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Mayank Kalra & Tanish Dahuja, *The Attention Economy of Gendered Hate: Algorithmic Amplification, Platform Incentives, and the Failure of Indian Intermediary Regulation*, 12(2) NLUJ L. Rev. 6 (2026).

THE ATTENTION ECONOMY OF GENDERED HATE: ALGORITHMIC AMPLIFICATION, PLATFORM INCENTIVES, AND THE FAILURE OF INDIAN INTERMEDIARY REGULATION

~ Mayank Kalra & Tanish Dahuja[*]

ABSTRACT

Indian platform regulation rests on a settlement forged for an earlier era. Section 79 of the Information Technology Act, 2000, as narrowed in Shreya Singhal v. Union of India and supplemented by the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, treats the platform as a passive conduit whose duties crystallise only on notified knowledge of unlawful material. That model misdescribes today's platforms, whose recommender systems select, rank, and amplify user expression according to engagement objectives that favour provocative content. This article argues that the algorithmic amplification of gendered hate is a legally relevant form of platform conduct that Indian doctrine neither names nor governs. Its principal contribution is a five-level taxonomy separating passive hosting from ranking, recommendation, amplification, and engagement optimisation, which locates the

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accountability gap within Section 79 with precision. Drawing on the Sulli Deals and Bulli Bai episodes, National Crime Records Bureau data, and the Twenty-Second Report of the Parliamentary Standing Committee on Communications and Information Technology, it grounds the taxonomy in Indian empirical reality, tests it against the proportionality jurisprudence of Puttaswamy and Anuradha Bhasin, and proposes amplification-sensitive due diligence, risk assessment, transparency, and calibrated liability, with the institutional mechanisms to operationalise them.

Keywords: *intermediary liability; algorithmic amplification; Section 79; recommender systems; gendered hate speech; platform accountability; Digital Services Act; safe harbour.*

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I. INTRODUCTION

The platforms that now mediate the largest share of public communication in India describe themselves in the vocabulary of neutrality. They host, they store, they connect. That self-description is no longer an accurate account of what they do. The defining feature of the modern platform is not storage but selection: the continuous, automated determination of which items of user expression are shown to whom, in what order, and with what prominence. The business model that funds this selection is the sale of attention, and attention is captured most efficiently by content that provokes a strong affective response.[1] Outrage, indignation, and hostility are, in this respect, commercially valuable.

This article is concerned with one consequence of that arrangement: the algorithmic amplification of gendered hate. The concern is not that misogynistic expression exists online, which it always has, nor that platforms occasionally fail to remove it. It is that the architecture of engagement optimisation can convert isolated hostility into coordinated, high-visibility abuse, and can do so as a predictable output of systems designed to maximise interaction rather than to harm any particular person.[2] Where a recommender system learns that provocation sustains engagement, it will tend to distribute provocative material more widely, irrespective of its effect on those it targets.[3]

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1 TIM WU, THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS (2016).

2 SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM (2019).

3 TARLETON GILLESPIE, CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA (2018).

Indian law has not absorbed this shift. Section 79 of the Information Technology Act, 2000, confers a conditional exemption from liability on intermediaries,[4] an exemption that the Supreme Court in *Shreya Singhal v. Union of India* narrowed to require knowledge through a court order or government notification before a duty to act arises.[5] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, layer additional due diligence obligations onto that framework.[6] Yet the entire structure is organised around a single regulated event, namely the presence of unlawful content on the network, and a single regulated response, namely its removal. It contains no vocabulary for distribution. It does not ask how content travels, why some content travels further than other content, or whether the platform's own ranking choices contributed to a harm.

The doctrinal gap this article identifies is therefore not a gap in coverage of content but a gap in the conception of conduct. The law recognises hosting and removal; it does not recognise amplification as a separate act capable of attracting separate obligations. The principal doctrinal contribution of this article is the taxonomy set out in Part V, which separates passive hosting from ranking, recommendation, amplification, and engagement optimisation, and which allows the accountability gap to be located within Section 79 with precision rather than by inference. The thesis advanced here is that amplification, once so

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4 Information Technology Act, 2000, § 79, No. 21, Acts of Parliament, 2000 (India).
5 *Shreya Singhal v. Union of India*, (2015) 5 SCC 1 (India).
6 Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Gazette of India, pt. II sec. 3(i) (Feb. 25, 2021) [hereinafter *IT Rules, 2021*].

distinguished, is a legally relevant form of platform conduct, and that the Indian framework is conceptually outdated to the extent that it continues to treat platforms primarily as passive intermediaries despite the architecture of modern recommender systems.[7]

The argument proceeds in seven further parts. Part II describes the architecture of the attention economy and the incentive structure it creates. Part III explains how that architecture interacts with gendered hostility to produce harms that are structural rather than merely individual, and grounds the analysis in Indian empirical and institutional evidence. Part IV sets out the Indian intermediary liability framework, demonstrates its inattention to distribution, and locates the constitutional standard of proportionality against which reform must be measured. Part V, the analytical core of the article, develops the doctrinal taxonomy distinguishing passive hosting from recommendation, amplification, and engagement optimisation, and argues that amplification may constitute an intervention distinct from the publication conduct that immunity protects.[8] Part VI examines comparative responses in the European Union, the United Kingdom, and the United States, and asks why each jurisdiction chose the model it did and what within each is normatively suitable for India. Part VII proposes amplification-sensitive reforms calibrated to Indian constitutional constraints, specifies the institutional mechanisms required

[7] DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (2014).
[8] Daphne Keller, *Amplification and Its Discontents*, KNIGHT FIRST AMEND. INST. (June 8, 2021), https://knightcolumbia.org/content/amplification-and-its-discontents.

to operationalise them, and engages the principal counterarguments. Part VIII concludes.

II. THE ARCHITECTURE OF THE ATTENTION ECONOMY

The platforms under examination are funded predominantly by advertising, and advertising revenue is a function of attention. The economic unit that a platform sells is the user's continued engagement, measured in sessions, impressions, watch time, and interactions. Every design choice that increases engagement increases the inventory available for sale. This is the sense in which attention is a commodity and the platform is its merchant.[9] The point is structural rather than moral: the platform is not malicious, but it is optimised, and the objective it is optimised toward is not the wellbeing of any user but the volume of measurable interaction.

Recommender systems are the instruments through which this optimisation operates. A recommender system predicts, for each user, which items from a vast corpus of available content are most likely to elicit engagement, and then orders the user's feed accordingly. The system does not evaluate truth, value, or harm. It evaluates predicted interaction. Because the prediction is learned from behavioural data, the system continuously refines its model of what holds a given user's attention, and it generalises across users to identify content with broad engagement potential.[10] Recent developments in machine learning, including the

[9] Wu, *supra* note 1, at 6.
[10] Zuboff, *supra* note 2.

incorporation of large foundation-model components into ranking and content-generation pipelines, extend this logic rather than displace it: the objective function remains engagement, and the models that now inform selection are more powerful predictors of what will hold attention, not different in character from what they have replaced.

Two properties of this process matter for the legal analysis. The first is that ranking is not neutral with respect to content type. Material that generates strong reactions, including anger and moral outrage, tends to produce more comments, shares, and reposts than material that generates mild approval. A system that rewards interaction will therefore tend to elevate provocation. The second property is that the system is editorial in effect even where it is automated in operation. To decide what a hundred million users see first is to exercise the function that, in an earlier media environment, belonged to editors.[11] The platform performs that function at scale and in real time, but it performs it nonetheless.

It is useful here to distinguish several activities that are routinely collapsed under the heading of hosting. Ranking is the ordering of content for presentation. Recommendation is the active surfacing of content the user did not seek. Amplification is the disproportionate distribution of particular content beyond the audience that would have encountered it through ordinary social diffusion. Engagement optimisation is the system-level objective that ties these activities to a commercial metric. Virality engineering refers to design features, such as frictionless resharing and

[11] Gillespie, *supra* note 3.

algorithmic boosting of trending material, that are built to accelerate diffusion. Monetised outrage describes the resulting equilibrium, in which provocative content is both more widely distributed and more lucrative.[12] These are not synonyms. They describe a sequence of distinct operations, and a regulatory framework that cannot name them cannot govern them.

None of this implies that platforms author the content they distribute. The content is supplied by users. What the platform supplies is the distribution function, and the distribution function is shaped by commercial incentives that are internal to the platform and invisible to the user. The governance literature has described the platform as a private legislator and adjudicator of speech;[13] the present argument adds that the platform is also a private distributor whose distributive choices are themselves a form of conduct, and that the legal characterisation of that conduct is the question Indian law has not asked.

III. GENDERED HATE IN THE ALGORITHMIC ECOSYSTEM

Gendered hate is a useful site for this inquiry because it exposes the difference between content and distribution with particular clarity. Misogynistic expression is not new and is not created by platforms. What is new is the capacity of platform architecture to aggregate, coordinate, and amplify such expression so that its effect on a target is qualitatively different from the effect of the same words in a dispersed offline setting.

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[12] Jack M. Balkin, *Free Speech is a Triangle*, 118 COLUM. L. REV. 2011 (2018).
[13] Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018).

Consider the structural features. First, abuse directed at a woman who has attracted attention, whether a journalist, a politician, an academic, or a private individual who has become briefly visible, tends to generate high engagement, because hostility and pile-on dynamics produce exactly the interactions that recommender systems reward. The abuse is therefore not merely tolerated; it is, as a matter of system behaviour, promoted. Second, the same dynamics enable coordination. Once a target has been identified, resharing and recommendation features distribute the target's identity and the hostile framing to audiences predisposed to continue the abuse, lowering the cost of participation and raising its reach.[14]

This is where the legal vocabulary of hosting fails. If one asks only whether a particular abusive post is unlawful and whether the platform removed it on notice, one captures a single transaction and misses the system. The harm to the target is not produced by any one post but by the aggregate visibility that the distribution architecture confers. A framework that addresses content item by item is structurally incapable of addressing a harm that is produced by distribution at scale.[15]

It is important to mark the boundary of this claim. The argument is not that all offensive speech should be suppressed, nor that platforms should be liable whenever abusive content appears. Offensive expression is, within limits, constitutionally protected, and a great deal of contested speech about gender is lawful even where it is unpleasant. The argument is narrower and more precise: that the platform's amplification of content, as

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[14] Citron, *supra* note 7.
[15] Olivier Sylvain, *Intermediary Design Duties*, 50 CONN. L. REV. 203 (2018).

distinct from its hosting of content, is a contribution to the resulting visibility that the law ought to be able to recognise and, where appropriate, regulate.[16] The relevant object of regulation is the distributive conduct, not the underlying opinion.

These structural claims are supported by a substantial body of feminist legal scholarship on gendered digital abuse, which has documented both the disproportionate targeting of women and the systemic inadequacy of intermediary regimes designed to see only individual items of content.[17] The Indian record confirms the pattern. The National Crime Records Bureau's most recent *Crime in India* report records 86,420 cyber-crime cases in 2023, a rise of over thirty per cent on the preceding year, with distinct sub-categories devoted to publication or transmission of sexually explicit material, cyber blackmailing, morphing, and fake profiles, all disproportionately directed at women.[18] Two episodes in particular illustrate what algorithmic distribution adds to underlying hostility. In July 2021, an application titled 'Sulli Deals', hosted on GitHub, aggregated the photographs and social-media profiles of more than eighty prominent Muslim women, presenting them for mock 'auction'; six months later, in January 2022, the 'Bulli Bai' application repeated the exercise with more than one hundred women, again aggregating profiles of journalists, lawyers, activists, and academics whose public visibility had been achieved through

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[16] Keller, *supra* note 8.

[17] Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009); Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655 (2012).

[18] NAT'L CRIME RECORDS BUREAU, MINISTRY OF HOME AFFAIRS, CRIME IN INDIA 2023 (Gov't of India 2024), https://ncrb.gov.in.

the very platforms that now enabled their targeted humiliation.[19] What these episodes disclose is not simply that unlawful content existed, which it plainly did, but that the underlying visibility and identifiability of the targets, on which the abuse depended, had been produced by the ordinary operation of distribution systems whose objective is engagement rather than safety.

Institutional recognition of the amplification problem has begun to emerge within Indian policymaking. The Parliamentary Standing Committee on Communications and Information Technology, in its Twenty-Second Report on curbing fake news tabled in Lok Sabha in December 2025, expressly identified platform design and algorithmic amplification as factors capable of making false or sensational content more visible than verified information, and recommended a review of the Section 79 safe harbour in cases where intermediaries actively amplify such material.[20] The Committee's recommendation is directed to misinformation rather than to gendered abuse, but its analytical premise is the same as the one advanced here: that amplification is a form of platform conduct that the existing safe harbour does not adequately address. The doctrinal argument developed in what follows can therefore be read not as a departure from present institutional trajectories but as an attempt to

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[19] Reports of the two episodes appear in mainstream Indian and international coverage. *See*, *e.g.*, Geeta Pandey, *Sulli Deals: Indian Man Who 'Sold' Muslim Women Online to Be Tried*, BBC NEWS (Dec. 16, 2022), https://www.bbc.com/news/world-asia-india-63939822; *Bulli Bai: India's Muslim Women Again Listed on App for 'Auction'*, AL JAZEERA (Jan. 2, 2022), https://www.aljazeera.com/news/2022/1/2/bulli-bai-muslim-women-auction-online-india.

[20] STANDING COMM. ON COMMC'NS & INFO. TECH., *Twenty-Second Report on Curbing Fake News* (Lok Sabha Sec't 2025).

generalise, and to place on principled foundations, a distinction that Parliament's own reporting has begun to draw.

IV. THE INDIAN INTERMEDIARY LIABILITY FRAMEWORK

The Indian framework begins with a definition. Section 2(1)(w) of the Information Technology Act defines an intermediary, with respect to a particular electronic record, as a person who on behalf of another receives, stores, or transmits that record or provides any service with respect to it.[21] The verbs are revealing. The statutory imagination is one of receipt, storage, and transmission. It does not contemplate ranking, recommendation, or amplification. The conceptual model embedded in the definition is the conduit, not the curator.

Section 79 then provides the operative exemption. An intermediary is not liable for third-party information made available or hosted by it, provided the conditions of Section 79(2) are met, namely that its function is limited to providing access or that it does not initiate the transmission, select its receiver, or select or modify the information, or alternatively that it observes due diligence and the prescribed guidelines.[22] The exemption is forfeited under Section 79(3)(b) where the intermediary, upon receiving actual knowledge or on being notified by the appropriate government, fails to expeditiously remove or disable access to the material.[23]

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[21] Information Technology Act, 2000, § 2(1)(w) (India).
[22] *Id.* § 79(1)–(2).
[23] *Id.* § 79(3)(b).

