliance risks for importers and global supply chains. This part of the USTR investigation concluded on June 2, 2026 and determined that most of these countries including India failed to effectively enforce or adopt import restrictions on forced-labour goods, resulting in two proposed tiers of additional ad valorem tariffs: 12.5% additional duties have been proposed for 54 countries, including India, which are deemed to have failed in adopting or enforcing adequate forced-labour import restrictions while 10% additional duties are proposed for 6 economies, including Pakistan, Indonesia and Mexico, that the USTR says have adopted partial bans or have trade agreement-based commitments to the US on this but have failed to implement them effectively.[53]

Instead of levying retaliatory tariffs, India's first preference will be to avoid the levies entirely by presenting the country's legal framework on forced-labour regulation to the USTR during the ongoing BTA negotiations. If this does not persuade the USTR, India will, no doubt, at a minimum, seek to transition to the second category of countries through the India-US BTA.

The BTA's conclusion has now been further complicated politically not only by the Section 301 investigations against India but even more recently, starting June 10,

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[53] Office of the US Trade Representive, '*Acts, Policies, and Practices of Various Economies Related to the Failure to Impose and Effectively Enforce a Prohibition on the Importation of Goods Produced with Forced Labor'* (2026). <https://ustr.gov/sites/default/files/files/Press/Releases/2026/USTR%20Report%20Sec%20301%20FL%20301%206-2-26%20FINAL%20for%20upload.pdf> accessed 11 June 2026.

2026 by the killing of three civilian Indian sailors by the US navy near the Hormuz Straits and Gulf of Oman as well as its repeated missile attacks against at least two other commercial tankers or ships with Indian civilian sailors on board.[54] These attacks to enforce the US' unilateral blockade of Iranian ports and oil forced India to lodge formal protests to the US government and Trump Administration, first, twice, through the US Charge D'affairs (CDA) in New Delhi in the absence of the US Ambassador and then, on June 12, directly by phone from Finland by India's External Affairs Minister Jaishanker with his US counterpart, Secretary of State Marco Rubio.[55] The matter remains unresolved, however, and is at a difficult impasse, having been further exacerbated by the US Secretary of State Marco Rubio's firm response to the Indian Minister, categorically and publicly proclaiming that all commercial vessels in that area must immediately comply with directives issued by US forces and no deviations from this instruction would be tolerated by it.[56]

In the meanwhile, the USTR has already proposed new tariffs ranging from 10-12.5% on the 60 countries to take effect immediately on the expiry of the current levies on July 24, 2026. Public comments for these proposed Section 301 tariffs are being accepted till July 6, 2026 with hearings set for the next day. India has already been found guilty of unfair trade practices by the USTR.[57]

Going back to services exports to the US and the February 6, 2026 Interim Framework Agreement for the India-US BTA announcement by the US White House, India has already agreed to also "….eliminate restrictive import licensing procedures that delay market access for, or impose quantitative restrictions on US Information and Communications Technology (ICT) goods…." and "the United States and India commit to address discriminatory or burdensome practices and other barriers to digital trade and

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[54] The Wire Staff, 'India Summons US Diplomat, Lodges Fresh Protest After Third Tanker Attack' *The Wire* (12 June 2026) <https://thewire.in/world/india-summons-us-diplomat-lodges-fresh-protest-over-third-tanker-attack> accessed 12 June 2026.

[55] ibid.

[56] 'Violations of US Blockade in Strait of Hormuz Will Not Be Tolerated, Rubio Tells Jaishankar' (*The Hindu*, 14 June 2026) <https://www.thehindu.com/news/international/violations-of-us-blockade-in-strait-of-hormuz-will-not-be-tolerated-rubio-tells-jaishankar/article71098045.ece> accessed 14 June 2026.

[57] Office of the United States Trade Representative, 'USTR Makes Findings and Proposes Action in 60 Section 301 Investigations Relating to Failures to Take Action' (4 June 2026) <https://ustr.gov/about/policy-offices/press-office/press-releases/2026/june/ustr-makes-findings-and-proposes-action-60-section-301-investigations-relating-failures-take-action> accessed 12 June 2026.

to set a clear pathway to achieve robust, ambitious and mutually beneficial digital trade rules as part of the BTA….".[58]

The elimination of the "Google Tax" is similar to Canada, which under Trump's threats in 2025, removed all taxes on Google, Meta, Amazon and other similar US companies even though Prime Minister Carney, despite the coincidental timing, insisted then that he was planning to do so on his own, not because of US pressure.[59]

It is worth noting, in this context, that the European Union (EU) has stood up more valiantly in this area which appears to be a regulatory red line for it, unlike its trade deal with the US. This was made evident by the heavy fine on Google in September 2025 for its anti-trust violations in the AdTech market and potential breaches of the EUs Digital Markets Act (DMA).[60] The fine of €2.95 billion on Google for abusing its dominant place in the online advertising technology sector was the fourth such European Commission (EC) fine on the company.[61] While the Commission is still reviewing Google's corrective actions, the EU reserves the right to order the break-up of Google's advertising business if the Commission considers Google's corrective actions insufficient. However, thus far, it is clear that the EU and EC correctly remain committed to their regulatory framework in this area.

To further demonstrate this, their regulators hit Elon Musk's X with a €120 million fine in early December 2025 for "disinformation" - the first major enforcement test case strike under the EUs Digital Services Act (DSA).[62] This Act gives the EU the power to demand content removals, algorithmic changes and data access with fines up

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[58] *The White House* [n 48].

[59] Kevin Breuninger, 'White House says Canada 'caved' to Trump over digital services tax' *Consumer News and Business Channel* (30 June 2025) <https://www.cnbc.com/2025/06/30/trump-hassett-trade-digital-services-tax-canada.html> accessed 27 January 2026.

[60] 'Commission fines Google €2.95 billion over abusive practices in online advertising technology' *European Commission* (Brussels, 5 September 2025) <https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1992> accessed on 1 February 2026.

[61] 'Google hit with $3.45 billion EU antitrust fine over adtech practices' *The Hindu* (New Delhi, 05 September 2025) <https://www.thehindu.com/sci-tech/technology/google-hit-with-345-billion-eu-antitrust-fine-over-adtech-practices/article70016999.ece> accessed 27 January 2026.

[62] Laura Cress, 'Elon Musk's X bans European Commission from making ads after €120m fine'. *British Broadcasting Company* (8 December 2025) <https://www.bbc.com/news/articles/c0589g0dqq7o> accessed 4 February 2026.

to a million, or even a billion Euros for defiance.[63] This sent the libertarian techno-feudalist Musk on a berserk rant against the very existence of the EU, alleging censorship of free speech, which has seen an irresponsible and unbridled version on X under Musk after his takeover of Twitter.

Some Indian commentators had been hoping before the recent West Asia crisis related further complications between India and the US that the recent May 23-26, 2026 India visit of Mr. Rubio would help hasten the conclusion and signing of the India-US BTA. However, all it generated on this even before his recent response to Minister Jaishanker were his expressed optimism that Washington D.C. and New Delhi would conclude a sustainable trade agreement soon to stabilize economic ties.[64] If anything, Rubio's visit was used by him to shore up major concessions by India to the US in the proposed BTA such as its so-called "Mission 500" Commitment to purchase $500 billion worth of US goods over a 5-year span, focusing on agriculture, energy and technology.[65] The only tangible outcome in a trade related area during Mr. Rubio's recent visit was the signing of the Critical Minerals Pact between the two countries.

Relations between India and the US are now much more politically complicated as a result of the deaths of three Indian civilians at the hands of the US Navy in the Persian Gulf on June 10. Mr Rubio's uncompromising response without even condoning the deaths of the three Indians has further enraged ordinary Indians and put pressure on the Modi government to do more. The Prime Minister has recently arrived in France for the G7 meeting, where he will meet President Trump. They are expected to discuss trade and the BTA on the sidelines of that meeting but it is unlikely that any progress or conclusion will be made there, especially in light of the most recent incident dividing the two countries.

In the meanwhile, the USTR, Jamieson Greer, is expected in India in the early second half of June for further trade talks. Some Indian commentators are naively

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63 The Digital Services Act 2024 s 3.

64 'India, US Signal Fresh Momentum in Strategic Partnership' *South Asian Herald* (24 May 2026) <https://southasianherald.com/india-us-signal-fresh-momentum-in-strategic-partnership/> accessed on 11 June 2026.

65 'India 'Commits' To Buying $500 Billion Worth Of US Goods. What Experts Said' NDTV World (Washington, 29 May 2026) <https://www.ndtv.com/world-news/india-commits-to-buying-500-billion-worth-of-us-goods-experts-weigh-in-11562538> accessed on 11 June 2026.

hoping that India can seek to reverse or modify the application of the new US H1B policy for Indians given the perceived dependency of many US tech firms on Indian professionals. However, such commentators ignore or do not understand that a BTA cannot directly fix or override US immigration laws like those on the H1B program. Indeed, even in more favourable times, sweeping legislative changes to the H1B program have not been included in standard US commerce and tariff treaties.

While US visa caps and the September 2025 Presidential Proclamation remains politically sensitive and under US jurisdiction, India can, however, continue to push for mutual talent mobility, visa processing improvements and social security pacts in the context of the India-US double taxation agreement as it did, in the first and second areas with the EU and the third area with the UK in its recent successfully negotiated Free Trade Agreements (FTA) with them.

However, because restrictive H1B policies will continue to limit the ability to move Indian talent to the US in the foreseeable future, the India-US BTA would do well to prioritize cross-border services embedded in expanding Global Capability Centers in India which benefit both sides and are consistent with the WTO GATS Mode 1 commitments of both parties. This, of course, assumes that the HIRE Act will remain stalled in the US Senate.

India should also continue to push a parallel agreement to the BTA which would prevent double taxation by allowing Indian professionals in the US to stop paying into the US Social Security system, thereby saving companies and Indian workers billions of US dollars. If it succeeds, this would be along the lines of its achievement in this area in the recent India-UK trade deal.

## IV. Conclusion and Way Forward

As should have been well established in earlier sections of this paper, there is neither an easy fix or short-cut for India in terms of the way forward. This paper has already, in considerable detail, suggested a way forward for India which prioritizes a range of both long over-due domestic structural reforms and export diversification strategies which, if seriously and fully implemented, will together bring about the

desired transformations and tangible outcomes. It is urgent that the Government of India and its corporate sector, especially those in the IT and other services areas, immediately embark on both sets of reforms simultaneously and resource them adequately. Much time over many decades has already been lost. Time remains of the essence if India is also to capitalize on and invest in its fast dwindling but still remaining demographic dividend. This new generation of Indians are its greatest potential source of wealth and hope, both for the country's future domestic sustainable growth and global contribution.

# A BOOK REVIEW OF THE CASTE CON CENSUS BY ANAND TELTUMBDE (2025)

*Prithiraj Borah*[*]

Anand Teltumbde in the preface of the book makes a strong argument that the Caste Census is no longer just a policy matter, it has become a battlefield in the political imagination of India.[1] Such imaginations of governance also prominent during colonial times, starting with the 1881 census and continuing until 1931, caste enumeration became a key mechanism of colonial control. This book examines how the shift from colonial to postcolonial governance did not disrupt caste as a scaffolding for the structure of power. He writes, 'like its colonial predecessor, today's caste census risks becoming a commanding ritual–one that does not simply reflect caste realities but actively shapes them, making caste more legible, administrable and politically salient'.[2] According to him, the support from the caste census has become a fashion among the liberal and progressives, so Teltumbde urges scholars to scrutinise its long-term impact of this exercise. He clarifies his political position that caste is not a problem that can be solved with such interventions, he calls for a real solution, its *annihilation*. The first and most substantive section of the book is the genealogy of caste enumeration. Teltumbde traces how caste's "roots lay in pre-existing social formations", which were gradually appropriated by Brahminism and inscribed into a conceptual and theological structure that proved durable across political changes. This is not merely historical scene-setting; it is the foundation of Teltumbde's central argument that caste is embedded simultaneously in material practice and ideological structure and therefore cannot be addressed through symbolic or administrative interventions alone.

The second major intervention of the book is a close reading of the BJP's dramatic shift on caste enumeration. Regional parties such as the RJD in Bihar and the JD(S) in Karnataka trace their lineage directly to the Mandal moment of the late 1970s and early 1980s, for whom caste enumeration is no mere technical exercise but a radical tool of power/resource redistribution — underpinning demands for land reform, sub-categorisation of OBC quotas, and proportional representation. For these parties, the caste census is genuinely emancipatory in intent, a weapon against inherited privilege. As the BJP now embraces what it once pilloried, Teltumbde argues that the party is using caste enumeration not to dismantle privilege but to

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[1] Anand Teltumbde, *The Caste Con Census* (Navayana 2025).