Two doctrinal observations follow. First, the phrase select or modify in Section 79(2)(a) is in tension with the operation of recommender systems, which by definition select information for presentation. A platform that ranks and recommends does not satisfy the conduit description in clause (a). It must instead rely on clause (b), the due diligence limb. The significance of this is that the due diligence rules become the entire content of the platform's obligations, and those rules, as drafted, say nothing about distribution. Second, the regulated event under Section 79(3)(b) is the failure to remove. The provision presupposes that the wrong to be remedied is the continued presence of content, and that the remedy is its removal. Amplification, which concerns the reach of content that may itself be lawful or borderline, is simply outside the provision's field of vision.

The constitutional gloss supplied by *Shreya Singhal* reinforces this orientation. The Court read down Section 79(3)(b), and the corresponding rule in the then-applicable 2011 Guidelines, to mean that the obligation to act is triggered only by a court order or a government notification relatable to the grounds in Article 19(2).[24] The decision was protective of speech and was correct to be: it prevented intermediaries from becoming private censors deciding for themselves what to remove. But its logic is entirely a logic of removal. It addresses when a platform must take content down. It

[24] Shreya Singhal v. Union of India, (2015) 5 SCC 1, ¶¶ 117–122 (India); *see* Information Technology (Intermediaries Guidelines) Rules, 2011, Gazette of India, pt. II sec. 3(i) (Apr. 11, 2011), r. 3(4).

does not address whether a platform may be asked to account for the consequences of pushing content up.

Subsequent decisions confirm the pattern. In *MySpace Inc. v. Super Cassettes Industries Ltd.*, the Delhi High Court distinguished actual knowledge from general awareness and declined to impose a duty of pre-emptive screening,[25] and in *Kent RO Systems Ltd. v. Amit Kotak* the same court held that requiring an intermediary to screen all content of its own motion would unreasonably interfere with its business.[26] These holdings are sound as responses to the question they answer, which is whether intermediaries must monitor and filter. They have nothing to say about amplification, because amplification was not the conduct in issue.

The deeper point is that the statute organises intermediary responsibility around a binary that no longer tracks platform behaviour. Either the entity is a conduit, in which case clause (a) of Section 79(2) applies and its passivity is assumed, or it falls back on clause (b) and discharges its duties by observing the prescribed due diligence. Neither limb has a place for the intermediate and now dominant case of the active distributor that neither authors content nor merely transmits it, but instead selects among lawful and unlawful material alike and decides how widely each item will travel. The conduct that defines the modern platform occupies precisely the conceptual space that the statutory binary leaves empty, and the prescribed due diligence has not been written to fill it.

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[25] MySpace Inc. v. Super Cassettes Indus. Ltd., 236 (2017) DLT 478 (Del. HC).
[26] Kent RO Sys. Ltd. v. Amit Kotak, 240 (2017) DLT 3 (Del. HC).

The 2021 Rules might have been expected to modernise this picture, and in one narrow respect they gesture toward it. Rule 3(1)(d) restates the removal obligation on actual knowledge through a court order or government notification.[27] Rule 4 imposes additional due diligence on significant social media intermediaries,[28] and Rule 4(4) requires such intermediaries to endeavour to deploy technology-based measures, including automated tools, to proactively identify a closed set of especially grave content, principally child sexual abuse material and depictions of non-consensual sexual acts.[29] Rule 7 makes the loss of the Section 79(1) exemption the consequence of non-observance.[30] Rule 4(4) is significant for the present argument precisely because it shows that Indian law already accepts, for narrow categories, an architecture-facing obligation that goes beyond notice and removal. The template exists. It has simply not been extended to distribution.

The single instance in which Indian courts have engaged proactive obligation, *Sabu Mathew George v. Union of India*, concerned advertisements for prenatal sex determination and produced a bespoke auto-block and nodal-agency mechanism.[31] It is instructive that this intervention arose under a specific statutory prohibition and was confined to a defined class of unlawful content. It did not generalise into a doctrine of distributive responsibility, and it sat uneasily with the speech-protective reasoning of

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27 *IT Rules, 2021*, *supra* note 6, r. 3(1)(d).
28 *Id.* r. 4; *see id.* r. 2(1)(v).
29 *Id.* r. 4(4).
30 *Id.* r. 7.
31 Sabu Mathew George v. Union of India, AIR 2018 SC 578 (India).

Shreya Singhal. The episode demonstrates both the appetite for architecture-facing remedies and the absence of a principled framework within which to situate them.

The constitutional values at stake cut in both directions. Article 19(1)(a) protects expression, and Article 19(2) permits only reasonable restrictions on enumerated grounds.[32] Any regulation of distribution must respect these limits, and a regime that pressured platforms to suppress lawful speech in order to avoid liability would reproduce the very over-removal that *Shreya Singhal* sought to prevent.[33] The challenge, developed in Part VII, is to address amplification without converting the platform into a censor.

The applicable standard of review is proportionality. In *Justice K.S. Puttaswamy (Retd.) v. Union of India*, the Supreme Court settled that any measure restricting a fundamental right must pursue a legitimate aim, be rationally connected to that aim, be no more restrictive than necessary, and be proportionate in its impact on the right holder.[34] In *Anuradha Bhasin v. Union of India*, the Court applied that framework to internet-related restrictions and held that even measures directed to security objectives are amenable to structured judicial review for proportionality, and that the burden of justifying necessity and the absence of less restrictive alternatives lies on the State.[35] The proportionality standard is thus not exogenous to the present inquiry but the constitutional lens through which any

[32] INDIA CONST.art. 19(1)(a); art. 19(2).
[33] *See* Shreya Singhal v. Union of India, (2015) 5 SCC 1 (India); *cf.* Keller, *supra* note 8.
[34] Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1 (India).
[35] Anuradha Bhasin v. Union of India, (2020) 3 SCC 637 (India).

amplification-facing reform must ultimately be assessed. Part VII returns to this test and shows why the reforms proposed there are calibrated to satisfy each of its four requirements while remaining consistent with the speech-protective posture of *Shreya Singhal*.

V. HOSTING VERSUS AMPLIFICATION: A DOCTRINAL DISTINCTION

This Part sets out what the article regards as its principal doctrinal contribution: a graduated taxonomy that separates passive hosting from ranking, recommendation, amplification, and engagement optimisation, and that maps each of these to the particular respect in which it does or does not attract the safe harbour. The central claim is that hosting and amplification are distinct forms of conduct and that the conflation of the two is the source of the doctrinal failure described above. What follows develops the distinction and defends it against the objection that it collapses into a crude theory of publisher liability.

The intuition can be sharpened by comparison with the United States, where the conflation is most explicit. Section 230(c)(1) of the Communications Decency Act provides that no provider of an interactive computer service shall be treated as the publisher or speaker of information provided by another.[36] Early decisions such as *Zeran v. America Online, Inc.* read this immunity expansively, extending it to the platform's distributive decisions as well as its hosting.[37] The question whether targeted

[36] 47 U.S.C. § 230(c)(1) (2018).
[37] Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997).

recommendation falls within publisher conduct then divided the courts. In *Force v. Facebook, Inc.*, the majority treated recommendation algorithms as an ordinary publishing function and therefore immune,[38] while Chief Judge Katzmann, dissenting in relevant part, argued that recommending content is analytically distinct from publishing it and should not automatically share its immunity.[39] When the Supreme Court took up the issue in *Gonzalez v. Google LLC*, it ultimately declined to resolve the scope of Section 230, disposing of the matter on the related liability question addressed in *Twitter, Inc. v. Taamneh*.[40] The American debate thus remains unsettled, but it has at least articulated the distinction that Indian doctrine has yet to recognise: that to recommend is to do something more than to host.

The distinction can be stated as a graduated taxonomy. At the first level is passive hosting, the storage of content at a user's direction and its availability to those who seek it out. This is the conduct that immunity classically protects, and properly so, because the platform here adds nothing beyond a repository. At the second level is ranking, the ordering of content the user has already chosen to encounter, for example the sequence of posts from accounts the user follows. Ranking is more active than hosting but remains tethered to the user's prior choices. At the third level is recommendation, the surfacing of content the user did not seek, selected by the platform on the basis of predicted engagement. At the fourth level is amplification, the disproportionate distribution of particular content

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[38] Force v. Facebook, Inc., 934 F.3d 53, 70 (2d Cir. 2019).
[39] *Id.* at 76–89 (Katzmann, C.J., concurring in part and dissenting in part).
[40] Gonzalez v. Google LLC, 598 U.S. 617 (2023) (per curiam); *see* Twitter, Inc. v. Taamneh, 598 U.S. 471 (2023).

driven by the platform's optimisation objective, such that the content reaches an audience it would not have reached through user-directed diffusion alone. At the fifth level is engagement optimisation, the system-wide configuration of the recommender toward a commercial metric that, as a foreseeable consequence, privileges provocation.

The legal salience of the taxonomy lies in the increasing causal contribution of the platform at each level. In passive hosting the platform contributes only availability. In amplification and optimisation the platform contributes reach, and reach is the operative cause of the structural harm described in Part III. The argument is not that reach is unlawful. It is that reach is conduct, attributable to the platform rather than to the user, and that conduct attributable to the platform is a legitimate object of legal attention in a way that user-authored content, standing alone, is not.[41]

The causal point deserves emphasis, because it is what separates this account from a theory of liability for speech. In an ordinary publication claim the wrong inheres in the content, and the speaker is answerable for having uttered it. In an amplification claim the wrong inheres in the distribution, and the platform is answerable not for the meaning of the message but for the operation of the mechanism that determined its reach. The two inquiries are analytically independent. A platform may distribute lawful content culpably, by designing a system that foreseeably channels hostility toward a target, and it may distribute unlawful content innocently, where its systems played no part in the item's circulation. Locating the

[41] Sylvain, *supra* note 15.

wrong in the mechanism rather than in the message is what allows the law to reach distributive conduct without trespassing on the protection that lawful expression enjoys.

This is also why the distinction does not collapse into publisher liability. The objection runs that any recognition of amplification as conduct would treat the platform as the author of every recommended item and thereby destroy the safe harbour. The objection fails because the taxonomy does not attribute the content to the platform at all. It attributes the distributive decision to the platform. A platform that amplifies a defamatory post is not thereby the author of the defamation; it is, however, the actor responsible for the scale of the post's circulation. The relevant duty is not a duty not to publish, which would be a content duty, but a duty to exercise reasonable care in the design and operation of distribution systems, which is a conduct duty.[42] The analogy is to product design rather than to authorship: the question is whether the distributive mechanism was designed and operated with reasonable regard for foreseeable harms, not whether the platform agreed with the message it carried.

Two further refinements preserve the nuance the distinction requires. First, not all amplification is culpable. Amplification of lawful, valuable, or merely popular content raises no concern, and the duty proposed is not a duty to suppress reach as such. The duty attaches to the foreseeable amplification of categories of content that the law already treats as harmful, and to the failure to incorporate reasonable safeguards against

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[42] Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401 (2017).

such amplification into system design. Second, the duty must be sensitive to the risk of collateral censorship, the danger that a platform faced with distributive liability will respond by suppressing lawful speech to insulate itself.[43] A well-designed duty therefore targets process and design rather than outcomes, asking whether the platform assessed and mitigated the relevant risks, not whether any particular item was distributed.

It is worth disaggregating the harms that amplification can produce, because they are not uniform and do not all implicate intermediary immunity in the same way. Some amplified content is independently unlawful, in which case the platform's distributive contribution aggravates a wrong that already exists. Some amplified content is lawful in isolation but harmful in aggregate, as with coordinated pile-on abuse assembled from individually defensible posts. And some amplification is itself the wrong, as where the distributive system foreseeably channels hostile content toward a target.[44] The taxonomy allows these cases to be told apart, which is precisely what the present Indian framework, with its single category of hosted content, cannot do.

A final point concerns the expressive status of the platform's own distributive choices. Recent United States authority has held that a platform's compilation and curation of a feed is itself expressive activity attracting constitutional protection.[45] This is significant for the doctrinal distinction in a way that may seem paradoxical. If curation is the platform's

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[43] Balkin, *supra* note 12.
[44] Keller, *supra* note 8.
[45] Moody v. NetChoice, LLC, 603 U.S. 707 (2024).

own expression, then it is the platform's conduct, not the user's, and the case for treating it as a distinct object of regulation is strengthened rather than weakened. A platform cannot simultaneously claim that its ranking is its own protected expression and that its ranking is merely the passive hosting of someone else's. The distinction between hosting and amplification is, on this view, one that the platforms themselves have begun to assert.

VI. COMPARATIVE REGULATORY DEVELOPMENTS

Comparative material is useful here not as a model to be transplanted but as evidence that the conceptual move this article proposes, the separation of distribution from hosting, is already underway in mature regulatory systems. Three jurisdictions illustrate distinct strategies.

The European Union's Digital Services Act is the most developed example of an architecture-facing regime.[46] Rather than asking only whether a platform removed unlawful content, the Regulation directs attention to the systems through which content is distributed. Article 27 imposes baseline transparency obligations on recommender systems, requiring platforms to set out the main parameters that determine what users see and the means by which users can modify them.[47] For very large online platforms, Articles 33 and 34 require an annual assessment of systemic risks, expressly including the influence of recommender system design on

46 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and Amending Directive 2000/31/EC (Digital Services Act), 2022 O.J. (L 277) 1 [hereinafter *DSA*].

47 *DSA*, *supra* note 46, art. 27.

the dissemination of illegal content and on fundamental rights, and the assessment must consider amplification and rapid dissemination as such.[48] Article 35 then requires reasonable, proportionate, and effective mitigation, which may include adapting the design of the recommender system itself,[49] and Article 38 requires that at least one recommender option be offered that is not based on profiling.[50] The significance of this design is that it regulates conduct, namely the configuration and operation of distribution systems, rather than adjudicating individual items of content. It thereby avoids the censorship objection while still reaching the structural harm.

The United Kingdom's Online Safety Act 2023 adopts a duty-of-care model administered by a regulator.[51] Regulated services must assess the risks that their design and operation, including the way content is disseminated, pose to users, and must take proportionate steps to mitigate those risks. The Act's emphasis on risk assessment and systems design, rather than on the liability of the service for any particular post, again reflects the migration from a content paradigm to a conduct paradigm. The British approach is notable for placing the assessment of design squarely within the regulated entity's continuing duties rather than treating safety as a matter resolved transaction by transaction.

The United States stands at the opposite pole. Section 230 continues to immunise interactive computer services from being treated as publishers of third-party content, and the Supreme Court's refusal in

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[48] *Id.* arts. 33–34; *see id.* art. 34(2)(a).
[49] *Id.* art. 35.
[50] *Id.* art. 38.
[51] Online Safety Act 2023, c. 50 (UK).