[2] ibid.

manage it politically. The danger Teltumbde identifies is not that the data will be wrong, but that it will be right — and then strategically deployed by the state to reconfigure OBC and Dalit constituencies in ways that consolidate rather than challenge upper-caste hegemony. The net effect, he argues, will be no better than the decennial census of the colonial era, which only strengthened caste, transforming social affiliations into rigid, state-recognised categories and enabling segmental control of society. This is a genuinely important analytical contribution. However, it also reveals one of the book's limitations: Teltumbde tends to treat the state as a monolithic instrument of caste perpetuation, leaving little room for the layered, contested, and sometimes emancipatory processes through which enumerated categories have historically been claimed and mobilized by subaltern communities themselves.

This is precisely where the recently published anthology *Dalit Counter-publics and the Classroom: A Sharmila Rege Reader* (Geetha and Chakravarti, eds., 2024) offers a productive, if uncomfortable, interlocutor for Teltumbde's arguments.[3] Rege makes a compelling argument for rethinking the content of sociological knowledge through anti-caste radical philosophies associated with Phule and Ambedkar, and calls attention to 'Dalit counter-publics'— comprising performance and commemorative traditions committed to ending the caste order — while also arguing for a critical rethinking of the relationship between caste, sexuality, and popular culture. Where Teltumbde views the apparatus of caste enumeration almost entirely through the lens of state control, Rege's scholarship — richly documented in her work on Ambedkarite music and print cultures in Maharashtra — foregrounds how oppressed communities have consistently created parallel epistemological spaces that operate within, around, and sometimes against state-administered categories. Dalit counter-publics, as Rege theorizes them, are not simply reactive formations; they constitute alternative knowledge-making practices that have historically negotiated the very categories the state imposes. This does not refute Teltumbde's concerns, but it complicates his somewhat top-down account of how caste is reproduced through enumeration. The question of whether a caste census can be simultaneously a tool of state control *and* a resource for Dalit counter-publics is one that the book could have engaged more productively.

Suraj Yengde's recent work, particularly *Caste: A Global Story* (2025), sharpens another tension latent in Teltumbde's argument — the question of epistemic standpoint.[4]

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[3] V Geetha and Uma Chakravarti (eds), *Dalit Counter-publics and the Classroom: A Sharmila Rege Reader* (Routledge 2024).

[4] Suraj Yengde, *Caste: A Global Story* (OUP/Hurst 2025).

Yengde insists that knowledge about caste must emerge from experience, not elite interpretation, embracing first-person narrative, affect, and field testimony as legitimate forms of political and scholarly expression. As debates have intensified following the release of India's caste census in 2026, Yengde's argument for epistemic justice and his critique of dominant caste data regimes appear particularly timely. Teltumbde, despite his own experience of caste-based persecution, operates largely within the register of structural and historical analysis — a mode of scholarship that is rigorous but that can sometimes distance itself from the granular, embodied realities of how caste is lived. Yengde's provocation — that caste must be theorised from below, through the lived experiences of those it most brutalizes — does not invalidate Teltumbde's critique of the caste census, but it does raise the question of whether the demand for a caste census itself, however instrumentalized by political parties, might reflect a legitimate politics of visibility among communities long rendered statistically invisible.

Teltumbde's ultimate political claim is unambiguous: the annihilation of caste is the only adequate response to caste oppression, and the caste census is, at best, a deferral of that imperative and, at worst, its betrayal. The book disrupts easy assumptions about social justice and asks readers to confront the most urgent task: annihilating caste rather than administering it. Yet the book's insistence on annihilation as the singular horizon sometimes foreclosed serious engagement with the question of what communities should do in the meantime — how they survive, organize, and resist within the constraints of existing political conditions. Read alongside Rege's *Dalit Counter-publics* and Yengde's *The Caste Con Census* is most productively understood not as the final word on caste enumeration, but as a vital provocation — one that compels sociologists, legal scholars, and policymakers alike to ask harder questions about what counting caste is actually for, who it serves, and what forms of solidarity it enables or forecloses.

# THE APPROACH OF W.T.O ADJUDICATING BODIES IN INTERPRETING ENVIRONMENT PROTECTION MEASURES: AN ANALYSIS OF LANDMARK CASES AND THEIR IMPLICATIONS FOR CLIMATE PROTECTION POLICIES

*Shaivy Maheshwari*[*]

**ABSTRACT**

*Much of the existing literature doubts the ability of the WTO framework to address and intervene in the climate change problem due to its inherent structural and legal limitations. Yet, in doing so, it underappreciates the role of the WTO adjudicating bodies. Having the power to enforce their decisions, the WTO's adjudicating bodies can provide an authoritative basis for addressing trade and climate change questions. To bridge this gap, it is essential to analyze how the WTO's adjudicating bodies approach affirmative environmental actions when creating trade restrictions. Only by doing this can we predict how these bodies are likely to respond to climate change policies. Moreover, such an examination will enable us to determine the true scope of the WTO framework for climate change mitigation. This paper analyzes the approach of WTO adjudicating bodies while examining environment-related trade disputes to identify interpretative patterns and doctrinal shifts in their reasoning. It uses this analysis to predict how adjudicating bodies are likely to review a climate policy dispute across different stages of interpretative reasoning. The paper notes that the WTO Appellate Body is currently non-operational; nevertheless, it evaluates its jurisprudence due to its greater relevance to the evolution of WTO law.*

## I. INTRODUCTION

The drastic impacts of climate change are more evident now than ever. According to a report published by UNEP in 2024, the ongoing climate change mitigation efforts require 42% reductions in GHG emissions annually by 2030 and 57% by 2035.[1] Unless these reductions are made, the

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[1] UN Environment Programme 'Emissions Gap Report 2024: No more hot air … please!' (October 2024) Report DEW/2672/NA.

goal of 1.5°C earmarked by the Paris Agreement will be unattainable in a few years, and the 2°C target will also be in jeopardy.[2] The situation calls for immediate action in all sectors responsible for GHG emissions, including the trade sector.

Trade significantly impacts global GHG emissions through production, transportation, and consumption of goods, three key processes involved in trade governance.[3]Trade liberalization leads to the establishment of industries in new regions, sometimes at the cost of relaxing environmental regulations.[4] This aggravates climate-related concerns in those areas. However, while trade can contribute to climate change, it also has the potential to mitigate it. Proactive changes in trade policies, such as easing access to environmentally friendly goods, can enhance energy efficiency and reduce pollution, thereby fostering a healthier environment. Such positive changes can play a significant role in reducing GHG emissions, mitigating the climate change problem.

The relationship between trade and climate change is, in fact, bidirectional. While trade governance affects climate change, climate change itself has the potential to profoundly impact trade ecosystems. It can do so by undermining production processes and disrupting transport infrastructure. This can severely affect existing trade flows and global supply chains.[5] Thus, there are two reasons why international trade should take climate change seriously: first, to minimize its negative impact on climate change, and second, to safeguard trade practices from disruptions caused by climate change.

Against this backdrop, the WTO framework, which recognizes the need to harmonize international trade with environmental preservation,[6] provides an important platform for aligning

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[2] Farhan Ahmed and others, 'The environmental impact of industrialization and foreign direct investment: empirical evidence from Asia-Pacific region' (2022) 29(20) *Environ Sci Pollut Res* <https://doi.org/10.1007/s11356-021-17560-w> accessed 22 June 2026.
[3] United Nations Climate Change, 'Causes and Effects of Climate Change' (*United Nations*) <https://www.un.org/en/climatechange/science/causes-effects-climate-change> accessed 22 June 2026.
[4] Farhan Ahmed (n 2).
[5] Danae Kyriakopoulou, Georgina Kyriacou and Natalie Pearson, 'How Does Climate Change Impact on International Trade?' (*Grantham Research Institute of Climate Change the Environment*, 12 June 2023) <https://www.lse.ac.uk/granthaminstitute/explainers/how-does-climate-change-impact-on-international-trade/> accessed 22 June 2026.
[6] Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154, Preamble.

international trade with climate change mitigation efforts. Having a compulsory enforcement mechanism through its adjudicating bodies, the WTO's legal framework, together with its adjudicating bodies, provides an authoritative ground to influence climate change mitigation efforts. Since member states are obligated to comply with the rulings of adjudicatory bodies, WTO adjudicatory decisions play a decisive role in shaping the course of trade-related climate change disputes. These disputes contribute to the development of prescriptive norms that shape a country's national policies for reducing greenhouse gas emissions.

Yet, despite its institutional capacity, the WTO's ability to address the conflicting priorities of trade liberalization and environmental protection is repeatedly questioned. Skepticism primarily arises from the absence of WTO rules specific to climate change,[7] which casts doubts on the WTO's capability to address climate-related interventions.

Nevertheless, while the WTO framework lacks explicit provisions to address climate change, it is not entirely devoid of arrangements that support environmental considerations. The preamble emphasizes the commitment of WTO members to conduct their trade-related endeavors in an environmentally friendly manner.[8] Acknowledging the interpretative significance of the preamble, the Appellate Body in the *US-Shrimp* case noted the importance and legitimacy of environmental protection, which is well understood by the WTO member states.[9] At the very least, this decision set normative guidance indicating that adjudicating bodies will interpret trade obligations in a manner that accommodates environmental objectives.

Similarly, Article XX of the GATT, which provides general exceptions from core GATT principles, acknowledges environmentally friendly measures that protect human, animal, and plant life as well as natural resources.[10] However, the absence of direct climate-related stipulations creates uncertainty about the permissible scope of climate-friendly measures within the WTO

[7] World Trade Organization, 'The Multilateral Trading System and Climate Change' <https://www.wto.org/english/tratop_e/envir_e/multilateral_trading_e.htm> accessed 22 June 2026.
[8] Markus W Gehring, 'Sustainable Development in World Trade Law: New Instruments' (CIAJ 2006) <https://ciaj-icaj.ca/wp-content/uploads/documents/import/2006/Gehring.pdf?id=1240&1582072739> accessed 22 June 2026.
[9] WTO, United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 of the DSU by Malaysia-Report of the Panel (15 June 2001) WT/DS58/R/RW [129].
[10] General Agreement on Tariffs and Trade (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 194 (GATT) arts. XX(b), XX(g).

regime.[11] An effective way to bridge these gaps is to appreciate the interpretative role of WTO adjudicating bodies. Being the primary bodies to resolve trade-related disputes, these bodies play a pivotal role in determining how trade law principles interact with environmental obligations.[12]

Because of this, it becomes essential to determine the approach of adjudicating bodies in interpreting environmental protection measures. Doing so will enable us to determine if the bodies strike an adequate balance between trade obligations and environmental requirements. It will also allow us to understand the jurisprudential implications of key environmental-related trade disputes on climate change mitigation policies. Since many of these disputes revolve around the interpretation of Article XX, it serves as a crucial guide in understanding the reconciliation between trade obligations and environmental protection.[13] Therefore, a detailed analysis of its interpretation is essential to ascertain the WTO's stance on balancing trade and environmental protection.

In light of these reasons, this paper examines the approach of WTO adjudicating bodies in interpreting environmental disputes related to trade. It identifies patterns in judicial interpretation and doctrinal shifts and determines how adjudicating bodies are likely to review a climate policy dispute across different stages of interpretative reasoning. It also highlights gaps in the bodies' reasoning and suggests targeted reforms to enhance judicial predictability and the ability to implement climate protection measures. This in-depth, structural analysis of the adjudicating bodies' approach can also assist policymakers in crafting strong and defensible climate-based policies at the national level.

The scope of this paper is limited to Article XX because it governs majority of environmental disputes in trade. This has been done to keep the research focused and precise for developing targeted recommendations.

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[11] Hyuntaik Lee, 'The Presumption of Conformity for Climate Measures: Reconciling the Climate Change Regime and the WTO' (2022) 17(2) Asian J. WTO Int. Health Law Policy 449.
[12] Henok Asmelash, 'The WTO Dispute Settlement System as a Forum for Climate Litigation?' (2023) 32(2) RECIEL 321.
[13] Anjitha Unnithan, 'Reconciling Trade and Environment Within GATT's Article XX' (2024) 6(1) IJLLR <https://www.ijllr.com/post/reconciling-trade-and-environment-within-gatt-s-article-xx> accessed 22 June 2026.