Gonzalez to delimit that immunity in the recommendation context has left the broad reading substantially intact.[52] At the same time, the Court has recognised in the content-moderation context that a platform's curation is its own expressive activity.[53] The American position is therefore internally complex: distribution is, on the prevailing statutory reading, shielded as publication, even as it is, on the constitutional reading, the platform's own speech. The instability of this position is itself an argument for the cleaner distinction proposed here.

Why the three jurisdictions have converged on such divergent designs is itself instructive. The European choice of systemic risk regulation is the product of a specific institutional trajectory: a regulatory culture accustomed to fundamental-rights impact assessment through the General Data Protection Regulation, a shared post-2016 experience of platform-mediated interference in democratic processes, and the availability of a supranational designation and enforcement mechanism capable of sustaining audit-based obligations on very large platforms.[54] The United Kingdom's duty-of-care model similarly builds on an existing institutional asset, namely the competence and independence of Ofcom as a sectoral regulator, and on a common-law comfort with reasonableness standards translated from tort and health-and-safety regulation into the platform context. The United States position, by contrast, reflects a First Amendment jurisprudence that treats content-based regulation with acute

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52 *See* 47 U.S.C. § 230, *supra* note 36 ; *Gonzalez*, *supra* note 40.
53 *Moody*, *supra* note 45 .
54 *See DSA*, *supra* note 46, recitals 79, 84 (identifying design of ad-incentivised platforms and dissemination of 'legal but harmful' content as animating concerns).

suspicion and a statutory design decision, taken at the birth of the commercial internet, to allocate almost all speech-related risk to users rather than to platforms. Each design is intelligible as a response to the institutional and constitutional resources locally available, not as an answer to some jurisdiction-neutral question about the correct treatment of amplification.

The lesson for India follows from that observation. India cannot import the European regime wholesale because it lacks, at present, the audit and designation infrastructure on which the DSA relies, and it cannot follow the American path because it operates under a constitutional text that expressly contemplates reasonable restrictions and a jurisprudence, developed in *Puttaswamy* and *Anuradha Bhasin*, that requires proportionality review of any measure limiting fundamental rights. What is normatively suitable for India is therefore the conceptual move that all three regimes share, the separation of distribution from hosting, calibrated to Indian constitutional constraints and to the institutional capacity that Section 79 and the 2021 Rules already provide. Each system has found it necessary to treat the design and operation of distribution systems as a regulable object distinct from the content distributed. Indian law has not yet taken that step, and the comparative experience indicates both that the step is feasible and that it can be taken without abandoning the protection of lawful speech.

VII. RETHINKING PLATFORM ACCOUNTABILITY IN INDIA

The reforms proposed here are deliberately incremental. They work within the architecture of Section 79 and the 2021 Rules rather than against it, and they are designed to be defensible under Article 19(2). The organising principle is that the law should regulate distributive conduct through duties of process and design, not adjudicate the lawfulness of individual items through expanded liability.

First, amplification-sensitive due diligence. The due diligence obligations under Section 79(2)(b) and the 2021 Rules can be interpreted, and if necessary amended, to include a duty of reasonable care in the design and operation of recommender systems in respect of foreseeable harms. The model already exists in Indian law. Rule 4(4) requires significant social media intermediaries to endeavour to deploy technological measures against narrowly defined grave content,[55] which is an architecture-facing obligation in all but name. Extending a calibrated version of that logic from detection of unlawful content to mitigation of foreseeable amplification harms would not introduce a new principle so much as generalise an existing one.

Second, risk assessment for large platforms. Significant social media intermediaries could be required to conduct and document periodic assessments of the systemic risks arising from their recommender systems, including the risk that engagement optimisation foreseeably amplifies abusive or hostile content directed at protected groups. The assessment would be a duty of inquiry, not a guarantee of outcomes, and its object would be the design of the system rather than any particular post. This mirrors the European risk-assessment model[56] while remaining within the

[55] *See IT Rules, 2021*, *supra* note 6, r. 4(4).
[56] *DSA*, *supra* note 46, arts. 34–35.

differentiated due diligence structure that the 2021 Rules already establish for significant intermediaries.

Third, transparency obligations. Platforms could be required to disclose, at a level of generality that does not compromise legitimate commercial interests, the principal parameters by which their recommender systems rank and distribute content, and to provide users with meaningful control over those parameters.[57] Transparency is the least intrusive of the proposed measures because it regulates neither content nor outcome but information about conduct. It enables courts, regulators, and researchers to assess whether a platform's distributive design is reasonable, and it does so without authorising the suppression of any speech.

Fourth, a differentiated and conduct-based standard of liability. Where a platform is shown to have designed or operated its distribution system with disregard for foreseeable and serious amplification harms, and to have failed to adopt reasonable available safeguards, the safe harbour should not automatically shield that distributive conduct. This is not strict liability for content, nor is it liability for hosting. It is liability for a failure of reasonable care in the design of a distributive mechanism, assessed by reference to what the platform knew or ought to have known about the behaviour of its own systems. The standard preserves the immunity that Section 79 properly confers on hosting while withdrawing it from culpable distributive conduct.

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[57] *Id.* art. 27; *cf.* Balkin, *supra* note 12.

Reform of this kind presupposes an institution capable of assessing whether a platform's distributive design is reasonable, and here the existing architecture offers a foundation rather than a vacuum. The Ministry of Electronics and Information Technology already designates significant social media intermediaries under the 2021 Rules and issues advisories on their observance, so oversight of amplification-sensitive obligations would fall within a competence the Ministry currently exercises. The Grievance Appellate Committees notified under Rule 3A of the 2021 Rules, which resolve users' appeals against intermediaries' grievance decisions,[58] could be structurally expanded, or complemented by a specialised body composed of technical and legal members, to receive, record, and adjudicate patterns of amplification harm across intermediaries rather than only individual complaints. Independent auditing, on the pattern of Article 37 of the Digital Services Act, could be introduced by rule to verify risk assessments without vesting adjudicatory discretion in the auditor. Vetted researcher access to platform data, again with commercial confidentiality preserved through non-disclosure obligations, would supply the evidentiary base on which reasonableness assessments and judicial review depend. The judicial architecture of writ jurisdiction remains available, as it always has, to test the exercise of these institutional powers against Article 14 and Article 19. The objective is not a new bureaucracy but the reorientation of an existing

[58] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2022, Gazette of India, Extraordinary pt. II. §3(i) (Oct. 28, 2022), inserting r. 3A; Notification No. G.S.R. 66(E), Ministry of Electronics & Information Technology (Jan. 27, 2023) (constituting three Grievance Appellate Committees).

one, from the single transaction to the system that produces transactions in the aggregate.

These proposals must be tested against the constitutional constraints that *Shreya Singhal* articulated,[59] and against the proportionality standard set by *Puttaswamy* and *Anuradha Bhasin*. Four features keep them within those limits. They pursue a legitimate aim, namely the protection of persons from foreseeable distributive harms produced by platform design. They are rationally connected to that aim, because they regulate the design and operation of the very systems that produce the reach. They are the least restrictive means available, because they target conduct and process rather than the content of expression, do not authorise the removal of lawful speech, and rely on reasonable care and risk mitigation rather than on outcome-based prohibition. And they are proportionate in impact, because they are differentiated by the scale and design of the platform, so that the burden falls on the actors whose distributive power creates the relevant risk, satisfying the requirement of reasonableness and the related guarantee of equality before the law.[60]

The principal objection remains the risk of collateral censorship. If a platform fears liability for amplification, it may suppress lawful but provocative speech, including legitimate and robust commentary on questions of gender, in order to protect itself. The objection is serious and is the reason the proposed duties are framed around process rather than

[59] Shreya Singhal v. Union of India, (2015) 5 SCC 1 (India).
[60] INDIA CONST.art. 19(2), art. 14.

outcome.[61] A platform that has conducted a reasonable risk assessment and adopted reasonable design safeguards discharges its duty even if harmful content is nonetheless distributed; conversely, a platform is exposed only where it has failed to take such steps. Because the standard does not condition safety on the removal of any particular item, it does not create the incentive to over-remove that a content-based liability rule would create. The aim, in short, is to make the platform accountable for the reasonableness of its distributive design, not for the existence of speech it carries.[62]

Two further counterarguments require direct response. The first concerns algorithmic opacity and trade secrets. Platforms may argue that meaningful disclosure of ranking parameters would expose proprietary systems to reverse-engineering, that risk assessments would compel the surrender of competitively sensitive information, and that vetted researcher access would multiply the risk of leakage. These concerns are real but exaggerated by the framing. The transparency obligation proposed here operates at the level of principal parameters and the reasons for their relative importance, not source code or model weights, and the risk-assessment duty is directed to whether the system's design foreseeably produces the relevant harms, not to the disclosure of algorithms in operational detail. Trade-secret protection can be preserved by confidentiality obligations on auditors and vetted researchers, by aggregated rather than raw disclosure to regulators, and by staggered publication of

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[61] Keller, *supra* note 8.
[62] Citron & Wittes, *supra* note 42.

assessment summaries with commercially sensitive material redacted, as the Digital Services Act contemplates. The competing interest is genuine, but the appropriate response is calibrated disclosure, not the abandonment of accountability. The second concern is implementation. It will be said that Indian regulators presently lack the technical capacity to audit recommender systems, that the intermediary ecosystem is heterogeneous, and that new duties risk imposing disproportionate burdens on smaller actors. The response is that the framework proposed here is deliberately differentiated. The heaviest obligations, risk assessment, independent auditing, and researcher access, attach only to significant social media intermediaries as already designated under the 2021 Rules; the lightest, baseline transparency and grievance-record preservation, apply generally. Institutional capacity can be developed in the way capacity has been developed under other complex regulatory statutes, through phased commencement, empanelled expert assistance, and iterative rule-making. Implementation is not an argument against reform; it is a design constraint that shapes the sequence in which reform is introduced.

VIII. CONCLUSION

The Indian intermediary liability framework was built for an internet of conduits, and it remains a framework about content and its removal. The platforms it now governs are not conduits. They are distributors whose recommender systems decide, on commercial criteria, what hundreds of millions of people see, and whose optimisation objectives foreseeably privilege the provocative. Gendered hate is one of the harms that this distributive architecture produces at scale, not because platforms author it, but because the systems that distribute it are tuned to the very reactions that abuse provokes.

The argument of this article has been that the law's difficulty is conceptual before it is practical. So long as the framework recognises only hosting and removal, it cannot see distribution, and so long as it cannot see distribution, it cannot govern the conduct that produces structural harm. The remedy is not to treat platforms as the authors of what they carry, which would be both doctrinally unsound and dangerous to lawful speech. It is to recognise amplification as a distinct form of platform conduct, distinguishable from passive hosting, and to attach to it duties of reasonable design, risk assessment, transparency, and calibrated liability that can be reconciled with Article 19 through the proportionality standard now settled in Indian constitutional law. The comparative experience confirms that this separation of distribution from hosting is workable. The constitutional jurisprudence confirms that it must be done carefully. The architecture of the modern platform, and the empirical record of what it has enabled in India, confirm that it can no longer be avoided.[63]

[63] Gillespie, *supra* note 3.

Raunak Uday, *The Ghost in the Consultation Room: AI Chatbot Disclosures as Criminal Evidence and the Case for a Sui Generis Evidentiary Category Under the Bharatiya Sakshya Adhiniyam*, 12(2) NLUJ L. Rev. 38 (2026).

THE GHOST IN THE CONSULTATION ROOM: AI CHATBOT DISCLOSURES AS CRIMINAL EVIDENCE AND THE CASE FOR A SUI GENERIS EVIDENTIARY CATEGORY UNDER THE BHARATIYA SAKSHYA ADHINIYAM

~ *Raunak Uday*[*]

ABSTRACT

An increase in the use of consumer-grade AI chatbots as therapeutic agents has raised questions about the privacy of such disclosures. With Sam Altman, CEO of one of the leading chatbot platforms, highlighting how such disclosures are subject to corporate privacy policies and producible for legal reasons, a structural vacuum has emerged. This paper argues that such conversation logs occupy a sui generis evidentiary category under Indian jurisprudence, falling out of the traditional communicative electronic records and acting more like digitised records of raw cognitive process elicited through architecturally induced intimacy. The genesis of this argument is rooted in the failure of the existing privilege categories under the Bharatiya Sakshya Adhiniyam, 2023, to account for such conversations, alongside a severe procedural gap that pertains to Section 63(4)'s mandatory certification requirement, which completely breaks down when applied to foreign-hosted AI server architectures that do not have a permanent office within Indian territory, for that matter. Anchored in constitutional guarantees of Puttaswamy's informational privacy and Selvi's mental autonomy, this paper proposes a two-track

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framework to address the failure of the machinery, introducing a legislative reporting mechanism alongside a judicially actionable contextual integrity principle rooted in Nissenbaum's standard to determine admissibility.

Keywords*: Artificial Intelligence; AI Chatbots; Digital Evidence; Cognitive Privacy; Informational Privacy.*

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I. INTRODUCTION

For individuals navigating psychological distress without access to professional therapeutic support, the absence of structured intervention compounds the difficulty of recovery, rendering an already arduous process significantly more precarious. While this is no longer a constraint in the present moment owing to the Artificial Intelligence ("**AI**")-based chatbot models, this raises a pertinent question of whether these disclosures can be compelled as evidence in criminal proceedings. A person in India, who is not able to afford a psychiatrist or due to a greater sense of confidentiality and comfort, has been relying on ChatGPT for the past 6 months to make it through the emotional crisis. During these 6 months, he disclosed thoughts about a person he was in conflict with, but that person is now dead. Now the police want access to those conversations. What happens under the Indian legal framework? This question is no longer theoretical and has become a reality. In the recent ruling of *United States v. Heppner*, the court was seen grappling with the exact question, where Judge Rakoff clarified that such exchanges between Claude, Anthropic's consumer-grade AI chatbot platform and a defendant were neither protected by the attorney-client privilege nor the work product doctrine.[1] While this clarifies the legal position in the United States, with reference to India, this presents an even deeper problem, as there is no such established doctrine to test. Further, adding to the complexity, the chatbot conversations fall out of any

[1] United States v. Heppner, No. 25-cr-00503-JSR (S.D.N.Y. Feb. 17, 2026).

of the privileged communications categories envisaged under the Bharatiya Sakshya Adhiniyam, 2023 ("**BSA**").[2]

This paper argues that AI chatbot conversations occupy a *sui generis* evidentiary category under Indian law. They are neither covered under the ordinary electronic records nor under the privileged communications categories and that the BSA requires a specific framework governing their production and admissibility in criminal proceedings.

The paper proceeds in nine chapters, beginning from the introduction, followed by the *sui generis* theory, moving to the evidentiary architecture and production machinery, then to the failure of existing privilege categories, then to the constitutional arguments and a comparative perspective, before the proposed framework and the conclusion.