## II. ARTICLE XX EXCEPTIONS

Article XX allows WTO members to justify their deviations from general GATT obligations while pursuing their legitimate policy objectives.[14] These policy objectives have been enumerated under 10 sub-paragraphs of Article XX. To invoke such justifications, member states are required to demonstrate that their measures fall within the ambit of one of these sub-paragraphs. In addition, they are also required to establish compliance with the conditions of non-arbitrariness, unjustifiableness, and non-discrimination delineated under the chapeau of Article XX.[15]

Among all exceptions listed under Article XX, two are most frequently used by countries to justify their environmental protection measures. Firstly, Article XX(b), which permits states to adopt measures "necessary" to protect the life or health of humans, animals, and plants.[16] Secondly, Article XX(g) that covers measures "relating" to the conservation of exhaustible natural resources.[17]

Thus, Article XX(b) requires member states to pass a "necessity" test and Article XX(g) requires states to pass a "relating to" test.[18] The following sections examine the individual requirements of each of these sections as interpreted by the WTO adjudicating bodies.

## III. ARTICLE XX(B)

Beyond the requirements of the chapeau, Article XX(b) requires states to justify the following requirements:

### *A. RISK ASSESSMENT AND THE DEGREE OF CONNECTION BETWEEN THE RISK AND THE POLICY OBJECTIVE*

[14] B.S. Chimni, 'WTO and Environment: Shrimp-Turtle and EC-Hormones Cases' [2000] 35(20) Economic and Political Weekly 1752.
[15] World Trade Organization, 'Repertory of Appellate Body Reports and Awards: General Exceptions – Article XX of the GATT 1994'.
[16] GATT (n 10) art. XX(b).
[17] GATT (n 10) art. XX(g).
[18] World Trade Organisation, 'WTO Rules and Environmental Policies: GATT Exceptions' (*World Trade Organization*) <https://www.wto.org/english/res_e/reser_e/ersd202005_e.htm> accessed November 5, 2024.

Initially, the adjudicating bodies require members to demonstrate a risk to human, animal, or plant life or health. Once the risk is established, it is seen whether there is a sufficient nexus between the risk and the stated policy objective under sub-paragraph (b).[19] For instance, in the *EC-Asbestos* case, both Panel and the Appellate Body gave an affirmation that the health risks posed by chrysotile asbestos fibres justified restriction on their sale, import, and use.[20] Yet before reaching this conclusion, the Bodies examined whether exposure to asbestos fibres created a health risk for humans by relying on evidence produced by scientific experts and reports published by international bodies such as WHO and IARC.[21] Notably, the appellate body stressed that a quantitative assessment is not mandatory for examining such 'risk' under sub-paragraph (b). Rather, panels may undertake a qualitative assessment to evaluate the risk.[22] This interpretative flexibility may be crucial for climate-related measures, which often rely on long-term projections rather than immediate or quantifiable harms.

On a slightly different note, in *Brazil–Retreaded Tyres,* the Panel considered whether an import ban on retreaded tyres is sufficiently linked to Brazil's stated objective of reducing waste tyre accumulation. Brazil argued that accumulated waste tyres created the risk of (1) mosquito-borne diseases, (2) tyre fires and toxic leaching, posing adverse effects on human and environmental health.[23] This contention was accepted by both the Panel and the Appellate Body after carefully assessing the measure's contribution in achieving the objective qualitatively. [24] The appellate body further examined coherence and internal consistency in the Panel's assessment, indicating an evolving jurisprudence of evidence-based scrutiny without the imposition of rigid scientific qualifications.

In both cases, the bodies carefully determined the nature and credibility of the country's adopted measures. They relied on scientific reports and qualitative assessments, indicating

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[19] ibid.
[20] WTO, *European Communities: Measures Affecting Asbestos and Asbestos-Containing Products – Report of the Appellate Body* (12 March 2001) WT/DS135/AB/R [175].
[21] ibid [162].
[22] WTO (n 20) [167].
[23] WTO, *Brazil: Measures Affecting Imports of Retreaded Tyres – Report of the Panel* (12 June 2007) WT/DS332/R [7.53].
[24] Marie Wilke, 'Litigating Environmental Protection and Public Health at the WTO: The Brazil-Retreaded Tyres Case' (September 2010) ICTSD Information Note No 1.

flexibility in their approach. This approach holds promise for climate protection policies, which depend on probabilistic scientific models and long-term projections. Immediate and quantifiable harm might not always be available in such cases.[25]

Another case that evaluates policy objectives under Article XX(b) is the *US Gasoline* case. In this case, the appellate body accepted the US's policy objective of reducing exposure to polluted air as it constituted a threat to human health.[26] The appellate body also found a sufficient nexus between the Gasoline rule, which sought to reduce toxic air emissions, and the objective of limiting air quality degradation. According to the body, the rule's design directly advanced the goal of non-degradation of air quality.

This case is particularly relevant for climate action policies that generally require carbon emission controls through fuel restrictions or other pollution-related trade restrictions. The Appellate Body's intricate analysis of the measure's design suggests that these policies should be carefully drafted and directly advance the policy objective.

### *B. NECESSITY TEST*

At this stage, the adjudicating bodies generally assess (a) the degree of contribution of the measure to the policy objective, (b) the extent of protection of common interests or values and (c) effect of the measure on international trade.[27]

In the *EC-Asbestos* case, the Panel noted that there is no safe level of exposure to chrysotile, as even the slightest amount of exposure creates a risk of pathologies.[28] Therefore, France's move to severely restrict the use of chrysotile was upheld as vital for protecting human life and health. The case reflects a stringent application of sub-paragraph (b) when fundamental human interests are at stake.

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[25] UN (n 3).
[26] WTO, *United States: Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body* (20 May 1996) WT/DS2/AB/R [3.39].
[27] WTO (n 18).
[28] WTO (n 20) [167].

To determine if a less trade restrictive measure was reasonably available, the Appellate body noted an observation made in the *Korea-Beef* case, which had established the importance of considering an alternative least trade restrictive measure that could achieve the same objective.[29] Yet, even after applying this reasoning, Canada's argument for controlled use was rejected as its efficacy is doubtful for achieving the chosen level of health protection.[30] While making this rejection, the appellate body emphasised how eliminating and reducing the threat of risk is both "*vital and important to the highest degree*." [31]

Thus, *EC-Asbestos* affirms *Korea Beef's* balancing approach, yet it goes one step further by broadening its application to cases involving acute public health risks. By allowing France to implement a complete ban, the adjudicating bodies demonstrated how stringent measures can also be allowed to protect against extreme danger to human health.

By contrast, *Brazil–Retreaded Tyres* demonstrates a more cautious but enabling approach to the necessity test. Here, while examining Brazil's import ban in light of the necessity test, the appellate body stressed how a measure must materially contribute to achieve its outlined objectives.[32] Its effects cannot be minor or insignificant. However, at the same time, the body rejected EC's arguments that the results of the measure should be immediately observable or quantifiable,[33] acknowledging that the effect of pro-environmental measures such as climate change mitigation might not always be "immediately observable."[34] This nuanced understanding may have implications for climate change policies, whose effects are often long-term and diffuse.

The appellate body ultimately accepted Brazil's import ban, noting that the import ban is an important component of Brazil's waste management policy. It also dismissed alternative measures

[29] WTO, *Korea: Measures Affecting Imports of Fresh, Chilled and Frozen Beef – Report of the Appellate Body* (10 January 2001) WT/DS161/AB/R and WT/DS169/AB/R [163], [166].
[30] ibid [174].
[31] WTO (n 29) [172].
[32] WTO (n 23) [150].
[33] Marie Wilke (n 24).
[34] WTO (n 23) [151].

of waste management and disposal, noting how they were merely remedial in nature.[35] This judgment signals that adjudicating bodies are becoming increasingly aware of the complexity associated with environmental governance. However, it leaves unresolved how climate measures, whose effects are often long-term and indirect, would be evaluated in terms of the necessity test. This lacuna must be addressed in future judgments. Contrastingly, in the *US Gasoline* case, the Panel rejected the US's baseline establishment method, opining that alternative methods were insufficiently explored.[36] The baseline method was thus rejected and deemed unnecessary, under Article XX(b).

On a similar note, the Panel in the *Thailand Cigarettes* case identified several GATT-consistent measures which could have the same health objectives.[37] It thus refuted Thailand's claims stating that restrictions on imported cigarettes co-existed with the sale of domestic ones and were "*an inconsistency with the General Agreement not 'necessary' within the meaning of Article XX(b)*."[38]

These cases illustrate how adjudicating bodies, while allowing reasonable policy space, closely scrutinize the availability of less trade-restrictive alternatives. Thus, future climate measures must have a carefully crafted policy design that is intricately linked with achieving the policy objective of climate protection. It must have sufficient scientific justification, although it is not necessary that such justification must be quantitative. It should, however, be evidence-based and should not be unnecessarily restrictive of trade.

## IV. ARTICLE XX(G)

To build a case under sub-paragraph (g) of Article XX, countries have to satisfy the following requirements:

### *A. MEANS AND ENDS TEST*

[35] WTO (n 23) [211].
[36] WTO (n 26) [28]–[29].
[37] *Thailand: Restrictions on Importation of and Internal Taxes on Cigarettes* (7 November 1990) GATT BISD 37S/200, 223 [81].
[38] ibid.

In this test, the adjudicating bodies assess whether the policy's subject matter qualifies as an exhaustible natural resource. They also analyze if the measure used to achieve a policy goal (means) is genuinely connected to the intended policy objective (ends).[39] Hence, to justify a measure under sub-paragraph (g), a state's measure must be substantially related to conserving exhaustible natural resources. In interpreting compliance with this test, adjudicating bodies have generally demonstrated an evolving approach marked by careful scrutiny of how measures have been designed and implemented.

In the *US-Gasoline* case, the Panel broadened the interpretation of exhaustible natural resources by recognizing that clean air falls within its ambit.[40] However, it concluded that baseline establishment rules, which adversely affected the market access of imported gasoline, had no direct connection with the objective of conserving clean air.[41] This reasoning was later rejected by the appellate body as it pointed out the lack of clarity and coherence in the Panel's approach. Instead, it held that there was a substantial relationship between the measure as the Gasoline Rule's objective would be essentially frustrated without the measure.[42]

Beyond this reasoning, in the *China-Rare Earths* case, the Panel explained that the measure's scope should be broad enough with reference to the stated policy objective.[43] However, the measure's contribution to achieving the policy objective doesn't need to be demonstrated in qualitative or quantitative terms.[44]

In this case, it was decided that mere references to 'conservation' in China's policy were insufficient to establish that the measures are 'related to' conservation.[45] The panel opined that the policy's text and design revealed that the measures were to achieve goals other than conservation.[46] These findings were also accepted by the appellate body.

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[39] WTO (n 27).
[40] WTO (n 36) [6.37.
[41] ibid.
[42] WTO (n 36).
[43] WTO, *China: Measures Related to the Exportation of Rare Earths – Report of the Panel* (29 August 2014) WT/DS431/R [7.379]
[44] ibid.
[45] WTO (n 43) [7.405].
[46] WTO (n 43) [7.407].

This suggests that the adjudicating bodies evaluate the measure's substantive impact rather than its declaratory connection to environmental conservation. Thus, mere superficial references to conservation will not pass the means-ends tests. The policy must have a genuine relationship with resource preservation.

On a slightly different note, the interpretation of the *US-Shrimp* case illustrates a more adaptive approach. In this case, the appellate body noted that the 'natural resources' under sub-paragraph (g) cannot have a static interpretation.[47] Rather, they would be considered evolutionary. Further, both living and non-living resources would come under the term's ambit.[48] Hence, living sea turtles qualify as an exhaustible natural resource. The appellate body also considered the design and structure of the policy and held that they were proportionately linked to achieving the goal of preserving sea turtles.[49]

Overall, the adjudicating bodies demonstrate a liberal yet cautious approach. While they have expanded the ambit of the term 'exhaustible natural resources', they continue to scrutinise the design and structure of implemented policies. Acceptance of clean air as an exhaustible resource in the *US-Gasoline* case appears promising, as many climate protection policies require reductions in GHG emissions. If clean air is considered as an exhaustible resource, it can provide affirmative support for GHG reduction policies that aim to reduce air pollution and promote clean air.