This paper uses OpenAI's ChatGPT as its primary analytical subject because it is the dominant consumer-grade AI chatbot platform and the platform whose terms of service and data retention practices are most thoroughly documented in the public domain. The only directly relevant case law, *United States v. Heppner*, involved Claude, Anthropic's consumer-grade AI platform. The legal principles derived from *Heppner* are applied here because they speak to consumer-grade AI chatbot platforms as a class, of which ChatGPT is the primary subject. The *sui generis* category and the contextual integrity standard proposed in the paper are intended to apply to the broader class of consumer-grade AI chatbot platforms that share the architecturally induced disclosure characteristic identified therein.

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[2] Bharatiya Sakshya Adhiniyam , 2023, No. 47 of 2023, Acts of Parliament, 2023 (India).

II. THE SUI GENERIS PROBLEM - WHAT AI CONVERSATIONS ACTUALLY ARE

Sam Altman, CEO of one of the leading public AI platforms, OpenAI, acknowledged that such routine disclosures made to AI-based chatbots, unlike those to a therapist or life coach, lack a legal confidentiality framework governing such disclosures, meaning they could potentially be produced for legal reasons.[3] The significance of the statement lies not merely in its content but in its source; the party most commercially motivated to deny the problem is publicly confirming it. This acknowledgement frames the threshold question, that is, what kind of thing is an AI conversation, as a matter of evidence law?

The answer begins with what it is not. A conversation with a chatbot, unlike text messages, which are directed at others, is not intended to be read by someone else; that is, documentary intent is absent in such conversations. The conversation with an AI is equivalent to a record of a cognitive process and not of communication, as they are thinking through an interface, not drafting.

Further, the conversation with an AI lacks any regulatory framework governing it. The conversation fails to acquire the character of a professional communication. There is no licensed interlocutor on the other side; no advocate, no doctor, no fiduciary and no regulatory

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[3] The Hindu Bureau, *OpenAI CEO Sam Altman warns ChatGPT users' personal questions could be used in lawsuits*, THE HINDU 28 July 2025, https://www.thehindu.com/sci-tech/technology/openai-ceo-sam-altman-warns-chatgpt-users-personal-questions-could-be-used-in-lawsuits/article69864881.ece.

framework which governs the relationship between the user and the platform. The very relational foundation that forms a prerequisite for it to be protected under the law is absent.

Moreover, such conversations are architecturally designed to be intimate; the platform responds to the messages of the user with the much-needed warmth, sympathy, continuity and apparent engagement. It is so comforting that Christa from Florida didn't feel that she could be fully honest with the therapist she saw once a week, yet chose to confide her struggles with social anxiety to a natural language AI model instead.[4] Yet this comfort and intimacy come at the cost of complete legal exposure; the sense of confidentiality associated with these conversations is stripped of its legal foundation, as the same is being transmitted to a third party's servers, being governed by the terms of service that reserve the right to disclose them in cases including legal process.[5]

A. Unprotected Communications

Now, arguments are advanced that such interactions fall within one of the existing categories of unprotected communications analogous to disclosures to a friend, to a priest outside formal confession or a cloud-stored personal document. This argument falls short on three primary counts.

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[4] Alice Robb, '*He checks in on me more than my friends and family': can AI therapists do better than the real thing?*, THE GUARDIAN 2 March 2024, https://www.theguardian.com/lifeandstyle/2024/mar/02/can-ai-chatbot-therapists-do-better-than-the-real-thing.

[5] OpenAI, https://openai.com/policies/row-privacy-policy/ (last visited May 12, 2026).

Firstly, the scale and searchability of such AI conversation logs are categorically different from any human-interlocutor disclosure. While a friend might retain an imperfect memory of such a disclosure, an AI would always have a perfect memory of such disclosures, as its servers have a comprehensive record of all the exchanged messages along with the metadata and context. These include, but are not limited to, the text messages and include even the classifier outputs.[6] This wide pool of context is not available with a friend who would merely have a faded memory of such disclosures.

Secondly, the parasocial architecture of such disclosures with AI is specifically engineered to invite intimate disclosure that the person would not even make to a friend. A study of 1,200 users of the AI-based cognitive behavioural therapy chatbot Wysa revealed that a "*therapeutic alliance*" was developed between the bot and the patient within just 5 days.[7] Some users reported that they could express distress without the social stigma associated with displaying emotion before another person.[8]

Thirdly, the third-party doctrine postulates that if a disclosure is made voluntarily to a third party, it loses the Fourth Amendment protection, which protects individuals from unreasonable searches and seizures by the government.[9] The rationale for the doctrine lies in the

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[6] Developers OpenAI, https://developers.openai.com/api/docs/guides/your-data (last visited May 12, 2026).
[7] Clare Beatty et al., *Evaluating the Therapeutic Alliance With a Free-Text CBT Conversational Agent (Wysa): A Mixed-Methods Study*, 4 Frontiers in Digital Health 847991 (2022).
[8] *Id.*
[9] Eang L. Ngov, *More Than Friends: A New Theory for the Third-Party Doctrine*, 74 AM. U. L. REV. 1 (2024).

reasonable expectation of privacy as observed in *Smith v. Maryland*, where it was observed that "*a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties*".[10]

However, the disclosures made to a friend or any third party in that case are not intended to be disclosed or produced on demand of law enforcement, as there exists no such contractual obligation; the disclosures made to a consumer-grade AI chatbot are governed by the very terms of service of that particular company, which reserves the right to produce such data in response to legal processes.[11]

The court, however, in *Carpenter v. United States*, recognised the limitation of this third-party doctrine while ruling on cell phone location information that is not only effortlessly compiled, but also detailed and encyclopedic,[12] thereby tweaking the third-party doctrine. Through this, the court mandated law enforcement agencies to obtain a warrant before seizing Cell Site Location Information ("**CSLI**").[13]

With the advent of AI, highly sensitive information now extends to chatbot conversations where disclosures are actively elicited through architecturally designed intimacy, stored verbatim, and subject to contractual production obligations. While the *Carpenter* case revealed the

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https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?article=1067&context=fac_articles.

10 Smith v. Maryland, 442 U.S. 735, 743 (1979).

11 OpenAI, https://cdn.openai.com/pdf/openai-law-enforcement-policy-v.2025-12.pdf (last visited May 15, 2026).

12 Carpenter v. United States, 585 U.S. 296, 320 (2018).

13 *Id.*

limitations of the CSLI, the AI chatbot disclosures present a categorically more acute privacy concern owing to their intimate character.

B. LIMITING PRINCIPLE

Now, since such disclosures fall short of the characteristics of an existing category of privileged and unprivileged communications, the need for a separate *sui generis* category is further strengthened. This category, however, posits an objection that incorporating such a change in category would mean that Email interactions, WhatsApp text messages and cloud storage, which work on similar settings of intimate disclosure, would fall under this category, thereby indiscriminately extending to all personal cloud data. However, this is where the limiting principle comes into play, which is the architecturally induced disclosure criterion, that is, the category would be limited to such disclosures where the platform's architecture is specifically designed to elicit self-revelatory disclosure through simulated relational engagement as the platform's core function, akin to AI-based chatbots. An email interaction, unlike the AI chatbot, does not prompt the user to share their anxieties and is merely limited to the user transmitting their messages to the recipients. Further, a Google search merely responds to the user's query with already available data on their own or connected servers and does not engage in the sense a chatbot does, thereby inviting disclosures from the user. Even though platforms like WhatsApp stand in a strikingly different position, they are merely responsible for the transmission of text messages or other forms of media that the user intends to send to the recipients. While this has some intimate character, unlike AI chatbots, it is not architecturally designed to elicit such disclosures. As far as the cloud storage services are concerned, they are merely passively dealing with the data that is being hosted on their server by the users; they do not interact with it actively. Hence, the objection falls flat, an AI chatbot disclosure is the only one to qualify among these, as they are architecturally designed to invite such disclosures from the users, providing them with the much-needed warmth, continuity, apparent memory and apparent engagement.

This limiting criterion ensures that this category is not only principled but also administrable, as courts can, relying on this criterion, assess whether or not disclosure made to a platform falls under such category. Moreover, this would ensure that such chatbot disclosures, which often involve cognitive scribbling of thoughts and are raw outputs of the user's thinking, which the user would never commit to a communicative document, would fall under this category. This would ensure a greater protection being accorded to such unedited scribbling, as these are raw thoughts.

C. POSITIVE THEORY

The mismatch between such platforms, architecturally designed to invite intimate disclosures, and the exposure is not accidental and is structurally produced by the very design of the platform and the current state of law. Nissenbaum advances the contextual integrity principle[14] for privacy as it applies to information about people, which holds that privacy

[14] Helen Nissenbaum, Privacy as Contextual Integrity, 79 WASH. L. REV. 119 (2004).

is respected when information flows match the norms of the context in which that information was originally disclosed.

Two forms of informational roles govern information about people: the principle of appropriateness[15] and the principle of distribution. The principle of appropriateness suggests what kind of information about a person is appropriate to be revealed in a particular context - we are expected to share our financial standing with the bank but not with our acquaintances. The principle of distribution, on the other hand, factors whether its flow respects contextual norms of information flow - we tell a friend something because we want to, and we expect them to keep it a secret, just as an address given to a delivery service carries no such restriction. Society is divided into various spheres, and each sphere has its own logic for how things should be shared. Privacy is violated when either norm is breached.[16]

Now, when it comes to AI-based chatbot conversations, the user did not intend such disclosure to be used for the sphere of criminal proceedings but merely intended to use it for therapeutic purposes or for cognitive scribbling of thoughts - contexts governed by norms of confidentiality and non-judgement, and using it for purposes of trial would run counter to the norm of distribution.

The constitutional authority for this principle is found in the *Justice K.S. Puttaswamy* judgment, where Nariman J. made the observation that

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[15] *Id.* at 136-147.
[16] Nissenbaum, *supra* note 14.

informational privacy "*recognises that an individual may have control over the dissemination of material that is personal to him. Unauthorised use of such information may, therefore, lead to infringement of this right*".[17] This is in line with the principle of limitation, that the information collected for one purpose is authorised for that purpose only, and any use contrary to that would result in breach of privacy.

Information disclosed to an AI chatbot is intended for therapeutic engagement or cognitive processing, not for production in criminal proceedings. Using it for the latter violates the contextual norm under which it was originally shared.

III. THE EVIDENTIARY ARCHITECTURE: HOW AI CONVERSATIONS ENTER A CRIMINAL COURT

If these conversations are to be admissible in the criminal courts of India, they would require adherence to the provisions of the BSA, which treats electronic records as documents with the same legal effect as that of physical documents.

Per the definition clause of the BSA, the term document even includes records on server logs and the documents on computers, laptops, or smartphones.[18] And the term evidence is inclusive of documents, including electronic or digital records that are produced for the inspection

[17] Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1.
[18] Bharatiya Sakshya Adhiniyam, 2023, §2(1)(d), No. 47 of 2023, Acts of Parliament, 2023 (India).

of the Court as documentary evidence.[19] However, Section 62 of the Act mandates that the contents of such electronic records be proven in accordance with the provisions of Section 63,[20] which requires the information to be produced during which the device was in regular use for carrying out regular activity by a person with lawful control over it, and such kind of information was being regularly fed into it.[21] Further, it requires the device to be operating properly so as not to affect the accuracy of its contents. The section additionally requires a certificate that identifies the record and describes the manner of its production, along with relevant particulars of the device that shows it was produced by a computer or an electronic device. The position of Indian law, as stated in *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*, stands clear with reference to such certification requirements laid down under Section 63 of the BSA (erstwhile Section 65B of the Evidence Act), that compliance with these conditions is mandatory in nature.[22]

However, this has an adverse bearing on the admissibility of such AI disclosures, as the section requires that such certification shall come from a person occupying a responsible official position in relation to the operation of the pertinent device or the management of relevant activities.[23]

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[19] Bharatiya Sakshya Adhiniyam, 2023, §2(1)(e), No. 47 of 2023, Acts of Parliament, 2023 (India).
[20] Bharatiya Sakshya Adhiniyam, 2023, §62, No. 47 of 2023, Acts of Parliament, 2023 (India).
[21] Bharatiya Sakshya Adhiniyam, 2023, §63, No. 47 of 2023, Acts of Parliament, 2023 (India).
[22] Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal, (2020) 3 SCC 1.
[23] Bharatiya Sakshya Adhiniyam, 2023, §63(4), No. 47 of 2023, Acts of Parliament, 2023 (India).

Now, for a ChatGPT conversation, the person responsible would be an OpenAI employee in San Francisco - a foreign national employed by a foreign company with no registered Indian presence. And since the criminal courts have no provisions to compel a foreign entity to produce such certificates, this creates a structural gap, which is essentially an architectural failure when applied to foreign AI platforms.

Another doctrinal gap that pertains to such chats is the opinion of the Examiner of Electronic Evidence, whose opinion is to be deemed as a relevant fact when the court requires it to form an opinion on such information stored in digital form, as per Section 39 of the Act.[24] However, this creates another problem, as the person to be appointed as such an examiner would not have access to the servers of OpenAI to meaningfully verify the integrity of the server logs, to ascertain whether the produced log reflects the original interaction, whether the model has been updated since the conversation, or whether the production is contextually complete. The two gaps, therefore, compound each other: the first makes admission procedurally impossible; the second means that even if that barrier were overcome, the court would have no independent verification mechanism.

These gaps are decisive, as the first gap makes it nearly impossible to comply with the mandatory requirement of such certification of the devices and even if somehow such certification is obtained, there is no way to verify the integrity of such evidence that is actually being admitted. This problem is further compounded by three distinct and specific

[24] Bharatiya Sakshya Adhiniyam, 2023, §39, No. 47 of 2023, Acts of Parliament, 2023 (India).

reliability questions. *Firstly*, the courts have no mechanism to order the complete production of such conversations with full system context, and in the absence of such mechanisms, the chats could be produced selectively without the much-needed context, in the absence of which it would be difficult to decipher the intent of such conversations.

Secondly, OpenAI periodically updates its underlying models and backend systems.[25] This raises a pertinent question as to whether server-side model changes retroactively affect what appears in stored conversation logs. No disclosure standard exists in Indian criminal procedure requiring OpenAI to certify that the produced log reflects the original interaction.

Lastly, unlike a physical document, an AI conversation log has no self-authenticating physical integrity. The logs could be edited by someone at the server end by anyone with access to the system, and there is no standard procedure or forensic protocol in Indian criminal procedure for verifying the integrity of an exported AI conversation log against its server-side original and even the hash value requirement under Section 63 is confined to the transmission integrity[26] and does not extend to the source integrity.

IV. THE PRODUCTION MACHINERY AND ITS LIMITS

These limitations not merely pertain to its admissibility, but also extend to the production machinery. Section 94 of the Bharatiya Nagarik

[25] OpenAI Help Center, https://help.openai.com/en/articles/20001053-what-to-expect-when-models-change.
[26] Bharatiya Sakshya Adhiniyam, 2023, §63(2), No. 47 of 2023, Acts of Parliament, 2023 (India).

Suraksha Sanhita, 2023 ("**BNSS**") empowers the courts to summon any document or other thing that it deems necessary for investigation or trial[27] and AI conversation logs are documents under Section 2(1)(d) of the BSA,[28] the threshold is low - necessity for investigation or trial and the power is broad, requiring no showing of specific suspicion or proportionality before a summons can be issued for such chatbot disclosures. Further, Section 96 of the BNSS provides that courts could issue search warrants for documents,[29] parcels or things when required for a criminal investigation or trial, and since chatbot disclosures are squarely covered within the definition of documents under BSA, the search warrant could be issued even for such disclosures. Most acutely, Section 69 of the Information Technology Act, 2000 authorises the government with the power to issue directions for interception, monitoring or decryption[30] of any information through any computer resource in the interests of India or for preventing incitement to the commission of any cognisable offence, without prior judicial authorisation.

Where the domestic machinery creates unchecked access, the foreign platform context creates a different problem - the machinery exists but cannot reach the data. This limitation is further compounded by three unaddressed problems. *Firstly*, the issue of jurisdiction: OpenAI has no

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[27] Bharatiya Nagarik Suraksha Sanhita, 2023, §94, No. 46 of 2023, Acts of Parliament, 2023 (India).
[28] Bharatiya Sakshya Adhiniyam, 2023, §2(1)(d), No. 47 of 2023, Acts of Parliament, 2023 (India)
[29] Bharatiya Nagarik Suraksha Sanhita, 2023, §96, No. 46 of 2023, Acts of Parliament, 2023 (India).
[30] Information Technology Act, 2000, § 69, No. 21 of 2000, Acts of Parliament, 2000 (India).

registered office in India and no formal Indian legal presence;[31] Even if such a production order is issued against it, its enforceability remains uncertain.

Secondly, the *NYT v. OpenAI* case rendered a court order requiring data preservation.[32] However, in the case of an Indian court ordering production of such disclosures, it would create conflicting legal obligations across the two jurisdictions. Although a Mutual Legal Assistance Treaty route exists, it is slow, discretionary and uncertain. *Lastly*, even after deletion of the data from the user's end, it is still retained for at least 30 days on the servers,[33] and litigation preservation orders could even extend this indefinitely.

A. THE DPDP ACT

While the implementation of the Digital Personal Data Protection Rules has been notified[34] for the Digital Personal Data Protection Act, 2023 ("**DPDP Act**"), the substantive provisions of the Act governing the fiduciary obligations, including Section 17, which provides for personal data processing without being subject to standard compliances for specific reasons,[35] are subject to phased commencement and are yet to be fully operational.[36] Once the section comes into effect, it would further

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31 OpenAI OpCo LLC, *supra* note 25.
32 OpenAI, https://openai.com/index/response-to-nyt-data-demands/.
33 OpenAI Help Center*, supra* note 25.
34 Digital Personal Data Protection Rules, 2025 (notified Nov. 13, 2025).
35 Digital Personal Data Protection Act, 2023, §17, No. 22 of 2023, Acts of Parliament, 2023 (India).
36 AZB Partners, *India's Digital Personal Data Protection Act: Phased Rollout and Key Compliance Milestones,* Nov. 14, 2025, https://www.azbpartners.com/bank/indias-digital-personal-data-protection-act-phased-rollout-and-key-compliance-milestones/ .

compound the problem, as it exempts processing of personal data by the state and its instrumentalities from the standard consent and purpose limitation requirements, on grounds including national security, public order, and prevention of offences – exemptions that are administratively determined and not subject to judicial review.

The AI platforms most plausibly qualify as data fiduciaries under Section 2(i) of the Act,[37] as they determine both the purpose and the means of processing such personal data of the users who interact with it, as specified in their terms of service. The result is three simultaneous and overlapping access routes - BNSS Section 94, IT Act Section 69, and DPDP Act Section 17, none of which requires proportionate judicial oversight before AI chatbot conversation data can be accessed or produced in criminal proceedings.

Thus, even the DPDP Act does not create a protection for the users interacting with such chatbots, but creates or rather compounds the problem by providing additional state access to such conversation data without the need for adherence to even the limited procedural safeguards available under Section 94 of the BNSS.

B. THE BNS DIMENSION

Certain offences under Bharatiya Nyaya Sanhita ("**BNS**") for instance, criminal conspiracy, organised crime, offences pertaining to

[37] Digital Personal Data Protection Act, 2023, §2(i), No. 22 of 2023, Acts of Parliament, 2023 (India).

terrorism, cheating and financial frauds,[38] are cases where the probative value of such AI logs become essential, where such chatbots have been used to seek some sort of tactical advice, research fraud methodology or to draft deceptive communications characterising such records as direct evidence of fraudulent intent. However, this creates a phenomenological problem, as the exploratory conversations about fraud methodology or terrorism ideology are phenomenologically indistinguishable from curiosity, research, or distress processing. The log records what was typed at a moment of need, not what was intended criminally, a mismatch that the contextual integrity standard in the proposed framework is specifically designed to address.

V. THE PRIVILEGE PROBLEM: WHY EXISTING PROTECTIONS DON'T WORK

The absence of any governing framework cannot be remedied by recourse to existing privilege categories under the BSA, as each fails on its own structural terms. And the explanation lies in the schematic arrangement of the BSA. *Firstly*, Section 132 of the BSA envisages legal professional privilege to communications made between an advocate and his client;[39] an AI is not an advocate. The ruling in *Heppner* (*United States v. Heppner*, which involved Claude, Anthropic's consumer-grade AI chatbot platform) acts as a first impression on consumer-grade generative AI

[38] Bharatiya Nyaya Sanhita, 2023, §§61, 111, 113–117, 316, No. 45 of 2023, Acts of Parliament, 2023 (India).

[39] Bharatiya Sakshya Adhiniyam, 2023, §132, No. 47 of 2023, Acts of Parliament, 2023 (India).

platforms as a class, which recognised that no privilege can exist without a trusting human relationship,[40] and one plausible explanation for it could be that humans can betray confidences in ways tools generally do not.[41]

The sole exception recognised in *Heppner* is counsel-directed AI use under the Kovel doctrine, where an attorney directs a client to use an AI tool,[42] the output may attract privilege as the work of a lawyer's agent. This exception does not assist the ordinary therapeutic user.

Heppner's rationale that no privilege can exist without a trusting human relationship is correct as far as the basis for the privilege is concerned; it reaches a different conclusion from it, as it conflates the criterion for privilege with one of its historical features. The basis of such professional privilege is not the human element of the interlocutor but the functional precondition that exists in such relationships - that the user must disclose candidly in order to derive value from the interaction. Attorney-client privilege or the therapeutic privilege in the US exists because effective advice requires the client or the patient, as the case may be, to speak without fear of consequences and AI disclosures, which creates a similar functional relationship, particularly in therapeutic contexts. The platform's architecture is specifically designed to elicit such disclosures from the user through continuity, warmth and non-judgment, the functional precondition that underlies professional privilege, which is replicated in its design. The relevant criterion for privilege is therefore not whether a human is on the

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[40] Heppner, *supra* note 1.
[41] Elizabeth X. Guo, *United States v. Heppner*, HARVARD LAW REVIEW (Mar. 3, 2026, 9:29 PM), https://harvardlawreview.org/blog/2026/03/united-states-v-heppner.
[42] Heppner*, supra* note 1.

other side, but whether the architecture of the interaction requires the user to disclose in order to benefit. The same applies structurally in the case of consumer AI chatbots, and the policy rationale for the privilege applies even in such cases, regardless of whether the existing BSA categories do or do not extend to it. Since the functional foundation that justifies professional privilege categories is present in AI chatbot interactions - architecturally induced candour as a precondition for the platform's value, the Indian evidence law should recognise this as the affirmative basis for a *sui generis* evidentiary protection, distinct from existing BSA categories but grounded in the same policy rationale that underlies them.

Secondly, sharing such information with an AI chatbot destroys its confidentiality. As confirmed in *Heppner*, Anthropic's privacy policy for Claude reserved the right to disclose such data to governmental authorities,[43] defeating any reasonable expectation of confidentiality. OpenAI's terms of service for ChatGPT contain an equivalent provision, producing the identical structural result for the primary analytical subject of this paper.

Further, the observations made by the Canadian Supreme Court in cases *R v. Marakah*[44] and *R v. Jones*[45] require significant engagement, as it was observed by the court that privacy interest in electronic conversations, like a text message, continues, despite it being held by third parties. However, this protection persisted because of three requisites being fulfilled; firstly,

[43] *Id.*
[44] R v. Marakah, (2017) 2 SCR 608.
[45] R v. Jones, (2017) 2 SCR 696.

there was a reasonable expectation of privacy in such messages towards the accused, as the right under Section 8 of Canada's Charter operated as a positive protection[46] against state intrusion into private communications. Secondly, it created a positive constitutional right against the state's actions, requiring the answer to the question of whether the state's conduct of searching violates that right. The Indian evidentiary privilege is narrower; it is restricted to the analysis of whether the user retained a confidential relationship with the platform sufficient to found privilege as a matter of evidence law. Both pertaining to entirely different enquiries.

Thirdly, the reasoning of Marakah and Jones does not transfer to the Indian context; it certainly corroborates the conceptual foundation of Article 21 that informational privacy in electronic communications attracts constitutional protection even when held by third parties. Moving further, Section 132 of the BSA does not apply to doctor-patient conversations,[47] and even the National Medical Commission (NMC) Code of Ethics merely creates an ethical obligation of confidentiality.[48] As opposed to other jurisdictions like the US, India has no such statutory doctor-patient privilege. Further, the Section 122 privilege applies only to communications between spouses,[49] and an AI platform fails to qualify for either of these categories.

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[46] Canadian Charter of Rights and Freedoms, 1982, §8.
[47] Bhartiya Sakshya Adhiniyam, *supra* note 39.
[48] National Medical Commission (Professional Conduct) Regulations, 2023, §24, No. 30 of 2019, Acts of Parliament 2019 (India).
[49] Bharatiya Sakshya Adhiniyam, 2023, §122, No. 47 of 2023, Acts of Parliament, 2023 (India).

VI. BEYOND ARTICLE 20(3) - SELF-INCRIMINATION AND THE MENTAL AUTONOMY DIMENSION OF ARTICLE 21

Compelling production of an already existing document does not qualify as a testimony, thereby falling out of the purview of Article 20(3),[50] which guarantees the right against self-incrimination. The distinction between testimonial compulsion and documentary production is settled in Indian law. The Supreme Court has observed in *State of Bombay v. Kathi Kalu Oghad* that production of a document does not amount to being a witness against oneself,[51] thereby confirming that Article 20(3) affords no protection against a production order for AI conversation logs.

Selvi v. State of Karnataka established mental privacy as a distinct category, as opposed to bodily privacy, holding that criminal and evidence law cannot be used to compel a person "*to impart personal knowledge about a relevant fact*,"[52] and the decision to make a statement is the product of a private choice, and there should be no interference with such autonomy of an individual.[53] The principle protects against the state forcibly extracting mental content, where the accused has no conscious control, like narcoanalysis and polygraph tests. In the case of a chatbot disclosure, the production of such conversations is, in fact, a surrender of a record of someone's mental process, which vitiates the principle of mental autonomy

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50 INDIA CONST., Art. 20, cl. 3.
51 State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808.
52 Selvi v. State of Karnataka, (2010) 7 SCC 263.
53 *Id.*

laid down in the *Selvi* case. Though it is to be noted that such compulsion operates at the level of production in the proceedings and not that of its creation.

In the *Puttaswamy* case, the court recognised informational privacy and decisional autonomy as a facet of the right to privacy. The same was reflected in Nariman J.'s observation that "*an individual may have control over the dissemination of material that is personal to him*."[54] But the production of such chatbot disclosures runs counter to this very principle laid down in the *Puttaswamy* judgment, as the moment it is produced without his permission in the courts, the individual loses control over its dissemination.

It is significant to note that *Selvi's* principle is not limited to compelled procedures and establishes mental autonomy as a constitutional category under Article 21. Compelled extraction of mental content without the user's consent violates Article 21, independent of Article 20(3), and the AI chatbot logs are records of cognitive process, not a communication, but thinking itself. It is analogous to a state gaining access to someone's mental process without consent. The objection that voluntary creation of the chatbot log forecloses any constitutional privacy claim was directly addressed and rejected by Nariman J. in *Puttaswamy*, who held - approving the *Canara Bank case* that voluntary parting with information destroys privacy rights "*has no plausible foundation in the text of Articles 14, 19, 20 or 21*

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[54] Justice K.S. Puttaswamy (Retd.)*, supra* note 17.

of our Constitution"[55] and that Indian courts had previously "*refused to apply it in the Indian context.*"[56]

The voluntariness of the original creation of the chatbot log, therefore, does not waive the constitutional right to control its subsequent use. Voluntary creation of such scribbling for therapeutic processing does not constitute consent to production as criminal evidence in the court proceedings, and such production must satisfy *Puttaswamy's* three-part test of legitimate aim, necessity, and proportionality.[57] When the necessity standard is applied to such production orders, it must answer the question that using such therapeutically-disclosed data for criminal evidence is necessary in the sense that without its use, the evidentiary goal cannot be achieved through lesser restrictive measures. This question incorporates within itself the purpose limitation principle; Data created for self-directed cognitive processing carries a normative expectation against evidentiary use for incrimination, and overriding that requires a necessity showing that accounts for the purpose mismatch. The purpose limitation principle, therefore, is a dimension of the necessity inquiry and not a freestanding rule.

VII. CHASM ACROSS JURISDICTIONS: THE COMPARATIVE POSITION

A. *SINGAPORE*

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[55] *Id.*
[56] *Id.*
[57] Justice K.S. Puttaswamy (Retd.), *supra* note 17.

Singapore's Evidence Act shares the same colonial heritage as the Indian Evidence Act, as it is modelled on the same Stephen's Draft of 1872,[58] making it the most structurally comparable jurisdiction for the purposes of this analysis. Singapore amended its Evidence Act in 2012, thereby introducing Section 116A,[59] which replaced the erstwhile mandatory certification requirement with a presumption-based framework. While the Indian evidence framework mandatorily requires a certificate from a responsible official as a prerequisite of admissibility, Singapore, on the other hand presumes electronic records authentic unless the contrary is proved. This does away with the foreign-certifier problem that India faces, as the certification requirement is no longer a prerequisite for its admissibility in Singapore.