### *B. EVEN HANDEDNESS TEST*

In this test, the adjudicating bodies determine if a state's measure unfairly discriminates between foreign and domestic products.[50] Passing this test is necessary, as even after satisfying the means and ends test, a measure may still be rejected if it does not meet the requirements of this test.

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[47] WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R [130]
[48] ibid [131].
[49] ibid [141].
[50] WTO (n 18).

In the *China-Rare Earths* case, the Panel ascertained whether the burden of restrictions on imported and domestic minerals was distributed evenly through China's policies. After careful consideration, it was concluded that there was a lack of evidence to support China's arguments that the distribution was even.[51] Accordingly, China's measures did not pass the even-handedness test.[52] A key point to note in this case is the high evidentiary burden imposed on states to demonstrate parity between domestic and foreign restrictions.

In contrast, the Appellate Body conducted a limited review of even-handedness in the case of *US-Gasoline*, highlighting only how restrictions on foreign imports were established alongside those on domestic producers. This satisfied the even-handedness requirement.[53] Thus, the appellate body made only a cursory assessment of the even-handedness, instead of examining the design and structure of the policy and its projected impact.

In the *US-Shrimp* case, the appellate body referred to the *US-Gasoline* case and noted the intended effects of the US regulations. It held that the measure was "*made effective in conjunction with the restrictions on domestic harvesting of shrimp*", again satisfying the even-handedness requirement.[54]

Thus, while the adjudicating bodies only checked formal consistency in the *US-Gasoline* and *US-Shrimp cases,* they undertook a detailed evidentiary analysis in the China-Rare Earths case. This inconsistency creates uncertainty regarding the level of proof required to satisfy even-handedness under Article XX(g). This can further create uncertainty in implementing ambitious climate protection policies that may naturally impact domestic and foreign actors differently due to technological or developmental disparities.

Future jurisprudence might strive for a clearer and predictable standard of even-handedness. This could involve (a) providing clear guidelines on proportionality standards, ensuring that

[51] ibid [7.160].
[52] ibid [7.600].
[53] WTO (n 36).
[54] WTO (n 47) [145].

measures are neither burdensome on trade nor excessively protectionist, (b) recognizing that countries may naturally be impacted differently due to variations in their technological capacity and access to clean energy infrastructure, and (c) this can enhance coherence in the reasoning of adjudicating bodies and ensure that the jurisprudential framework is more accommodating of climate protection policies.

### *C. REQUIREMENTS UNDER THE CHAPEAU OF ARTICLE XX*

After examining the requirements of individual sub-paragraphs, the adjudicating bodies assess whether the stipulations provided under Article XX's chapeau are also fulfilled. This is the final requirement that must be satisfied to successfully build a case under Article XX. Accordingly, three conditions need to be fulfilled to satisfy the chapeau criteria, namely (a) the absence of arbitrary discrimination, (b) the absence of unjustifiable discrimination, and (c) the absence of disguised restriction on trade.

This three-pronged test serves as a procedural safeguard, ensuring that environmental measures do not become a pretext for unnecessary trade restrictions and that trading partners continue to receive fair treatment. In some cases, adjudicating bodies have completely invalidated measures because they failed to satisfy the conditions of the Chapeau.[55] Yet, owing to irregularities in adjudicating bodies' reasoning, precise meanings attributed to Chapeau's terms are still not clear.[56]

In the environmental context, additional parameters have also been introduced that states must now satisfy to pass the Chapeau test. For instance, in the *US Gasoline* case, the appellate body highlighted two omissions on the part of the US.[57] 1) Failure to cooperate with trading partners to mitigate administrative challenges. 2) Failure to calculate additional costs imposed on foreign refiners. In the body's view, these violated the requirements of "unjustifiable discrimination" and "disguised restriction on trade". Accordingly, the body refused protection

[55] Gracia Marín Durán, 'Measures with Multiple Competing Purposes after EC – Seal Products: Avoiding a Conflict between GATT Article XX-Chapeau and Article 2.1 TBT Agreement' (2016) 19 JIEL 467.
[56] Arwel Davies, 'Interpreting the Chapeau of GATT Article XX in Light of the "New" Approach in Brazil – Tyres' (2009) 43(3) JWT 507.
[57] WTO (n 36) 28-29.

under Article XX. In doing so, the Body added an additional parameter of 'involving' or engaging with the trading partner before implementing trade-impacting environmental measures.

A further parameter of 'prior evaluation' emerged in the *US-Shrimp* case. Here, rather than focusing on the measure's design and structure, the appellate body gave special importance to the approach adopted by the US in implementing the measure. It criticised the US for failing to evaluate whether it was feasible for the partner countries to implement the measure. According to the Body, this would have allowed them a fair chance to comply with their standards.[58] This reasoning reflected an evolving emphasis on procedural fairness and cooperation in implementing environmental measures.

A second jurisprudential development was made in the *Brazil Retreaded Tyres* case. Here, the Panel initially adopted an 'effects-based approach' to determining whether Brazil's exemptions significantly impacted its overall policy objectives.[59] This appellate body rejected this reasoning, clarifying that the focus should instead be on the rationale for discrimination and its connection to the policy objective, thereby establishing a 'rational connection' test.

This approach provides clearer legal standards for evaluation,[60] as it links the legitimacy of the discrimination to the integrity of the environmental objective itself. Such reasoning can enable countries to have greater flexibility in supporting environmental objectives, including those related to climate change. Thus, the adjudicating bodies show an evolving approach in testing the chapeau requirements. This means that the exact legal standards for review might appear in future cases. Nevertheless, from the climate change perspective, two things are clear, namely that (a) countries must make reasonable efforts to engage in international cooperation before introducing trade-affected measures and (b) their discrimination must be legitimately built on a rational connection between the measure and its environmental objective.

[58] WTO (n 47) [164]-[165].
[59] Marie Wilke (n 24).
[60] ibid.

### *D. OTHER GATT EXCEPTIONS*

While sub-paragraphs (b) and (g) of Article XX are generally invoked by countries to justify their environmental measures, they are not the only provisions used for this purpose. In a notable environmental dispute between India and the US, India invoked sub-paragraphs (d) and (j) of Article XX to justify its domestic content requirements (DCR) on electricity-based inputs in a government-supported solar power project.[61]

The US challenged India's DCR requirements introduced by India, arguing that India's moves discriminated against foreign imports.[62] Invoking sub-paragraph (j) of Article XX, India stated that there was a deficiency in its domestic manufacturing, which necessitated support for domestic produce. Only this could ensure a consistent local supply of these products, as disruptions in imports could cause shortages in the product's supply. The Panel rejected these claims, holding that (a) potential disruptions in imports did not qualify as a supply shortage.[63] (b) India was not entitled to an equitable share in international production but only to an equitable share in international supply.[64]

India further invoked sub-paragraph (d) of Article XX, stating that DCR measures were necessary to ensure compliance with Indian laws and regulations as well as several international instruments. Dismissing these claims, the Panel stated that international instruments fall outside the scope of "laws and regulations" under sub-paragraph (d) of Article XX.[65] It further stated that domestic instruments were only declaratory and aspirational in nature. Hence, there was an absence of any "legally enforceable rule" which mandated compliance.[66] The appellate body affirmed these arguments and stated that 'laws and regulations' mentioned under sub-paragraph (d) refer to obligations which have been incorporated in the domestic legal system. Therefore, general international obligations without domestic implementation will not fall under sub-

[61] Marianna Karttunen and Michael O Moore, 'India–Solar Cells: Trade Rules, Climate Policy, and Sustainable Development Goals' (2018) 17(2) World Trade Review 215.
[62] ibid.
[63] WTO, *India: Certain Measures Relating to Solar Cells and Solar Modules – Report of the Panel* (24 February 2016) WT/DS456/R [7.265].
[64] ibid.
[65] ibid [7.333].
[66] Marianna Karttunen and Michael O Moore (n 61).

paragraph (d)'s purview.[67] These interpretations are restrictive, narrowing the scope for countries to justify environmental policies under these two sub-paragraphs.[68]

Yet, for climate action, two observations are clear through this case, namely (a) domestic laws and regulations could justify the imposition of pro-climate actions if they create a legally enforceable mandate for countries to take such actions. The lacuna, however, lies in the lack of clear guidelines on the language and implications of laws that would constitute a legal mandate, and how these differ from laws that are merely declaratory or prescriptive and (b) the case leaves open the possibility that future environmental or climate change policies could be supported through enforceable laws at the domestic level. Although analogy suggests that this should be the case, it isn't abundantly clear through a normative buildup in this case whether they would be. As part of future reform processes, countries could consider strengthening their legal commitments by making them legally binding.

## V. COMMENTS ON THE ADJUDICATING BODIES' APPROACH

### *A. NECESSITY TEST UNDER ARTICLE XX(B)*

The reasoning of adjudicating bodies reflects a general flexibility in allowing environmental measures and a growing awareness of pro-environmental policies. This is especially true for cases in which protection has been sought under sub-paragraph (b) of Article XX. By permitting qualitative assessments and acknowledging that environmental effects may not be immediately observable, the bodies adopt a flexible stance that can accommodate climate protection measures.

However, this flexibility does not signify an openness to all pro-environmental measures regardless of their design. The requirement of 'material contribution' indicates the necessity of measures to be genuine in achieving their stated objectives. At the same time, the adjudicating bodies do undertake a careful scrutiny of the policy design and the availability of less trade-restrictive alternatives. This is evident in the *US–Gasoline* and *Thailand–Cigarettes* cases.

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[67] WTO (n 63) [7.333].
[68] Marianna Karttunen and Michael O Moore (n 61).

The analysis of these cases shows that while the WTO framework may accommodate ambitious policies, countries must carefully design them and explore all possible alternatives, as the adjudicating bodies generally adopt a strict scrutiny at this stage.

### *B. 'RELATING TO' TEST UNDER ARTICLE XX(G)*

Through their liberal interpretations, the adjudicating bodies have generally broadened the scope of what constitutes 'natural resources.[69] A significant development is the US-Shrimp case, in which the Appellate Body explicitly acknowledged the evolutionary nature of natural resources. This forward-looking approach creates opportunities for positive interpretations of environmental objectives, including efforts to combat climate degradation.[70]

However, beyond this reasoning, one can easily observe both the general evolution and inconsistencies in the approach of adjudicating bodies to accommodate environmental policies. The evolution is apparent through adjudicating bodies' emphasis on 'substantial relationship with policy objective' in the *US Gasoline* case and on the breadth of scope in relation to the policy objective in the *China-Rare Earths* case.

Yet, inconsistency persists in how the adjudicating bodies have interpreted the concept of even-handedness. While the adjudicating bodies conducted only a limited review in the US Gasoline case, they undertook a detailed evidentiary analysis in the China-Rare Earths case to ascertain the actual impact on domestic producers. This inconsistency creates doubts regarding the required level of proof to establish a case for even-handedness.

Overall, Article XX(g) interpretations indicate a careful scrutiny of policy substance rather than its stated objectives.

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[69] Henrik Horn and Petros C Mavroidis, 'Burden of Proof in Environmental Disputes in the WTO: Legal Aspects' (2009) 18 European Energy and Environmental Law Review 112.

[70] Pallavi Kishore, 'Revisiting the WTO Shrimps Case in the Light of Current Climate Protectionism: A Developing Country Perspective' (2012) 3(1) George Washington Journal of Energy & Environmental Law 78.

### *C. IN ANALYSING CHAPEAU*

Initially, in the *US-Gasoline* and *US-Shrimp* cases, the adjudicating bodies conducted relatively rigorous assessments of trade impact, highlighting several instances where the government failed to engage meaningfully with trading partners. Their reasoning introduced several new procedural parameters, such as 'involving trading partners' and 'prior evaluation' to the chapeau test. The introduction of these parameters indicates an expectation of good faith and procedural fairness on the part of member states introducing a trade restrictive measure.

However, the appellate body's reasoning in the *Brazil–Retreaded Tyres* case indicates a visible shift towards a more structured and principle-based evaluation. The introduction of the 'rational connection test' signifies a refinement in adjudicating bodies' approach to evaluating compliance under the chapeau.

This shift in approach represents a more enabling stance for pro-environmental policies as it allows countries to justify their measures as long as they can establish a direct link between the discrimination and the underlying environmental objectives. Yet, while making its observation, the appellate body did not clarify whether it had shifted its reasoning from the older approaches to a newer approach of rational connection. This leaves ambiguity regarding how future cases will be decided in light of the chapeau test. Going forward, the adjudicating bodies should clarify their interpretative standard to ensure predictability in the application of Article XX's chapeau.

Moreover, Article 2(2) of the Paris Agreement clarifies that climate obligations under the agreement are interpreted in light of the principle of equity. It also indicates that countries' respective capabilities and circumstances are taken into consideration while perceiving their expectations.[71] This supports the reasoning that procedural expectations under the chapeau should be set with sensitivity to members' institutional capacities and circumstances. Such an approach would ensure that WTO adjudication remains aligned with contemporary norms of climate governance.

[71] Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 3, art 2(2).

## VI. IMPLICATIONS FOR CLIMATE CHANGE MITIGATION POLICIES

Based on the evolving jurisprudence of Article XX, WTO adjudicating bodies generally demonstrate a willingness to accommodate pro-environmental policies. This creates opportunities for member states to adopt climate protection measures and justify their stance under sub-paragraphs (b) and (g) of Article XX. A key example is the broad interpretation of natural resources in the *US Shrimp* case. Similarly, there is a willingness to adopt qualitative assessments and long-term projections. This provides a favorable framework to support environmental measures such as climate change mitigation, the impact of which manifests after long periods of time.[72]

In addition, the reliance on international body reports in the *EC-Asbestos* and *Brazil–Retreaded Tyres* cases indicates the potential to support climate protection measures, which are typically based on scientific assessments that highlight the long-term risks of climate change. Collectively, such openness can help legitimize ambitious climate change policies. Yet, this flexibility is more apparent at the initial stages of analysis by the adjudicating bodies, where they assess whether a measure falls within the policy objectives supported by sub-paragraphs (b) and (g) of Article XX.

Beyond this, one can clearly observe rigidity in the approach, with strict adherence to procedural standards. For instance, the requirement of 'material contribution' requires that a measure substantially contribute to the outcome of its stated objective. If complied with strictly, it could be difficult to justify 'material contribution' in climate change mitigation policies, as they often involve preventive measures aimed at reducing greenhouse gas emissions to avert long-term environmental harm.[73] Though such a difficulty was acknowledged broadly in the *Brazil Retreaded Tyres* case, the adjudicating bodies did not clarify how these measures would be assessed in light of Article XX exceptions.

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[72] UNDP, 'What Are Long-Term Climate Strategies, and How Can They Help Us Tackle Climate Change?' (3 April 2023) (3 April 2023) <https://climatepromise.undp.org/news-and-stories/long-term-climate-strategies-LTS-LTLEDS-climate-change> accessed 22 June 2026.

[73] Ming Du, 'The Necessity Test in World Trade Law: What now?' (2016) 15(4) Chinese Journal of International Law 817.

Another difficulty may arise due to the rigorous scrutiny of policy designs, which require a direct and substantial connection between the measure and its stated objective. These standards might be ill-suited to climate protection measures because of their multifaceted nature, which makes it difficult to link climate change directly to its sources.[74]

Lastly, the evidentiary standards that adjudicating bodies use to assess compliance with chapeau requirements are rigorous. They consistently demand clear and substantiated justification. These standards may also pose challenges for climate policies, which involve complex mitigation strategies that seldom create a direct impact.

At the same time, the immediate trade impacts of such measures may be more readily quantifiable, creating an asymmetry between competing priorities. A constructive reform can be an interpretative declaration that provides guidance on the admissibility of qualitative and probabilistic scientific evidence in evaluating measures that address long-term environmental risks such as climate change.

## VII. HOW WILL THE ADJUDICATING BODIES LIKELY ASSESS THE CBAM POLICY BASED ON THEIR APPROACH?

The Carbon Border Adjustment Mechanism (CBAM) aims to deter excessive carbon leakage in production processes, thereby encouraging cleaner manufacturing practices.[75] The policy is aligned with the EU's broader climate policy objectives. To achieve this, foreign producers must pay a carbon tax on goods exported that were produced through excessive carbon emissions. The rates of this tax are equivalent to those levied under the EU's Emission Trading System (ETS).[76] A crucial rationale behind introducing this policy is to prevent third countries from adopting weaker climate protection policies that could result in excessive carbon leakage.

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[74] United Nations (n 3).

[75] European Commission, 'Carbon Border Adjustment Mechanism' (Taxation & Customs Union, 21 October 2025) <https://taxation-customs.ec.europa.eu/carbon-border-adjustment-mechanism_en> accessed 22 June 2026.

[76] Marc Jarsulic, 'What the European Union's Proposed Trade Tax on Carbon Means for the United States' (Centre for American Progress, 16 August 2021) <https://www.americanprogress.org/article/european-unions-proposed-trade-tax-carbon-means-united-states/> accessed 22 June 2026.

### *A. ANALYSIS OF WHETHER THE POLICY CAN BE DEFENDED UNDER ARTICLE XX(B)*

At the initial stages of their tests, the bodies demonstrate a general flexibility to adapt to environmental policies. They accept qualitative assessments, which can demonstrate impact on human, animal, and plant life and health. Therefore, they are likely to accept that the measure satisfies the policy objectives of sub-paragraph (b). However, beyond this, the bodies perform a necessity test to see if there is a material contribution of the policy to the objective of averting climate harm. They also consider whether there are any less trade-restrictive alternatives that can achieve the same objective.

Here, if the bodies rely on their previous reasoning, they might accept qualitative assessments only if they can demonstrate that preventing carbon leakages substantially contributes to the goal of averting climate change. In *Brazil-Retreaded Tyres,* they have accepted climate protection as a 'higher level objective' and acknowledged that environmental effects may not be immediately observable in some cases. Therefore, there may be a possibility of satisfying the material contribution test, provided that reliable qualitative assessments demonstrate a substantial contribution. However, the measure might be challenged by the bodies in terms of exploring lesser trade-restrictive options. According to the literature, alternatives such as plurilateral cooperation through climate clubs,[77] or MRVs (measurement, reporting, verification) systems could act as less trade-restrictive alternatives to the policy. [78]

Overall, at this stage, the bodies undertake a rigorous scrutiny; therefore, there is a higher risk for failure. The EU may therefore not be able to succeed in defending its policy unless it demonstrates that (1) CBAM makes an indispensable contribution to reducing carbon leakage; (2) all possible alternatives have been satisfactorily explored, and CBAM policy is the least trade-restrictive among other alternatives.

### *B. ANALYSIS OF WHETHER THE POLICY CAN BE DEFENDED UNDER ARTICLE XX(G)*

[77] Indra Overland and Mirza Sadaqat Huda, 'Climate Clubs and Carbon Border Adjustments: A Review' (2022) 17 *Environmental Research Letters* 093005.
[78] Harman Singh, Aparna Sharma and Vaibhav Chaturvedi, *EU Carbon Border Adjustment Mechanism: Dominant Perspectives in India* (Working Paper, Council on Energy, Environment and Water, New Delhi, October 2025).

At initial levels of the means and ends test, the bodies have taken a forward-looking approach and liberally interpreted whether the measure falls within the scope of sub-paragraph (g). The US-Gasoline case also sets an affirmative precedent for reducing GHG emissions, which can make it easier to support the policy at this stage. However, beyond this stage, the reasoning on means and ends has been evolving inconsistently, indicating unpredictability in the approach.

Nevertheless, the adjudicating bodies may assess the substance of the CBAM policy rather than its stated objectives to determine if it is genuinely designed to preserve the claimed natural resource. There is a moderate level of vulnerability at this stage, as the bodies sometimes require a concrete level of evidence, and at other times, conduct a limited review. Many scholars note that the policy serves as a 'compensatory mechanism' to offset competitive concerns arising from domestic ETS taxes.[79] Because of this, it does not appear to be a genuine environmental measure, as demanded through the tests carried out under sub-paragraph (g).

### *C. ANALYSIS OF WHETHER THE POLICY CAN SURVIVE CHAPEAU REQUIREMENTS*

At this stage, the adjudicating bodies have generally demonstrated procedural rigidity. They have also added procedural parameters, such as involving trading partners and evaluating whether it is feasible for them to carry out the measure. This approach makes it highly risky for the CBAM policy to survive the chapeau test. Literature argues that the CBAM policy has been implemented unilaterally by the EU, without engaging in negotiations or dialogues with other countries.[80] Furthermore, although the EU conducted impact studies and consultations to assess the effects on trading partners, they do not fully reflect the trading partner's capacity to implement the policy.[81]

Secondly, if the adjudicating bodies adhere to their revised approach and apply the rational connection test, they will determine whether there is a rational nexus between the discrimination

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[79] OECD, *What to Expect from the EU Carbon Border Adjustment Mechanism?* (Policy Brief No 15, OECD Publishing, Paris, 17 March 2025).

[80] S Markkanen and others, *On the Borderline: The EU CBAM and its place in the world of trade* (Cambridge Institute for Sustainability Leadership/Cambridge Econometrics, October 2021).

[81] World Bank, *Preliminary Study on the Economic Impact that the EU Carbon Border Adjustment Mechanism Could Potentially Impose on Foreign Exporters of Products to the EU Market: The Case of Thailand, India, and Vietnam* (Final Report, May 2021) <https://ercst.org/preliminary-study-on-the-economic-impact-that-eu-cbam-could-potentially-impose-on-foreign-exporters-of-products-to-the-eu-market-thailand-india-and-vietnam/> accessed 22 June 2026.

and the climate protection objective. CBAM's legitimacy has been repeatedly questioned because of its features that discriminate against foreign goods, without a genuine environmental rationale. For example, the feature of allocating free allowances under the EU ETS, which is not reflected in CBAM, benefits domestic producers unequally, as they do not have to bear full carbon costs for years.[82] This discriminatory burden lacks a connection to environmental objectives; therefore, it may not survive the rational connection test. Based on the above discussion, the CBAM policy may not survive the chapeau of Article XX if we purely consider the jurisprudence and approach of adjudicating bodies.

## VIII. CONCLUSION AND RECOMMENDATIONS

Article XX jurisprudence shows that adjudicating bodies WTO create a predictable yet evolutionary stance in environment-related trade disputes. The evolution demonstrates a general willingness to accommodate pro-environmental policies. By accepting qualitative evidence, enhancing the scope of policy objectives, and acknowledging its limitations in assessing complex environmental issues, the adjudicating bodies have left a visible space for countries to support their environmental objectives. However, at the same time, adjudicating bodies demand strict procedural compliance with measures invoked under Article XX. Moreover, there are ambiguities about the precise level of proof and normative tests to be applied at different stages of review.

This tension between initial openness and subsequent strictness creates opportunities and challenges for climate change mitigation measures. Prima facie, it may seem that such cases are admissible, but they might be rejected at later stages. However, due to the accommodating approach of the adjudicating bodies, at least at the initial levels, it is possible to justify climate protection measures under Article XX. Members should seek interpretative guidance on Article XX for climate change measures to improve predictability and better align the WTO framework with climate objectives.

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[82] Peter Lunenborg and Vahini Naidu, *How the EU's Carbon Border Adjustment Mechanism Discriminates Against Foreign Producers* (South Centre Policy Brief No 117, 14 March 2023) <https://www.southcentre.int/wp-content/uploads/2024/02/PB124_How-the-EUs-Carbon-Border-Adjustment-Mechanism-discriminates-against-foreign-producers_EN.pdf> accessed 22 June 2026.

More specifically, the guidance/interpretative note could (a) clarify the 'material contribution' requirement under the necessity test for climate-based policies, (b) clarify the proportionality standards on the even-handedness requirement, (c) standardise requirements that constitute procedural fairness to pass the chapeau test – for instance, engaging in international cooperation, carrying out prior evaluation on impact, and (d) acknowledge the complexity of producing qualitative or scientific assessments that demonstrate the impact of climate change policies. Such guidance can also introduce adaptability in evidentiary standards, making the framework more conducive to addressing the climate change problem.

As part of the reform process, each institution must embrace the realities of climate governance, which includes the WTO's adjudicating bodies. They should internalise the urgency and uniqueness of the problem in their interpretative framework. With this change, the institution can truly act on its aspirational goals of supporting the environment and sustainability alongside trade. The success of this also requires cooperation among members; only then can the WTO move from being a passive accommodator to an active facilitator of trade.