Section 116A(2) clearly states that the court presumes the electronic record to be authentic,[60] unless any contrary evidence is adduced, where the record was generated in the usual and ordinary course of business by a person who was not a party to the proceedings. The AI platforms are precisely that person in such cases; they act as neutral third parties and not a party to the criminal proceedings, generating the logs in the ordinary course of their operations. Hence, an AI chatbot conversational log would therefore be presumptively admissible in Singapore courts without there being a requirement for certification. The structural gap that arises under the Indian evidence law does not arise under the Singapore framework.

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[58] Siyuan Chen, *Redefining Relevancy and Exclusionary Discretion in Sir James Fitzjames Stephen's Indian Evidence Act of 1872: The Singapore Experiment and Lessons for Other Indian Evidence Act Jurisdictions*, 10 INT'L COMMENT. ON EVIDENCE 1 (2014).
[59] Evidence Act, 1893 § 116A, *amended by* Evidence (Amendment) Act 2012 (Singapore).
[60] Evidence Act, 1893 § 116A (2), *amended by* Evidence (Amendment) Act 2012 (Singapore).

However, even the presumptive framework does not eliminate the reliability problems in its entirety. The Singapore Court of Appeal in the *GIL v. Public Prosecutor* case recognised the distinction between admissibility and reliability of a record.[61] It was held that the presumption extends only to accurate communication and not to the substantive reliability or truth of what the data actually means. Though the case concerned smartwatch sleep data, the principle maps directly onto AI disclosure logs. The section would presume a ChatGPT conversation log accurately records what was transmitted between the user and the platform, but it cannot presume that the content reliably reflects criminal intent rather than therapeutic exploration, cognitive scribbling, or distress processing. The central evidentiary problem in AI chatbot log cases survives even in Singapore's more permissive framework. The contextual integrity standard is therefore not displaced by Singapore's approach; it addresses a distinct and analytically prior question that the presumption of authenticity cannot resolve.

While the doctrinal transfer could be allowed, its limitations need to be acknowledged. Singapore's framework has no equivalent to Article 21's positive fundamental right. Section 116A presumption model resolves the admissibility threshold by removing the mandatory certification requirement; it does not require proportionality review of such production orders as a constitutional matter. Indian courts operating under the Puttaswamy principle have a stronger constitutional basis for requiring such review than Singapore courts do, precisely because the Indian constitutional

[61] GIL v. Public Prosecutor, (2025) SGCA 21.

framework mandates it. The Indian judicial framework, therefore, goes beyond what Singapore's model requires - grounding production oversight in Puttaswamy proportionality, which is a constitutional requirement unique to the Indian framework.

B. <u>THE UNITED STATES</u>

United States v. Heppner, which involved Claude, Anthropic's consumer-grade AI chatbot platform, clarified the position that consumer-grade AI chatbot conversations attract no recognised professional privilege[62] – confidentiality was defeated by Anthropic's own privacy policy for Claude, reserving the right to disclose it to governmental authorities, and the interaction served no purpose of obtaining legal advice.[63] OpenAI's terms of service for ChatGPT contain an equivalent provision, producing the identical structural result for the primary analytical subject of this paper.[64] While the Kovel doctrine preserves a narrow exception for counsel-directed AI use,[65] this does not assist the ordinary therapeutic user who relies on these chatbots for their mental health support. The comparative significance of *Heppner* is that even the most developed common law privilege framework resolved this question in a legal vacuum, through a first-instance district court ruling without any governing framework specifically designed to address consumer AI platforms.

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[62] Heppner*, supra* note *1*.
[63] *Id.*
[64] OpenAI*, supra* note *5*.
[65] *Id.*

While the Singapore model of presumption-based admission provides a procedural model that eliminates the foreign-certifier barrier as a matter of legislative design, the *GIL v. PP* case confirms that reliability problems survive even these frameworks. The United States provides the doctrinal vacuum; the most developed common law privilege jurisdiction has no governing answer to this question. However, India combines the doctrinal gap of the United States with the structural vulnerability identified in Section V - the complete absence of any statutory therapeutic privilege and the Section VIII framework address all three dimensions: the admissibility barrier, the reliability problems, and the proportionality deficit that only *Puttaswamy* can supply.

VIII. THE PROPOSAL - AN EXCLUSIONARY FRAMEWORK FOR AI CONVERSATIONS IN INDIAN CRIMINAL PROCEEDINGS

While the legislative intervention is not plausible overnight, the paper proposes two-track recommendations, that is, the changes that could be implemented judicially right now and the changes that require legislative intervention, requiring more time and deliberation.

The sliding scale of proportionality rooted in *Puttaswamy's* proportionality test does not operate with a uniform threshold for all categories of personal information. The sensitivity of the information determines the threshold for justification. While location data, financial records, AI therapeutic conversations and browsing history all correspond to the category of personal information, they sit at different points on the spectrum of intimacy. The AI therapeutic conversations sit at the extreme of the spectrum, as they are direct and hence are at times compared to the act of cognitive scribbling, as they are generated in a context of perceived confidentiality and designs that work to elicit self-revelatory disclosure. The more intimate and self-revelatory the data category, the heavier the state's burden to justify production - this gives the four elements below their operational content.

Where an AI platform's internal systems flag conversations as indicating an imminent, credible, specific threat of violence, a statutory duty to notify Indian law enforcement should be established. This element is the paper's legislative recommendation; it cannot be imposed judicially under existing provisions and requires legislative intervention. The structural model for this duty is founded on Section 12 of the Prevention of Money Laundering Act, 2002,[66] read with Rule 3(1)(D) of the Prevention of Money Laundering (Maintenance of Records) Rules, 2005[67] which mandates that every reporting entity furnish information on suspicious transactions to the Financial Intelligence Unit-India within seven working days of determining suspicion proactively, without waiting for a complaint or court order. Akin to a bank's internal monitoring system, which triggers a mandatory notification to a designated authority when it detects patterns indicative of financial crime, an AI platform's internal systems should trigger a mandatory notification to Indian law enforcement when they detect

[66] Prevention of Money Laundering Act, 2002, §12, No. 15 of 2003, Acts of Parliament, 2003 (India).

[67] Prevention of Money-Laundering (Maintenance of Records) Rules, 2005, r. 3(1)(D) (India).

patterns indicative of imminent violence. The threshold determination in both cases is institutional; the entity applies defined criteria to its own data and reports when the threshold is met. This element applies the structural logic of this framework to a new context and recommends that the legislature establish equivalent institutional infrastructure, including a designated receiving authority, defined imminence criteria, and a statutory timeline for notification. The boundary of this duty is defined by the contextual integrity standard of the second element, that is, the exploratory, therapeutic, and ambiguous conversations are protected; only conversations meeting the statutory imminence threshold are subject to the mandatory notification duty.

The second, third and fourth elements all form part of the judicial framework recommendations. The second element proposes the contextual integrity standard, that is, the AI conversations are admissible in the courts only for purposes consistent with the context in which they were produced. The standard judicially applicable read through *Puttaswamy*[68] and Nissenbaum's contextual integrity framework,[69] ensures conversations generated in a therapeutic or exploratory context are not admissible as direct evidence of intent without corroborating evidence establishing that the context was transactional or deliberate.

Further, in every major BNS offence category where AI logs are most probative for the prosecution, the exploratory-versus-intentional

[68] Justice K.S. Puttaswamy (Retd.), *supra* note 17.
[69] Nissenbaum, *supra* note 14.

distinction is precisely the evidentiary question the court must resolve, and this element gives courts the doctrinal tool to resolve it.

The third element proposes that production orders for AI conversation logs from foreign platforms must require prior judicial authorisation at the Sessions Court level or above, not issuable by investigating officers under BNSS Section 96[70] alone, and not via the government directives under Section 69 of the IT Act[71] without judicial review. The court authorising so shall apply *Puttaswamy's* three-part test,[72] that is, a legitimate aim, necessity and proportionality of the privacy intrusion calibrated to the sliding scale above.

Three specific criteria constrain the executive's application independently of its own characterisation of necessity: particularity, the logs sought must be identified with specificity as to date range or subject matter, not ordered as blanket production; secondly, specific articulable suspicion tied to a named offence rather than investigative curiosity; and lastly, a finding that the relevant information cannot be obtained from less intrusive sources.

For cases pertaining to Sections 113 to 117 of the BNS[73] being tried in ordinary Sessions Courts, this element applies directly; the BNSS Section 96 and Section 94 are the operative production machinery provisions, and the Sessions Court is the authorising court for such cases. Whereas for

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[70] Bharatiya Nagarik Suraksha Sanhita, *supra* note 29.
[71] Information Technology Act, *supra* note 30.
[72] Justice K.S. Puttaswamy (Retd.), *supra* note 17.
[73] Bharatiya Nyaya Sanhita, 2023, § 113–117, No. 45 of 2023, Acts of Parliament, 2023 (India).

National Investigation Agency ("**NIA**") Special Court cases, the paper recommends judicial construction of the same standard under *Puttaswamy*, with an explicit recommendation that NIA courts adopt an equivalent prior authorisation requirement via the procedural route of Section 43 of Unlawful Activities Prevention Act, 1967[74] rather than BNSS Section 96.

Moving further, the fourth element has a standard protocol and a covert investigation protocol. The standard protocol is a non-covert investigation procedure which proposes that any production order issued under Section 94 or 96 of the BNSS for AI conversation logs from a foreign platform must be served on the accused or their counsel simultaneously with service on the platform, giving the accused notice and opportunity to challenge before production in compliance with the principle of audi alteram partem. The accused in such cases has standing to apply to the authorising Sessions Court for a stay of the production order pending a proportionality hearing. Where the accused is unrepresented or cannot practically access the court, the court issuing the production order must conduct an ex parte proportionality review before issuing such orders, analogous to the judicial oversight role in warrant issuance under BNSS Section 96(2).[75]

The covert investigation protocol requires that, in early-stage investigations where simultaneous notification would alert the accused and enable destruction of other evidence or flight, particularly in cases of

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[74] Unlawful Activities Prevention Act, 1967, § 43, No. 37 of 1967, Acts of Parliament, 1967 (India).
[75] Bharatiya Nagarik Suraksha Sanhita, 2023, §96(2), No. 46 of 2023, Acts of Parliament, 2023 (India).

organised crime, terrorism and financial frauds, the court may issue a sealed production order. The sealed order mechanism commences the moment the court issues the production order and notification to the platform under seal, with the accused's notification being deferred. The sealed period is fixed at a maximum of 90 days. At the expiry of that period, one of three outcomes occurs: either the investigation has matured to arrest or charge, notification to the accused happens automatically at that stage; or if the investigation is ongoing, the prosecution may apply once for a further extension of the seal, which the court may grant only on specific articulated grounds of operational necessity and only once; or if the investigation is closed or the data goes unused, the accused is never notified because no evidence is ultimately relied upon against them. The mandatory notification obligation before evidence is tendered at trial is absolute and admits no exception.

The framework does not require contemporaneous notice; it requires proportionate intrusion. Deferred notification with a hard 90-day sunset period and a mandatory pre-trial disclosure obligation satisfies proportionality. What *Puttaswamy* does not permit, and what this framework explicitly prohibits, is indefinite non-disclosure or use of the evidence without the accused ever having an opportunity to challenge its production.

A. Institutional Safeguards

The institutional problem is real and must be addressed. If the court that issues sealed orders hears only the executive's application with no adversarial challenge, proportionality review risks being formal rather than substantive, particularly in national security contexts. To address this, a three-mechanism approach is proposed.

Firstly, the production order requires the court to apply specific criteria independently of the executive's characterisation, particularity of the logs sought, specific articulable suspicion tied to a named offence, and a finding that the relevant information cannot be obtained from less intrusive sources. These criteria constrain the executive's application without requiring an adversary to be present; the court applies them independently.

Secondly, the 90-day sunset with a single permitted extension creates a real cost to overbroad sealed orders. If the investigation does not mature within that period, the executive either discloses to the accused or permanently forfeits the right to use the evidence. This incentive structure disciplines overbroad production requests before they are made.

Thirdly, retrospective adversarial review with an exclusionary remedy. Once the accused is notified, they have full standing to challenge not just the admissibility of the evidence but the proportionality of the original production order itself. If the court on retrospective review finds the order was disproportionate and that the executive overstated necessity, the logs sought were too broad, the purpose was investigative fishing rather than specific suspicion, the evidence is excluded. The exclusionary consequence removes the incentive for executive overreach; this is precisely the justification for exclusionary remedies in evidence law generally, and it is the real structural check, not the prior authorisation alone.

The paper does not argue that all sorts of interference with privacy are impermissible. It argues that Privacy is not absolute and *Puttaswamy* says so explicitly. The argument is that AI conversation logs require a higher threshold of justification than ordinary electronic records, calibrated by the sliding scale, a judicially authorised and time-limited process where covert access is genuinely necessary, and a retrospective exclusionary remedy when the threshold is not met. This is a calibrated position, not an absolute one, and it is more defensible precisely because it acknowledges the legitimate state interest in criminal investigation while providing real structural checks on its exercise.

These four elements operate as a complete circuit; the first element governs the affirmative disclosure duty from platform to state the legislative track; the second element governs contextual admissibility, what the state may do with what it receives; the third element governs the production order threshold - the state's approach to the platform, judicially authorised and calibrated to the sliding scale; lastly, the fourth element governs the accused's procedural rights and the covert investigation protocol with the retrospective exclusionary remedy as the real institutional check. Together, they address the unguarded pathway identified throughout this paper from both ends, over-production by the state and under-protection of the accused.

IX. CONCLUSION

The BSA's modernisation of Indian evidence law,[76] in treating AI chatbot conversation logs as producible electronic records without any framework governing their specific evidentiary character, has created a maximally permissive pathway for their admission in criminal proceedings. Further, the Section 63 certificate problem,[77] the IT Act Section 69 unchecked access power,[78] and the DPDP Act's sweeping Section 17 exemptions,[79] combine to leave Indian users without any principled legal protection.

The result is a structural vacuum; the law reaches the data but provides for no principled basis for determining when that reach is legitimate and when it is not. Three doctrinal findings establish why the existing framework cannot supply that basis.

First, the Section 63(4) foreign-certifier gap is an original contribution unaddressed in existing literature. The BSA's certification architecture was designed for domestically operated systems and breaks down structurally when applied to foreign AI platforms, making compliance with the mandatory Khotkar requirement[80] practically impossible.