# BEHAVIOURAL ATTRIBUTES AS 'MEASUREMENTS' UNDER THE CRIMINAL PROCEDURE (IDENTIFICATION) ACT, 2022: RATIONALE, RELIABILITY, AND RIGHTS

*Asutosh Kar*[*]

## ABSTRACT

*The Criminal Procedure (Identification) Act, 2022 (CPIA) significantly expands the Indian State's power of identification by including "behavioural attributes" within the definition of "measurements." This paper examines the rationale, reliability, and rights-based implications of this expansion. Firstly, it argues that the State's motivation lies in the perceived investigative promise of behavioural data. This includes linking cases through offender profiling, identifying recidivists, and compensating for absent biological evidence. Secondly, however, the study demonstrates that such data are inherently unreliable for evidentiary purposes. Behaviour is situationally specific, and the theoretical assumptions of intra-offender consistency and inter-offender homology often collapse under empirical scrutiny. Profiling practices are further undermined by subjective interpretation, confirmation bias, and the use of poorly maintained databases by unqualified personnel. Thirdly, beyond evidentiary concerns, the paper evaluates the CPIA's compatibility with constitutional guarantees. It contends that the collection of behavioural attributes through experiments akin to polygraph or brain mapping violates Article 20(3)'s right against self-incrimination, while the statute's 75-year retention clause fails the proportionality test under Article 21's right to privacy as articulated in K.S. Puttaswamy v. Union of India. By institutionalising subjective and character-laden categories of suspicion, the CPIA blurs the line between the investigative and the intrusive. The paper concludes that the inclusion of behavioural attributes as "measurements" undermines both evidentiary reliability and constitutional rights, signalling a drift towards a surveillance-oriented criminal justice regime.*

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## I. INTRODUCTION

*"Every city has its eye: the lookout towers, the sentinels, the watchmen. But when the gaze of the city penetrates its inhabitants' gestures, the city itself becomes its prison."*

Surveillance often transforms from an external safeguard into an internalised mechanism of control. A similar shift can be seen in Indian criminal law. The Identification of Prisoners Act, 1920 confined the State's gaze to limited physical markers such as finger and foot impressions.[1] In contrast, the Statement of Objects and Reasons for the Criminal Procedure (Identification) Act, 2022 (**CPIA**) claims that modern technologies allow for more expansive means of identifying individuals, making investigation more efficient. To this end, §2(1)(b) of the CPIA expands the definition of "measurements" to encompass various new biometric data.[2]

Among these, perhaps the most ambiguous and controversial is the inclusion of "behavioural attributes."[3] This comment seeks to answer why the State has sought to convert behaviour into data and whether its collection and retention withstand scrutiny in terms of evidentiary reliability and constitutional rights. *Section I* explains the state's possible *rationale*, showing how a repository of behavioural attributes can aid criminal profiling. *Section II* argues that, despite these utilities, such data has weak *reliability* in criminal procedure. *Section III* extends the critique by arguing that the retention under CPIA violates human *rights* such as privacy and right against self-incrimination.

## II. BEHAVIOUR AS DATA: WHY EXPAND 'MEASUREMENTS' IN CRIMINAL PROCEDURE?

Imagine arriving at a crime scene: the broken window is not merely evidence of entry, but indicative of impulsivity; the careful placement of objects may signal ritual; the language in a ransom note reveals dialect and education. Criminal profiling builds on these fragments of evidence to determine probable offender characteristics.[4] In drawing this portrait of an offender from elements of a crime scene, it aims not to individuate, but to establish the type of person

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[1] Identification of Prisoners Act 1920, s 2(a).
[2] Criminal Procedure Identification Act 2022 (CPIA 2022) s 2(1)(b).
[3] The inclusion of handwriting, signatures and other measurements from CrPC within this phrase of "behavioural attributes" must be understood with respect to the word "includes" in the definitions clause. This indicates the legislative intent to extend the phrase's scope to meanings not ordinarily comprised within it, as held in *Bharat Co-operative Bank (Mumbai) Ltd. vs Co-operative Bank Employees Union* (2007) 4 SCC 685. This paper does not cover these extended aspects within the ambit of behavioural attributes.
[4] Pascale Chifflet, 'Questioning the Validity of Criminal Profiling: An Evidence-Based Approach' (2015) 48(2) ANZSOC 238.

likely to have committed a crime.[5] Behavioural attributes promise to aid this process of investigation.

### *A. THEORETICAL ASSUMPTIONS*

This promise rests on two theoretical tenets. *First*, the consistency assumption holds that the same offender shows stable behavioural features across their offences.[6] For instance, an offender may adopt a method of burglary or arson that 'works'.[7] Even when there are variations, the rate must be less than variations with respect to other offenders. This intra-offender stability allows case linkage i.e. determining whether two (or more) cases may have been committed by the same offender(s).[8] Such a practice links solved crimes with similar behavioural aspects to an unsolved one, influencing sentencing procedures and conviction rates.[9] *Second*, the homology assumption holds that acts committed in a similar style imply similar background characteristics like demographics or personality traits of the different persons committing them.[10] This inter-offender similarity helps narrow down the investigative field by prioritising certain suspects matching these behavioural descriptions.

### *B. PRACTICAL APPLICATIONS*

These investigative utilities assume greater importance in sexual assaults, where analysis by laboratories has shown that 45% of cases may lack semen stains.[11] This absence of biological samples such as DNA can be due to deliberate use of condoms to avoid leaving evidence or an 'ashamed' victim washing off these traces.[12] In these circumstances, idiosyncrasies of sexual criminals such as public libraries as crime sites, or speech patterns giving an excuse for the behaviour have been used to link series of rapes and their perpetrator.[13] Further, the modus operandi or "signature" behaviour of criminals such as stealing victims' identity cards for intimidation becomes distinctive markers for repeat offenders.[14] Hence, a

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[5] Laurence Alison and others, 'Pragmatic Solutions to Offender Profiling and Behavioural Investigative Advice' (2010) 15 Legal & Criminological Psych 115, 119.
[6] ibid.
[7] ibid 120.
[8] ibid.
[9] Anne Davies, 'The Use of DNA Profiling and Behavioural Science in the Investigation of Sexual Offences' (1991) 31 Med Sci & L 95.
[10] Alison (n 5) 119.
[11] Davies (n 9).
[12] ibid.
[13] ibid.
[14] Brent E Turvey, *Criminal Profiling: An Introduction to Behavioral Evidence Analysis* (4th edn, Academic Press 2012) 335.

database of information on previously identified offenders does not only aim to resolve cases, but is envisaged as addressing the broader challenge of recidivism.[15]

While convictions for serious crimes intuitively (and empirically)[16] tell us that the person has a significant propensity to commit crime, non-criminal anti-social behaviour is also often employed to show that offending would not be out of character for that person.[17] As an illustration, a video-recording of extreme racist views, condemnable but not criminal, was relied upon to show the accused had a comparative propensity to commit racist violence.[18] More recently, researchers have used Machine Learning algorithms to capture and study hate comments posted by suspects on social media and used these behavioural parameters to group suspects into different categories.[19] On the other hand, good character behaviour and standing of an accused has been held as a relevant factor while considering a bail application.[20] These examples illustrate that behaviour has long been an implicit category in criminal justice. The CPIA makes this explicit, expanding "measurements" to behavioural attributes and hinting at the state's rationale behind transforming conduct into data.

## III. BEHAVIOUR ON TRIAL: THE EVIDENTIARY FAULTLINES

Yet, the very assumptions that make behavioural attributes attractive to investigators expose their unreliability as evidence during a trial. This section offers these practical criticisms by *first*, questioning the consistency assumption since the behaviour of an offender is specific to situations; *second*, highlighting the flaws of the profiler taking/analysing behavioural attributes; *third*, showing how poorly compiled databases used by unqualified analysists have led to acquittals.

### *A. SITUATIONAL SPECIFICITY OF BEHAVIOUR*

The earlier theory that a unique combination of certain attributes – "traits" – comprised a person's personality, stable across starkly divergent situations, has been refuted by

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[15] Alison (n 5) 122.
[16] The rate of recidivism for murder convicts is 6.6%, making them 200 times more likely to commit the crime compared to others according to a study by Allen J. Beck called Recidivism of Prisoners Released In 1983, published in 1989 by the Bureau of Justice Statistics.
[17] Mike Redmayne, *Character in the Criminal Trial* (OUP 2014) 268.
[18] *R v David Allan Norris* [2013] EWCA Crim 712.
[19] Barkhashree and Parneeta Dhaliwal, 'Impounding Behavioural Connotations for Hate Speech Analysis – A View towards Criminal Investigation Using Machine Learning' (2024) 16(3) International Journal of Information Technology 1685, 1686.
[20] *P. Chidambaram v Central Bureau of Investigation* MANU/SC/1456/2019 [22].

psychologists.[21] Instead, behaviour is influenced by specific situational determinants,[22] countering the consistency assumption. For example, sexual offence is a highly dynamic event where contextual factors such as the type of victim resistance strategy and familiarity with environment shapes the offender's modus operandi.[23] Hence, even trivial differences in situations can invalidate behavioural predictions made by profilers.[24]

To reconcile the seemingly constant personality traits with situational variability of behaviour, theorists have defined personality as "a system of mediating processes whose interactions are manifested in predictable patterns of situation-behaviour relations."[25] Hence, while we cannot conclude that a person would always react with a particular behaviour, say Y, we may be able to predict "if situation X arises… then reaction Y" for the subject.[26]

To see how we can find these predictable patterns, consider a person who has cheated his clients. Is he likely to evade taxes by understating income? This determination requires knowledge of how the subject perceives the two situations (cheating clients vis-à-vis the government), how he encodes them cognitively and emotionally, and interactions of these encodings with other cognitions in the subject's personality system.[27] Only then can we arrive at a "if X, then Y" signature identifying the accused. Therefore, this process requires mental health experts to meticulously reconstruct the subject's life history using sources such as family, employers, or mental hospital records.[28] A generalised character trait cannot be inferred from one or two instances of a person's past behaviour recorded in the National Crime Records Bureau (**NCRB**) database, as envisaged by the CPIA.[29]

### *B. Perils of the Profiler's Analysis*

Even assuming that these inferences are useful, relying on analysis by criminal profilers results in two main drawbacks. *First*, the comparative process of determining how well an offence fits a previous profile is inherently subjective.[30] Different examiners will test the

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[21] Miguel A Méndez, 'Character Evidence Reconsidered: "People Do Not Seem to Be Predictable Characters"' (1998) 49 UC Law SF L J 871, 877.
[22] ibid 878.
[23] Alison (n 5) 120.
[24] Mendez (n 21) 878.
[25] Mendez (n 21) 879.
[26] Redmayne (n 17) 13.
[27] Mendez (n 21) 879.
[28] Mendez (n 21) 881.
[29] CPIA 2022, s 3, s 4.
[30] Chifflet (n 4) 246.

veracity of an offender's characteristics using their own perspective, especially in the absence of elaborate procedures. *Second*, behavioural investigative advice often leads to confirmation bias. Officers suffer from a tendency to selectively focus on hits in the profile and ignore the misses.[31] For example, two groups of police officers were given the same profile and asked to compare to a different offender. Though only one was the actual offender, both groups found the profile accurate despite its relation to discernibly different offenders.[32]

### *C. Unreliable Databases, Unqualified Analysts*

Given the aforementioned scope of mistakes, it would be reasonable to expect the authorities entrusted with taking measurements or analysing them to be specialists in behavioural assessments. However, this has often not been the case, as demonstrated by *California v. Kenneth Hernandez*.[33] Here, the state sought to introduce the testimony of a crime analyst to prove the offender's identity. The analyst was not a trained profiler. Her role extended to crime mapping and data entry, not behavioural analysis. Further, this testimony was based on an in-house database containing "unique descriptors of suspects". The database had been constructed using initial police reports transferred to the log by clerical support. These were riddled with omissions and edits without any independent checks. Hence, despite their value as an investigative tool, these methods did not meet the test of admissibility in criminal trials and resulted in reversal of convictions.[34]

Hence, the accuracy of modern law enforcement case databases depends on the data entered.[35] Error is more likely, if not always present, when non-scientists base this on data that is incomplete, unchecked, or incorrect (as is typical throughout the investigative stage of a law enforcement probe).[36]

These concerns remain relevant for the Indian law. The CPIA allows police officers from the rank of Head Constable or prison officers from the rank of Head Warder to take the measurements.[37] These officers who have been granted access to the database by the NCRB are termed "authorised users",[38] implying they may also perform the function of analysing

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[31] ibid.
[32] ibid.
[33] *People v Hernandez* (1997) 55 Cal App 4th 225 (Cal Ct App).
[34] ibid.
[35] Turvey (n 14) 343.
[36] ibid.
[37] CPIA 2022, s 3.
[38] Criminal Procedure (Identification) Rules, 2022 (CPIR 2022) s 2(b).

previously stored data. These individuals lack expertise in psychology or forensic analysis, raising the likelihood of subjective or erroneous interpretations discussed in sub-section 'B'. Additionally, the Rules leave the framing of Standard Operating Procedures entirely to the NCRB without safeguards such as periodic audits or independent oversight.[39] Without clear SOPs, uniform formats, or mechanisms for deletion of incorrect entries, the NCRB's digital repository risks becoming a vast but unreliable archive of citizen's behavioural attributes.

## IV. BEHAVIOUR STORED BY THE STATE: RIGHTS-BASED FAULTLINES

This comment has focused on the evidentiary unreliability of behavioural attributes so far. The lack of scientific rigour and inadmissibility in courtrooms may not help the state secure convictions using this data. Even then, the mere act of non-consensual collection,[40] and retention for 75 years[41] has implications for fundamental rights. *First,* I analyse the possibility of methods such as polygraph test or brain mapping to collect behavioural attributes violating the right against self-incrimination. *Second,* I examine how the blanket and indiscriminate retention of the data may violate right to privacy, given the failure to satisfy the test of proportionality laid down in *Puttaswamy*.

### *A. RIGHT AGAINST SELF-INCRIMINATION*

Article 20(3) of the Constitution protects an accused from being compelled to be a witness against themselves.[42] *State of Bombay v. Kathi Kalu Oghad* defined "to be a witness" as imparting knowledge of relevant facts through oral or written statements by someone with personal knowledge of the same to a court or the investigator.[43] It was clarified by *Selvi v. State of Karnataka* (**Selvi**) that such communication may happen through means other than oral or written statements.[44] While narcoanalysis directly elicits verbal statements, the Court reasoned that even polygraph and Brain Electrical Activation Profile (BEAP) transmit knowledge from the subject's mind through physiological responses used by the investigator to draw inferences.[45] Hence, these methods amounted to testimonial compulsion and were prohibited.

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[39] CPIR 2022, s 3(2).
[40] CPIA 2022, s 6(1).
[41] CPIA 2022, s 4(2).
[42] Constitution of India, Article 20(3).
[43] *State of Bombay v Kathi Kalu Oghad* AIR 1961 SC 1808 [18].
[44] *Selvi v State of Karnataka* AIR 2010 SC 1974 [158].
[45] ibid [160].

In the CPIA, "taking" of behavioural attributes by the concerned officer has a high likelihood of involving controlled experiments. These may include replication of crime-scene contexts and recording of stress reactions, emotional outbursts, or subconscious cues. Indeed, incorporation of situational circumstances to reach "If X, then Y" conclusions has already been advocated to improve the reliability of criminal profiling.[46] Hence, such exercises would inevitably require methods akin to polygraph or BEAP, previously declared unconstitutional.

It may be argued that similar to how physical characteristics such as signatures or DNA have been exempted from the bar,[47] behavioural attributes can be allowed since they are also used for identification or comparison with materials *already* with the investigators.[48] However, *firstly,* behavioural attributes are not merely bodily traits and the manner of their collection is not purely physical, but testimonial. *Secondly*, eliciting behavioural cues also aims to generate *new* knowledge about the subject's mental state. This would then be recorded in the database for someone who has never been subjected to this procedure before. Therefore, this leads to discovery of fresh facts instead of a mere corroboration with pre-existing ones – the former recognised as leading to unconstitutionality.[49]

### *B. Right To Privacy*

Drawing on the interrelationship of rights, *Selvi* also held that right against self-incrimination can be read as a component of 'personal liberty' under Article 21.[50] This provided for an intersection of right to privacy with Article 20(3), leading the court to declare that forced interference with a person's mental processes also violated the right to privacy.[51]

The legal position governing the right to privacy has since been defined by *K. S. Puttaswamy v. Union of India* (**Puttaswamy**). A violation of right to privacy is only legal if it passes the three-fold test outlined in *Puttaswamy.* The conditions requiring *legality*, i.e. existence of a law sanctioning this violation and *need*, i.e. legitimate aim of the state, are satisfied by the CPIA embodying the goal of improving criminal investigation and identification.[52] The third condition of *proportionality* aims to ensure a rational nexus between

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[46] Alison (n 5) 120.
[47] *Selvi* (n 44) [188].
[48] ibid [136].
[49] ibid [149].
[50] ibid [192].
[51] ibid [193].
[52] *Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors.* 2017 (10) SCC 1 [325].

the goals and the means adopted to achieve them.[53] It includes a 'necessity' stage dictating that there must not exist less restrictive yet equally effective alternatives and a 'balancing' stage stipulating that the impact on rights must not be disproportionate to the benefits gained.[54] These stages of proportionality are not satisfied by the CPIA.

To understand how, consider comparative jurisprudence dealing with similar statutes. *S and Marper v. United Kingdom* (**Marper**) held that indefinite retention of DNA samples taken from arrested persons not only constituted an interference with right to privacy *but also* that this interference was disproportionate – constituting a violation of Article 8's right to privacy under the European Convention of Human Rights.[55] This stemmed from the "blanket" and "indiscriminate" retention without individualised assessments or specification of time.[56] India's regime is remarkably close to what was prohibited by the European Court of Human Rights. The CPIA's 75-year retention clause is, for all practical purposes, lifelong. The retention period remains the same for offenders convicted under *any law* without gradation of the seriousness of offences involved or recording of reasons for retention. Further, the magistrate can direct "any person" to provide their behavioural attributes, if satisfied that it is expedient to do so for any investigation.[57] Instead of providing for default deletion once the conditions of release without trial or acquittal are met, the Rules worsen the asymmetry of power by placing the onus on individuals to apply for destruction.[58] These provisions demonstrate the clear possibility of having less restrictive but effective alternatives to the CPIA.

Consider the UK's post-*Marper* changes to the Police and Criminal Evidence Act to see such alternatives. Where an arrestee does not go on to be convicted, the material must be destroyed at the conclusion of investigation or, if charged, at the conclusion of criminal proceedings.[59] The option of long-term retention can only be considered if the materials have been taken in connection with a 'qualifying offence', which includes serious offences such as

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[53] ibid.
[54] *Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors* 2019 (1) SCC 1.
[55] *S and Marper v United Kingdom* [2008] ECHR 158. Article 8 of the ECHR provides: (1) everyone has the right to respect for his private and family life, his home and his correspondence; (2) there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society… for the prevention of disorder or crime. This is largely in line with the proportionality test laid out in *Puttaswamy*.
[56] *Marper* (n 55).
[57] CPIA 2022, s 5.
[58] CPIR 2022, s 5(5)(i).
[59] Police and Criminal Evidence Act 1984 (PACE 1984), ss 63F-63H.

murder,[60] from an individual with a *prior* conviction.[61] In its absence, police can only retain the material for three years, often requiring the consent of the Commissioner for the Retention and Use of Biometric Material.[62] Differentiation between individuals based on their personal history and nature of offence, independent oversight, and default destruction are meaningful constraints that preserve investigative utility while avoiding blanket and indiscriminate retention. Hence, the retention of the attributes under CPIA fails the necessity stage.

The final step in the proportionality analysis is the balancing stage of determining whether benefits of retaining the behavioural data outweighs the burdens imposed. The lack of benefits, contrary to the state's assertions of efficient investigation, has already been established in *Section II*. On the other hand, there are distinctive harms to the larger society from the retention of any individual's attributes.

It violates the presumption of innocence and relatedly, leads to stigmatisation by the state.[63] A person whose handwriting, stress responses, or speech patterns are permanently recorded is assumed to be a *type of person* with a propensity to offend. Unlike physical samples like DNA or fingerprints seen as 'neutral' biological identifiers, behavioural markers are imbued with meanings of the subject's character. Their retention suggests that the individual embodies traits of riskiness or deviance, even when acquitted. This risks creating "an interim categorisation of suspicion", where the person is not guilty, yet never fully innocent either.[64] Even when such information is not disclosed to the general public, internalisation of a stigmatic label occurs due to this treatment by the State.[65] Hence, individuals may themselves absorb the state's implicit message that they are less trustworthy than others.

Further, behavioural data is more vulnerable to subjective interpretation. While a DNA profile may either match or may not, a stress reaction or idiosyncratic conduct can always be re-read in the future. This malleability gives scope to the state for reviving this suspicion indefinitely, amplifying the stigma. Thus, behavioural attributes lead to a "lingering suspicion" that undermines equal citizenship.[66] Although the police often must unavoidably target certain

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[60] PACE 1984, s 65.
[61] PACE 1984, s 63F.
[62] Protection of Freedoms Act 2012, s 20.
[63] Liz Campbell, 'A Rights-Based Analysis of DNA Retention: "Non-Conviction" Databases and the Liberal State' [2010] Crim LR 889, 9.
[64] ibid 5.
[65] ibid 9.
[66] ibid 10.

individuals, articulating and entrenching the same in legislation undermines the fundamental State-citizen relationship in a liberal polity.[67]

These societal harms outweigh any improbable benefits, failing the 'balancing' stage of proportionality. Therefore, the collection and retention of behavioural attributes as measurements under the CPIA violates the right to privacy disproportionately.

## V. CONCLUSION

This comment has examined the inclusion of "behavioural attributes" within the expanded definition of measurements under the CPIA. The State rationalises this expansion through the investigative promise of such data. This includes potentially linking cases, prioritising suspects, and addressing recidivism. However, closer scrutiny reveals significant evidentiary weaknesses. Behaviour is situationally contingent, the process of profiling is riddled with subjectivity and confirmation bias, and inaccuracies in the NCRB database may abound. Beyond the lack of reliability, the CPIA raises questions of significant rights-violations. The intrusive methods needed to elicit behavioural cues risk violating Article 20(3)'s right against self-incrimination. Indiscriminate retention of such data for seventy-five years further fails the proportionality standard of *Puttaswamy*, undermining the right to privacy. Ultimately, the CPIA risks institutionalising suspicion and moving towards a surveillance state instead of securing convictions.

[67] ibid 10.

# SUPREME COURT ON NEW DELHI'S AIR CRISIS: THE RIGHTS V. RHETORIC NARRATIVE

*Pratibha Sharma*[*]

ABSTRACT

*For decades now, New Delhi has remained shrouded in a pollution bubble, despite the constitutionalisation of the right to clean air. This essay locates this contradiction in the rhetoric-led, damage-control jurisprudence of the courts. I argue that the severity of the pollution crisis is not a product of administrative failure. Rather, it is a shortfall of the judiciary in aiming in the right direction. My argument proceeds at three levels. Firstly, I explore the very core of what justiciability means and how it plays out in this context. Secondly, I analyse the court's interpretation of key environmental principles, which inadvertently play against the common man. Finally, I chart out the ambiguity in our governing frameworks, which keeps the successful enforcement of the right to clean air a distant dream.*

## I. INTRODUCTION

Following the landmark decision in *Subhash Kumar v. State of Bihar* (1991), the Indian Supreme Court read the Right to Clean Air into the expansive ambit of Article 21 of the Constitution.[1] However, the material reality of the National Capital Region (NCR) presents a brutal contrast. The city's daily average PM2.5 levels hover around 240 µg/m³, which is nearly 16 times the World Health Organization's safe guidelines of 15 µg/m³.[2] In this essay, I argue that this sheer dissonance is not merely a failure of executive implementation. It is rooted in a broader judicial approach that constitutionalises clean air in principle while hollowing it out through fragmented, episodic, and non-coercive remedies. My central thesis is that the Supreme Court has rendered the

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[1] *Subhash Kumar v. State of Bihar,* (1991) 1 SCC 598.

[2] 'AQI : Real-Time Air Quality Index | Air Pollution Level' (https://www.aqi.in/in/dashboard/india/delhi/new-delhi/pm).

Right to Clean Air a namesake right. It has done so by privileging substantive rhetoric, which is the mere declaration of a right without practical tools to enforce it.

In my reading, the Court's jurisprudence suffers from fundamental internal inconsistencies. It employs *remedial justice* through emergency blanket checks and suo motu bans during seasonal pollution spikes. Yet, it simultaneously adopts a posture of *Cartesian Detachment* during periods of normalcy, by treating nature as a commodified resource to be balanced against development. To substantiate these claims I shall, *firstly,* define the concept of Justiciability and contrast it with the court's *Episodic Remedialism*; *secondly*, examine the weaponisation of the "Polluter Pays" principle into a "pay-to-pollute" regime; and *lastly*, explore the crisis of ambiguity which plagues the Right to Clean Air in India.