Second, each existing BSA privilege category fails on its own structural terms. Legal professional privilege requires a licensed advocate,

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[76] Bharatiya Sakshya Adhiniyam, *supra* note 2.
[77] Bharatiya Sakshya Adhiniyam, *supra* note 21.
[78] Information Technology Act, *supra* note 30.
[79] Digital Personal Data Protection Act, *supra* note 35.
[80] Arjun Panditrao Khotkar, *supra* note 22.

the confidentiality basis is defeated by OpenAI's own terms of service,[81] and the Marakah[82] and Jones[83] reasoning does not transfer because the Indian evidentiary enquiry is narrower than the Charter Section 8 positive rights framework.[84]

Third, the Article 21 constitutional basis, through *Selvi's* mental autonomy principle,[85] *Puttaswamy's* informational privacy doctrine,[86] and purpose limitation as a dimension of the necessity inquiry, provides the constitutional anchor for protection that the existing Indian evidence doctrine has not yet developed for this category.

The four-element framework proposed in this paper addresses each of these gaps in sequence. The legislative track, a mandatory notification duty modelled on PMLA's institutional reporting structure,[87] governs affirmative disclosure from platform to state, confined to conversations meeting a statutory imminence threshold. The judicial track, the contextual integrity admissibility standard, the prior authorisation requirement calibrated to the sliding scale of proportionality, and the retrospective exclusionary remedy govern everything else and are judicially applicable under existing constitutional authority without waiting for legislative intervention. The framework does not argue that all interference with privacy is impermissible. It argues that AI conversation logs require a higher

[81] OpenAI, *supra* note 5.
[82] Marakah, *supra* note 44.
[83] Jones, *supra* note 45.
[84] Canadian Charter of Rights and Freedoms, *supra* note 46.
[85] Selvi, *supra* note 52.
[86] Justice K.S. Puttaswamy (Retd.), *supra* note 17.
[87] Prevention of Money Laundering Act, 2002, No. 15 of 2003, Acts of Parliament, 2003 (India).

justification threshold than ordinary electronic records and that the retrospective exclusionary remedy is the real structural check on executive overreach.

AI chatbot disclosures occupy a *sui generis* evidentiary category under Indian law: neither electronic records nor privileged communications, as they are records of cognitive process disclosed in a context of perceived confidentiality whose contextual norms are fundamentally incompatible with criminal evidence production without principled oversight. Indian evidence law must recognise them as such. The framework this paper proposes gives courts the doctrinal tools to do so within existing constitutional authority, grounded in *Puttaswamy*, anchored in *Selvi*, and structured around the contextual integrity standard that Nissenbaum's framework,[88] supplies and Indian constitutional law demands.

[88] Nissenbaum, *supra* note 14.

Divyansh Chauhan & Keshav Jain, *The Subsidiary as Shadow: SEBI's 2025 Related Party Transaction Framework and the Loophole that Remained*, 12(2) NLUJ L. Rev. 79 (2026).

THE SUBSIDIARY AS SHADOW: SEBI'S 2025 RELATED PARTY TRANSACTION FRAMEWORK AND THE LOOPHOLE THAT REMAINED

~ *Divyansh Chauhan & Keshav Jain*[*]

ABSTRACT

The Fifth Amendment to the Securities and Exchange Board of India's Listing Obligations and Disclosure Requirements Regulations (2025) reworked the approach to related party transactions, primarily aimed at addressing a persistent gap: transactions through subsidiaries that avoided scrutiny at the parent company level providing subsidiary regulation. This paper looks at the structural choices built into amended Regulation 23(2), which establishes a dual-track approval framework, turnover-based for audited subsidiaries and paid-up capital-based for unaudited ones. Through careful analysis, an assessment of enforcement practice, and a comparative review of regulatory regimes in Singapore, the UK, and the US, the paper contends that the framework's precision gives rise to five interconnected weaknesses that collectively undercut its purpose.

Drawing on lessons from Singapore's group-wide aggregation model, the UK's systems-based accountability approach, and the US disclosure framework, the paper puts forward a set of focused reforms. The analysis reveals that India's framework inadvertently

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legitimizes the very loophole it sought to close and provides a clear roadmap for structured avoidance yet lacks the enforcement architecture to detect or deter it.

Keywords: *Related Party Transactions, Paid-Up Capital, Group-Wide Aggregation, Subsidiary Regulation.*

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I. INTRODUCTION

On 19th November 2025, the Securities and Exchange Board of India ("**SEBI**") notified the SEBI (Listing Obligations and Disclosure Requirements) ("**LODR**") (Fifth Amendment) Regulations, 2025, which amend selected provisions of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("**Fifth Amendment**")[1]. The Fifth Amendment introduces important modifications to the regulatory mode of listed entities, including a revised materiality threshold for related party transactions ("**RPTs**"), adjusted compliance requirements for subsidiaries, and revised disclosure requirements. Among these changes, the amendment also addressed a long-standing vulnerability in the LODR's governance structure: how RPTs undertaken through subsidiaries were to be treated. A listed company could transfer funds to a subsidiary, which would then enter into a transaction with a promoter-related party, all while remaining outside the approval mechanisms designed to protect minority shareholders. That was not a completely abusive structure, but this established a mechanism through which value could be transferred without being targeted by the scrutiny that direct transactions would attract.[2]

[1] Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Fifth Amendment) Regulations, 2025, GAZETTE OF INDIA, Extraordinary, pt III, sec. 4, Notification No. SEBI/LAD-NRO/GN/2025/273 (Nov. 18, 2025) (India).

[2] SECURITIES AND EXCHANGE BOARD OF INDIA, AGENDA FOR THE SEBI BOARD MEETING (Sept. 2025) https://www.sebi.gov.in/media-and-notifications/press-releases/sep-2025/sebi-board-meeting_96601.html.

SEBI, in amending Regulation 23(2) of the SEBI LODR regulations,[3] attempted to respond to this by putting the subsidiary transactions under the oversight net. Any of the transactions exceeding certain values would have to be approved by the Audit Committee of the parent company. The thresholds were made according to the size of the subsidiary, creating a proportional framework that appeared to balance oversight with operational flexibility. But the calibration contains design choices that need closer examination than they have received. The two differing subsidiary-specific measures of determining when parent scrutiny attaches are put forward by the framework. Both are measured against the parent's Schedule XII materiality threshold, with the lower of the two figures determining whether approval is required.[4]

This paper argues that these design choices create a paradox. They form barriers that permit evasion and makes breaches structurally invisible to law. The framework not only fails to close the subsidiary loophole; it also legitimises it by providing a roadmap for structuring transactions to evade scrutiny. This architecture creates four interlocking vulnerabilities: a fragmentation envelope that allows promoters to distribute exposure across multiple entities; a layering pathway that places transactions beyond

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[3] Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, GAZETTE OF INDIA, reg. 23(2), Notification No. SEBI/LAD-NRO/GN/2015- 16/013 (Sept. 2, 2015).

[4] Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, GAZETTE OF INDIA, reg 23, Notification No. SEBI/LAD-NRO/GN/2015- 16/013 (Sept. 2, 2015), as amended by Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Fifth Amendment) Regulations, 2025, GAZETTE OF INDIA, pt. III sec. 4, Notification No. SEBI/LAD-NRO/GN/2025/273 (Nov. 19, 2025).

regulatory reach through indirect subsidiaries; a metric distortion that systematically mismeasures subsidiary size; and a detection vacuum that renders structured avoidance invisible.

This article is divided into six sections. Part II breaks down Regulation 23(2), exploring the de minimis floor, the distinction of status of audit, the choice of metric, and aggregation architecture. Part III considers enforcement, which shows how this design decisions make violations seem structurally invisible. Part IV makes a comparison of Singapore, the United Kingdom ("**UK**") and the United States ("**US**") approaches and pinpoints the mechanisms that India is lacking. Part V provides specific reforms: aggregation of groups, inclusion of all controlled persons, certification of the net worth, reporting of below-threshold patterns, and significant sanctions. Part VI ends by considering the issue of rules-based governance in concentrated ownership markets.

II. THE ARCHITECTURE OF SUBSIDIARY OVERSIGHT

A. THE THRESHOLD PROBLEM: CALIBRATING SCRUTINY TO RISK

The Fifth Amendment introduces a fundamental shift i.e. transactions carried out by subsidiaries shall be assessed prior to their measurement against the size of the subsidiary itself before being assessed against the materiality level of the parent under amended Regulation 23(2)[5]. For subsidiaries with audited financial statements, the relevant metric is turnover; for those without, it is paid-up capital plus the securities premium

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[5] SEBI (LODR) Regulations, reg. 23(2).

account.[6] In either case, Audit Committee approval is triggered only where the RPT exceeds one crore rupees and its value exceeds the lower of the applicable subsidiary-specific benchmark and the listed entity's Schedule XII threshold.[7]

In order to grasp the reason behind the adoption of this form, the predecessor of the new framework must be explored. Any regulatory framework on the RPTs should necessarily respond to a key question: when is a transaction deemed substantial enough to be subject to oversight? This is a question about how the regulator conceptualises risk and what it treats as a proxy for materiality. The pre-amendment framework answered this question by tying subsidiary scrutiny to the parent's turnover.[8] A subsidiary transaction required parent audit committee approval only if it exceeded ten per cent of the parent's consolidated turnover.[9] This decision reflected a certain theory: the importance of the transaction to the listed entity and not to the subsidiary in which it is carried out. However, it presupposed one thing: the turnover of the parent is the relevant yardstick against which all subsidiary transactions may be measured, no matter the size of the subsidiary. To illustrate the same, let's consider a listed parent company with a turnover of fifty thousand crore rupees and a subsidiary with a turnover of five hundred crore rupees. The subsidiary had the ability to enter into transactions with the related parties to the extent of five thousand crore rupees without leading to parent scrutiny under the pre-amendment

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[6] *Id.*
[7] *Id sch. XII (as amended in 2025).*
[8] SEBI (LODR) Regulations, reg. 23(2).
[9] SEBI (LODR) Regulations, reg. 23(2) (prior to the 2023 threshold revision).

regime. In theory, the subsidiary is allowed to sell its entire value on several occasions to the related parties without the Audit Committee of the parent company being notified at all. This was essentially due to a conceptual mislocation of the reference point.

It was the above-stated conceptual deficiency that the Fifth Amendment sought to address. The rationale underlying SEBI's introduction of the Fifth Amendment to the related party transaction framework appears to have extended beyond the objective of preventing regulatory evasion, as the amendments sought to rationalise compliance by reducing disproportionate burdens on listed entities, particularly in relation to routine or low-value subsidiary transactions. The adoption of turnover as the relevant threshold metric for audited subsidiaries and paid-up capital plus securities premium account for unaudited subsidiaries reflects SEBI's preference for objective, readily verifiable financial proxies capable of consistent application across diverse group structures. Turnover was chosen as a familiar indicator of business scale, while paid-up capital served as a practical proxy where audited turnover data was unavailable.[10] Although these metrics promote administrability and ease of compliance, they may not always capture economic substance. Accordingly, the criticism advanced in this paper is not that SEBI's chosen metrics lack regulatory logic, but that their rationale remains incomplete when viewed against the

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[10] SECURITIES AND EXCHANGE BOARD OF INDIA, CONSULTATION PAPER ON AMENDMENTS TO PROVISIONS RELATING TO RELATED PARTY TRANSACTIONS UNDER SEBI (LODR) REGULATIONS, 2015 (Aug 4. 2025), https://www.sebi.gov.in/reports-and-statistics/reports/aug-2025/consultation-paper-on-amendments-to-provisions-relating-to-related-party-transactions-under-sebi-lodr-regulations-2015-and-circulars-thereunder_95824.html.

risks of transaction fragmentation, corporate structuring, and cross-subsidiary avoidance.

The amended framework accordingly replaces the parent-centric benchmark with subsidiary-specific metrics. A transaction is now measured against the subsidiary's own size before being compared to the parent's threshold. The question now becomes: what is the right subsidiary-specific metric, and does the framework's choice create its own distortions? The answer is a binary rule: turnover for audited subsidiaries, paid-up capital for unaudited ones.[11] Firstly, it assumes that turnover is the appropriate measure of a subsidiary's significance., The Companies Act, 2013 defines "turnover" as the gross revenue recognised from the sale, supply or distribution of goods or rendering of services during a financial year.[12] Therefore, it operates only as a proxy for the scale of commercial activity and does not necessarily reflect profitability, asset base or the strategic market significance of the undertaking. A high-turnover subsidiary may nevertheless have limited economic significance where its profitability is comparatively low. Conversely, a subsidiary with modest turnover may be strategically significant because of its intellectual property, market access, or other commercially valuable assets.

Secondly, the amendments assume that paid-up capital is an acceptable substitute when audited turnover figures are unavailable. Paid-up share capital is defined as the aggregate amount credited as paid on shares issued by a company and therefore reflects the equity contributions

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[11] SEBI (LODR) Regulations, reg. 23.
[12] Companies Act No. 18 of 2013, INDIA CODE § 2(91) (2013) (India).

made by shareholders at the time of issuance of shares rather than the evolving financial position of the enterprise.[13] For newly formed subsidiaries, paid-up capital may be the only reliable figure available. In the case of holding companies or investment vehicles, paid-up capital can be more important than turnover, which might be insignificant. However, paid-up capital does not have the necessary correlation with scale or economic substance of operations of a subsidiary.[14] A service subsidiary that is mainly financed by debt can have minimal paid-up capital even though it is generating huge amount of revenue. A profitable subsidiary that has retained earnings for years may have a capital base that is a fraction of its actual net worth. The metric systematically underscores the size of businesses that are financed via debt or expansion, and overscores the size of holding companies with vast capital bases but slight procedures.

The outcome is that the framework has alignment issues of its own. A low-capital-service subsidiary with high revenue is at radically different headroom in regulation, depending on whether it has passed the one-year audit test. An identical business funded through debt rather than equity faces tighter constraints for no reason related to governance. A subsidiary which has expanded as a result of retained earnings receives no increment even though its economic substance is on the rise. By so doing, it incentivises on the promoters to shape their affairs not based on business requirements but based on regulatory measures within the purview of

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[13] *Id § 2(64).*

[14] Ankit Singhi & Janvi Dhingra, *Treatment of Share Capital: Companies Act vis-à-vis Ind AS and MCA Filings*, CORPORATE PROFESSIONALS (Sept. 15, 2025), https://www.corporateprofessionals.com/articles/treatment-of-share-capital-companies-act-vis-a-vis-ind-as-and-mca-filings/.

audits, ensuring the turnover threshold is favourable. This may create a regulatory preference for equity financing over debt, as a higher equity base would permit greater transaction value before the regulatory threshold is triggered, irrespective of the underlying commercial rationale.