## II. INTERROGATING JUSTICIABILITY

To assess the Right to Clean Air, I first define Justiciability. In Indian law, justiciable rights are those that can be legally enforced in a court of law.[3] However, I argue that in the context of environmental law, a right is only meaningful if it includes the procedural trinity. This trinity is built of three essential rights including the access to information, meaningful public participation in decision making and access to justice *before* the harm occurs. This definition aligns with the 2018 Framework Principles on Human Rights and the Environment.[4] It recognises that substantive environmental outcomes depend on the procedures that govern them. When people participate in decision-making, societies achieve stronger environmental protections.

My analysis is that it appears that the Indian Supreme Court has abandoned this trinity. Rather than enforcing clean air as a continuous constitutional obligation, the Court has adopted what this paper describes as "episodic remedialism." This is a reactive, seasonal style of law. It attempts to manage pollution through emergency orders like construction bans or school closures. These orders are usually issued during winter pollution spikes. They often lack technical precision and are usually issued once the issue intensifies. This is evident from the Court's order dated October 15, 2025.[5] It deferred decisions on firecracker regulation to post-Diwali assessments by

[3] 'Profile - Fundamental Rights - Know India: National Portal of India' (*knowindia.india.gov.in*2020).
[4] 'OHCHR | Framework Principles on Human Rights and the Environment (2018)' (https://www.ohchr.org/en/special-procedures/sr-environment/framework-principles-human-rights-and-environment-2018).
[5] *M.C. Mehta v. Union of India*, 2025 SCC OnLine SC 2244.

the Commission for Air Quality Management (CAQM), despite the well-documented and predictable contribution of Diwali-related emissions to winter pollution. Judicial control intensified only in mid-December, when AQI levels crossed 401. This prompted another order invoking GRAP Stage IV and directing temporary restrictions such as construction bans and traffic curbs.[6] Taken together, these orders reveal a judicial strategy that manages pollution seasonally through crisis thresholds. This process effectively absolves the State of its duty during the rest of the year.

Drawing on Upendra Baxi's work, I argue that these interventions are not true guardianship.[7] Baxi posits that the state ignores the invisible suffering of the poor. It only acts when an issue has a high danger quotient that threatens systemic stability. While smog is democratic because it affects all classes, the legal response is distinctly elitist. It is typically triggered mainly when it impacts the social and political capital of the urban upper class. Furthermore, even when such judicial intervention occurs, it remains discretionary in its application. Powerful actors are often able to manipulate regulations in their favour or avoid them altogether (as will be discussed in the next section). In contrast, for the relatively weaker sections of the society, rules are regarded as moral constraints. This effectively creates a *Dual Legal System*, which decides not only when to act but also on whom to act.

For example, in September 2025, the Court suggested penal provisions against farmers for stubble burning.[8] Then CJI B.R. Gavai stated that having people behind bars sends the right message. At the same time, the Court also separately flagged that State Pollution Control Boards in Haryana and Punjab have chronic vacancies. These vacancies cripple actual enforcement efforts but directives to fill these vacancies remain mere instructions without many follow ups. While the court's focus on preventing stubble burning is commendable, it also clearly illustrates that the Court is engaging in Preventive Crisis Management. It treats symptoms through individual criminalisation while the institutional disregard for regulatory incapacity remains.

I contend that true justiciability requires shifting the battleground. Citizens must have a procedural veto over projects before they contribute to any toxic load. We can see a better model

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[6] Government of NCT of Delhi, 'Order (17 December 2025) on Air Quality and GRAP Measures in Delhi' (Department of Environment, Delhi Government).
[7] Sathe S P and Upendra Baxi, 'Crisis of Indian Legal System' (1983) 18 Economic and Political Weekly 1388.
[8] *Suo Moto Contempt Petition* (Civil) No1/2025 (Supreme Court of India).

though our global counterparts such as the State Council of Colombia's intervention in the Bogotá River case.[9] The Colombian court focused on institutional innovation. It enhanced inter-agency coordination and transparency rather than issuing sweeping bans. This approach modernises administrations instead of replacing their judgment with more judicial orders.

## III. THE WEAPONISATION OF "POLLUTER PAYS"

Having looked at the normative content of the right requiring justiciability, I now turn towards how courts engage with different principles to assess the issue of pollution and why this engagement appears troubled. A significant component of the Court's doctrinal failure lies in the "Polluter Pays" principle. This principle was originally intended as a deterrent. In *M.C. Mehta v. Union of India* (1987), the Court evolved the doctrine of Absolute Liability.[10] This held enterprises liable for harm regardless of negligence. Later, *Vellore Citizens Welfare Forum* (1996) integrated the Precautionary Principle into the law.[11] This principle mandates preventive action in the face of scientific uncertainty regarding environmental damage. I argue that the judiciary has inadvertently weaponised the Polluter Pays doctrine. It has created a *pay-to-pollute regime*. By prioritising fiscal compensation over precaution, the Court creates a false middle ground. It treats industrial development as an inevitable counterweight to health. This is a manifestation of Cartesian Detachment.[12] Nature is treated as an external object to be managed via fines rather than to be prevented from its violation.

Utilising Balakrishnan Rajagopal's critique of Judicial Governance, I argue the Court has further internalised executive biases.[13] It has adopted the ideologies of Developmentalism and Statism. Developmentalism prioritises national economic growth over individual rights while Statism involves internalisation of ideologies which favour state authorities. This is evident in cases like *CREDAI v. Vanashakti*[14] and the Aravalli hills issue[15]. In these instances, the Court

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[9] Maria Emilia Mamberti, 'A New "Administrative Law Approach" to Social Rights? Learnings a New "Administrative Law Approach" to Social Rights? Learnings from Environmental Litigation in Colombia from Environmental Litigation in Colombia' (2025) Volume 40 American University International Law Review 432.
[10] *M.C. Mehta v. Union of India* (Kanpur Tanneries - 22-9-87), (1987) 4 SCC 463.
[11] *Vellore Citizens' Welfare Forum v. Union of India,* (1996) 5 SCC 647.
[12] C Colebrook, 'Cartesian Affect' in A Houen (ed), *Affect and Literature* (CUP 2020) 425.
[13] Balakrishnan Rajagopal, 'Pro-Human Rights but Anti-Poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective' (*DigitalCommons@UM Carey Law*2023).
[14] *Confederation of Real Estate Developers of India v. Vanashakti,* 2025 SCC OnLine SC 2474.
[15] *T.N. Godavarman Thirumulpad v. Union of India,* 2025 SCC OnLine SC 2514.

diluted environmental protections to prioritise real estate interests. This commodification makes the Right to Clean Air subservient to growth as long as a pollution fee is paid for any damage.

The National Green Tribunal (NGT) has noted this danger.[16] It warns that the Polluter Pays principle must not result in a Right to Pollute for the wealthy. Industries often find it more cost-effective to pay low compensation than to invest in clean technology. This creates a cycle of environmental degradation. The Indian Court's reliance on Sustainable Development often hides this bias. By transforming a fundamental right into a cost-benefit variable, whereby paying a fine exempts one from liability, the right becomes substantively hollow. This is what Baxi describes as the rejection of Legalism. Rules are not followed as moral duties but are negotiated based on the influence of the ones they are impacting. As a consequence, rights such as that to clean air get reduced to a prescription rather than a mandate in this dual legal system.

## IV. THE CRISIS OF AMBIGUITY

Lastly, I argue that a core problem is that the Right to Clean Air in India suffers from a crisis of ambiguity. This is mainly because of three reasons. *Firstly*, there is a lack of substantial certainty in the domestic framework. Thus, in the absence of clear, legislated standards, the Court has transitioned its role. It has moved from being a constitutional guardian to an administrative manager. The 2017 decision in *Arjun Gopal v. Union of India* is a primary example of this.[17]

In *Arjun Gopal*, the Court addressed the severe health hazards caused by Diwali firecrackers. It affirmed that the right to clean air is an inherent component of the right to life under article 21. However, the judiciary soon transitioned from its role as a constitutional guardian to that of an administrative manager by attempting to regulate technical manufacturing standards. It directed the Central Pollution Control Board (CPCB) to define the specific chemical parameters for green crackers. Through this micro-managing, the Court functioned as a municipal regulator instead of a legal arbiter of fundamental rights.

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[16] Vineet Upadhyay, 'Pollution Threat to Existence of Planet: Why National Green Tribunal Invoked Roman Era "Doctrine of Public Trust"' (*The Indian Express*31 January 2026).
[17] *Arjun Gopal v. Union of India,* (2017) 16 SCC 280.

Additionally, the Court's rhetoric was also disconnected from its material enforcement. While the Court declared that the right to clean air and good health must have primacy over commercial or religious interests, it simultaneously moved towards a model of calibrated permissions. It eventually permitted the sale of green crackers despite evidence from scientific bodies that these alternatives are not actually pollution-free. This approach manifests Cartesian Detachment, as it treats the atmosphere as a commodified resource to be balanced against cultural normalcy. Effectively, it attempted to manage a tolerable level of toxic smoke rather than completely preventing the violation of Article 21 at its source. This speaking green, acting grey paradox reveals that judicial directives remain disconnected from ecological reality.

*Secondly*, the need for procedural democracy has been obscured because of a fetish with this "Green Judge" archetype. When the Court relies on suo motu cognizance and emergency task forces, it sends a dangerous signal. It suggests that environmental protection is a matter for judicial expertise rather than collective action. This marginalises the rights-holder because their opinions are not considered while finalising the decisions. It reduces the citizen to a petitioner for relief rather than a participant in the process. Following Gerald Rosenberg and Sudhir Krishnaswamy, I argue the Court is a contingent actor.[18] Its impact requires a *Three-Legged Stool*, consisting of judicial monitoring, state support, and civil society mobilisation. Without these three legs, judgments remain only symbolic. This can be observed in the Court's current focus on Graded Response Action Plans (GRAP). These are prohibitory orders which cannot substitute preventive solutions required to secure an enforceable constitutional guarantee.

*Lastly*, the Right to Clean Air is morally impoverished because it lacks a corresponding foundational obligation. Drawing on Robert Cover's work, I now look at the growing emergence of duty-based constitutionalism.[19] In a culture of rights, legitimacy flows from individual consent. In a culture of obligation, legitimacy is expressed through being bound by duties. Without an incumbent command that binds regulatory agencies to a duty-based framework, the citizen's entitlement to the right remains empty rhetoric. For example, while the Court acknowledged the chronic staff vacancies in State Pollution Control Boards in Punjab and Haryana, instead of issuing an inescapable order to restore this institutional capacity, the Court prioritised post-facto harm

[18] Gerald N Rosenberg, Shishir Bail and Sudhir Krishnaswamy, 'Conclusion' [2019] A Qualified Hope 345.
[19] Robert M Cover, 'Obligation: A Jewish Jurisprudence of the Social Order' (1987) 5 Journal of Law and Religion 65.

management by suggesting criminal penalties for farmers who burn stubble. Consequently, the right to clean air remains merely a promise that only gets attention post the damage, without the authorities feeling compelled to proactively deal with the situation prior to any harm.

## V. CONCLUSION

The trajectory of Delhi's air pollution jurisprudence reveals a disturbing pattern. As the Supreme Court's rhetoric has grown, the Executive's actual accountability has become more elusive. This is not a coincidence. It is a causal relationship. The current judicial approach treats environmental degradation as something to be managed rather than a violation to be prevented. This renders the fundamental right substantively hollow. The path forward demands a new outlook towards the way this entire issue is perceived.

Power is not a commodity held by the courts. It is a circulating force generated through networks. Real change occurs through strategic porousness.[20] Activists, bureaucrats, and the judiciary must interact through shared data and pressure. Citizens must be able to challenge policy opaqueness before a crop is burnt or a brick is laid. The Court's role should shift to becoming the Guarantor of Procedural Transparency. The remedy for Delhi does not lie in strengthening the Court's remedial powers. It lies in resurrecting the Procedural Rights of the citizen. True justiciability requires shifting the battleground. At a time when frustration is too easy to fall into, we need to look within and muster courage to ask difficult questions, hold our institutions accountable and nudge them towards long lasting and structural change.

[20] Deepta Chopra, 'Interactions of "Power" in the Making and Shaping of Social Policy' (2011) 19 Contemporary South Asia 153.