B. THE DE MINIMIS FLOOR: THE ONE CRORE RUPEE QUESTION

The decision to exempt all subsidiary transactions below one crore rupees from parent audit committee approval is the first and most fundamental design choice in the amended framework. This is not a threshold calibrated to subsidiary size; it is a floor that applies regardless of whether the subsidiary is a newly incorporated entity with minimal capital or a substantial operating company approaching the parent's materiality threshold. Such a floor is justified by the stakeholder feedback that has been obtained during the consultation process. SEBI saw this clearly in its consultation paper of August 2025, in which it clearly recognised the claims of stakeholders that compliance was burdensome, especially with respect to routine or low-value transactions.[15] According to SEBI, increasing the difficulty of all subsidiary transactions, including small ones, disclosed and approved would increase costs, which would exceed any governance benefit that could accrue. After such consultations, the Industry Standards Forum made submissions to affect a relaxation of smaller and less-risky RPTs bearing disproportionate disclosure requirements.[16] The choice of

[15] SECURITIES AND EXCHANGE BOARD OF INDIA, *supra* note 10.
[16] SECURITIES AND EXCHANGE BOARD OF INDIA, CIRCULAR ON MINIMUM INFORMATION TO BE PROVIDED TO THE AUDIT COMMITTEE AND SHAREHOLDERS FOR APPROVAL OF RELATED PARTY TRANSACTIONS 2 (Oct. 13,2025), https://www.sebi.gov.in/legal/circulars/oct-2025/minimum-information-to-be-

one crore rupees itself reflects the regulatory judgment involved in balancing effective oversight against the compliance burden imposed on listed entities and their subsidiaries. More significant than the particular monetary threshold, however, is the structure of the exemption itself.

The one crore floor creates what might be called a "fragmentation envelope", a space within which transactions can be structured to avoid oversight by distributing them across related parties, across subsidiaries, or across both dimensions.[17] Consider a promoter who wishes to move significant value to a related party without triggering parent audit committee approval. Under the current framework, this can be achieved through three distinct fragmentation strategies. *First*, the promoter can fragment across related parties. A subsidiary could do ninety-nine lakh rupees of transactions with each of ten different entities that are all, in substance, part of the same promoter network. Each relationship stays beneath the one crore threshold, so no approval is required. *Second*, the promoter can fragment across subsidiaries. Using five different subsidiaries, each doing ninety-nine lakh rupees of transactions with the same related party, achieves nearly five crores of total related party exposure without any single subsidiary crossing the threshold. *Third*, the promoter can combine both strategies, creating a matrix of transactions across multiple subsidiaries and multiple related parties that, in aggregate, moves substantial value while each individual transaction remains beneath the regulatory radar.

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provided-to-the-audit-committee-and-shareholders-for-approval-of-related-party-transactions_97281.html.

[17] *Case Study 1 - Related Party Transactions,* VINOD KOTHARI CONSULTANTS (July 6, 2021), https://vinodkothari.com/2021/07/case-study-i-related-party-transactions-case-1/.

The dangers of such fragmentation were addressed in the landmark case of Linde India Ltd. v. SEBI.[18] In that case, the Securities Appellate Tribunal ("**SAT**") held that Regulation 23 consistently uses the plural term "Related Party Transactions" to address RPTs for aggregation, which implies that all transactions *qua* a related party are to be considered for testing materiality and not *qua* a single contract. The same logic applies to fragmentation across related parties and subsidiaries. If splitting across contracts to avoid aggregation defeats the purpose of the regulation, so does splitting across related parties that are economically connected, or across subsidiaries under common control. Yet the current framework's one crore floor, with its per-related-party and per-subsidiary structure, recreates a version of the same vulnerability, just at a different scale.

C. The Audit Status Distinction: Why One Year Matters

Another major design choice is the distinction between subsidiaries with at least one year of audited financial statements and those without such statements. The underlying presumption of distinguishing based on audit status is straightforward: it provides reliable, verified information,[19] and without such statements, the regulator cannot confidently use turnover as a metric due to potential unreliability. For subsidiaries with unaudited financial statements, the chosen alternative is paid-up capital plus securities

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[18] *Linde India Ltd. v. Securities & Exchange Board of India*, 2025 SCC OnLine SAT 460 (India).

[19] Institute of Chartered Accountants of India, Standard on Auditing (SA) 200: Overall Objectives of the Independent Auditor and the Conduct of an Audit in Accordance with Standards on Auditing (2010), https://www.caalley.com/eqc/18132sa200_rev.pdf.

premium account. The regulation could have mandated audited financials for any period; since even a single audited statement provides more reliable information than none at all. Alternatively, it could have mandated two or three years of audited statements, given that a longer audit history provides greater assurance about the subsidiary's financial stability and reduces the risk of manipulation through a one-time audit clean-up.[20]

The one-year requirement may produce divergent incentives for promoters. Once a subsidiary has audited financial statements for at least one year, it becomes subject to the turnover-based threshold, which may encourage promoters to complete the audit process promptly. This is broadly consistent with the regulatory objective of promoting financial transparency. Conversely, where the capital-based threshold is more favourable, promoters may have an incentive to delay the subsidiary's transition to the turnover-based regime or restructure the subsidiary before the one-year period is completed. The regulation also does not provide guidance on what constitutes a new subsidiary for this purpose, creating uncertainty and potential for avoidance.

D. THE AGGREGATION ARCHITECTURE: WITHIN BUT NOT ACROSS

For transactions involving a subsidiary, the regulation requires their value to be assessed individually or cumulatively with previous transactions entered into during the financial year.[21] Notably, the regulation does not mandate aggregation between various subsidiaries. The transactions

[20] David S. Jenkins & Uma Velury, *Does Auditor Tenure Influence the Reporting of Conservative Earnings*, 27 J. ACCT. & PUB. POL'Y 115 (2008).

[21] LODR Regulations, reg 23(2).

involving the same related party done by different subsidiaries are tested independently against the threshold of different subsidiaries. This creates what can be termed as a "boundary problem": the structure describes the unit of analysis as the individual subsidiary but not the exposure of the group as a whole to a given related party.

The boundary problem has both horizontal and vertical dimensions. In the horizontal approach, a promoter may have several subsidiaries, each of which is carrying out transactions with the same related party up to a certain threshold but none of which will provoke scrutiny. The overall exposure of a group to that party may be high, although the exposure of an individual subsidiary may be within the authorized range. As long as a promoter has ten audited subsidiaries with Rs. 500 crore turnover per subsidiary, RPTs of five hundred crore rupees could go undisclosed. It is the same case for subsidiaries which are not audited and have Rs. 10 crore capital each, RPTs of up to ten crore rupees can escape scrutiny. The potential for regulatory fragmentation increases with the number of entities within a corporate group. Regulation 23(2) expressly applies to transactions involving a subsidiary of the listed entity, but does not clearly address transactions undertaken at lower levels of a subsidiary chain. Thus, where a subsidiary has subsidiaries of its own, transactions at the indirect-subsidiary level may fall outside the express scope of the provision, particularly where the listed entity is not a party to the transaction. This creates a potential gap in oversight and may permit transactions to be structured across multiple levels of a corporate group without triggering the approval requirements applicable to direct subsidiaries.

III. THE ENFORCEMENT PARADOX

A regulatory framework is not merely a set of commands; it is a system of detection, enforcement, and sanction. They are suggestions; their binding quality is an illusion sustained only by the willingness of regulated entities to comply voluntarily.[22] The issue discussed in this section is whether Regulation 23(2) establishes an effective enforcement framework, whether aspects of its design create systemic obstacles to detecting and penalising non-compliance.

A. ARCHITECTURE OF DETECTION

In the context of subsidiary RPTs, several actors may contribute to their detection, although each operates within certain limitations. The body that approves subsidiary transactions crossing the given threshold is the Audit Committee. In accordance with the Companies Act, 2013, Regulation 23(2),[23] used with Section 177,[24] the Audit Committee has to issue prior approval for any subsidiary RPT which is above the applicable threshold. Nonetheless, the Audit Committee will be acting in a certain informational environment. It receives materials prepared by management; it does not typically conduct independent investigations of subsidiary activity unless

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22 ROBERT BALDWIN, MARTIN CAVE & MARTIN LODGE, UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE, 245 (2d ed. Oxford Univ. Press 2012).
23 LODR Regulations, reg. 23(2).
24 Companies Act, § 177.

triggered by specific concerns.[25] The Committee's effectiveness depends on the quality and completeness of information provided by management. The new Industry Standards mandate that management provide a certificate from the Chief Executive Officer ("**CEO**") or Chief Financial Officer ("**CFO**") confirming that proposed RPTs are in the company's interest.[26] The Audit Committee may also seek additional information at its discretion.[27] However, the framework does not require subsidiaries to report transactions that fall below approval thresholds, nor does it mandate that the Audit Committee independently verify the completeness of management's disclosures.

The statutory auditor's responsibilities are governed by Section 143 of the Companies Act, 2013,[28] and the Standards on Auditing issued by the Institute of Chartered Accountants of India Standards on Auditing 550 ("**SA 550**") (Related Parties) requires the auditor to obtain an understanding of related party relationships and transactions sufficient to identify risks of material misstatement.[29] SA 550 requires the auditor to consider whether transactions have been appropriately authorized, however, this is in the context of evaluating whether they might be indicative of fraud or error. If a transaction is structured to fall below approval thresholds and does not

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[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id. § 143.*
[29] INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA, STANDARD ON AUDITING (SA) 550: RELATED PARTIES (REV. 2016) (2009), HTTPS://CAALLEY.COM/EQC/15397LINK32_550TEXT.PDF.

appear in the financial statements, for example, the auditor has no basis to detect it.

Stock exchanges receive periodic disclosures from listed entities under Regulation 23(9) of the LODR Regulations. This provision requires listed entities to submit a statement of related party transactions within the timeframe specified in SEBI's circulars.[30] Under the Securities Contracts (Regulation) Act, 1956, and the LODR Regulations, exchanges are responsible for ensuring compliance with listing conditions, but their surveillance functions under Regulation 33 of the LODR Regulations focus primarily on price-sensitive information, market manipulation, and continuous listing requirements.[31] The completeness of RPT disclosures is not typically a subject of proactive exchange surveillance, as exchanges lack the investigative machinery to verify the accuracy of every filed disclosure. Importantly, not all listed entities are even required to be companies.[32] The exchange does not conduct independent investigations into whether transactions were improperly omitted from disclosures, as this would require access to books and records beyond its statutory mandate.[33]

SEBI's enforcement data shows that between 2020 and 2025, the regulator disposed of approximately 450 cases related to RPT violations across all listed entities, a fraction of the over 5,000 listed companies.[34] The

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[30] LODR Regulations, reg. 23(9).
[31] *Id. reg. 33.*
[32] *Id. reg. 15(2).*
[33] Securities and Exchange Board of India Act, No. 15 of 1992, § 11C (Ind.).
[34] PTI, *SEBI Asks MIIs to Resolve Whistleblower Complaints in 60 Days, Outlines Guidelines on Governance*, ECON. TIMES (Nov. 22, 2024), https://economictimes.indiatimes.com/markets/stocks/news/sebi-asks-miis-to-resolve-

regulator prioritises cases involving significant investor harm, market manipulation, or systemic risk. Subsidiary-level RPTs that are structured to avoid thresholds are unlikely to surface through routine surveillance because they generate no public disclosures.[35]As the Karma Energy,[36] and the Zuari Agro cases illustrate,[37] SEBI's enforcement actions typically occur after significant violations have already occurred, often years after the fact, and usually only when the violation is large enough to attract attention through other means such as whistleblower complaints or media reports. The detection architecture thus relies on self-reporting and periodic review. It has no mechanism for real-time monitoring of subsidiary transactions, no requirement for subsidiaries to report their RPT activity directly to anybody, and no independent verification of the completeness of disclosures.

B. THE SANCTION STRUCTURE: WHAT HAPPENS WHEN VIOLATIONS ARE FOUND?

Recent enforcement initiatives demonstrate both the potential and limitations of SEBI's enforcement apparatus and, more importantly, the inability of the existing framework to prevent the forms of regulatory avoidance identified in this paper.

whistleblower-complaints-in-60-days-outlines-guidelines-on-governance/articleshow/115573362.cms.

[35] *In re* Karma Energy Ltd., (2025) SCC OnLine SEBI-AO 32 (Ind.).

[36] *In re* Karma Energy Ltd., Adjudication Order No. Order/JS/YK/2025-26/31530, Securities & Exchange Board of India (July 10, 2025).

[37] *In re* Zuari Agro Chemicals Ltd., Settlement Order No. SO/AK/GN/2025-26/8384-8388, Securities & Exchange Board of India (Mar. 5, 2026).

The case of Zuari Agro Chemicals,[38] which was settled in March 2026, dealt with material related-party transactions of Rs. 811.33 crore, which were made without any prior permission of the Audit Committee or the shareholders. The company was also accused of financial statement misstatements and bad accounting. The case was resolved at a sum total of Rs. 2.91 crore, with the company and four officials paying the amount and giving voluntary three- to four-month trading bans. The Zuari Agro settlement depicts two points of importance. The 0.36 per cent penalty of transaction value was economically insignificant. To a promoter who considers whether to abide by the approval conditions or risk not abiding by the approval conditions, the cost of violation is significantly less in comparison to that of compliance since that involves delay, scrutiny and could even lead to rejection of the transaction. Second, the out-of-court settlement is an indication that there is no record in the court which can be used by the shareholders in a future legal action.

In the case of Karma Energy,[39] the company made an inter-corporate deposit of Rs. 4.62 crore without prior permission of the shareholders to the related party. The company acknowledged the lapse, and it later received post-facto approval with 99.97 per cent shareholder support. SEBI did, however, impose a monetary penalty of Rs. 2 lakhs, but it highlighted that the post-facto approval is not a valid substitute for prior approval. This shows that in jurisdictions where there is an admission of a violation that is later sanctioned by shareholders, the penalty is almost

[38] *In re* Zuari Agro Chemicals Ltd., Settlement Order No. SO/AK/GN/2025-26/8384-8388, Securities & Exchange Board of India (Mar. 5, 2026).
[39] *Karma Energy Ltd.*, 2025 SCC OnLine SEBI-AO 32, ¶ - (Ind.).

insignificant. More importantly, this case sends the message that the framework is concerned with curing individual violations after they occur rather than the prevention of the underlying behaviour. When the reward of non-compliance is a minor penalty and a postponed approval process, then *ex ante* incentive to comply is low.

In December 2024, in the Premier Polyfilm case, RPTs were entered into without the approval of the Audit Committee.[40] The company claimed that it had erroneously assumed that the counterparties were not parties of the first part. SEBI did not accept this defence and said that lack of knowledge of law could not be used as a defence. The penalty imposed was Rs. 3 lakhs. It supports the fact that SEBI will penalize even in those cases when the breach is unintentional; ensuring deterence. However, this also brings out the constraints of a transaction-by-transaction enforcement method. The judgment error made by the company was regarding the relationship between the two parties. More advanced types of avoidance that this paper will identify contain no such error; they consist of a conscious form of structuring to remain within the literal meaning of the provisions. The framework does not contemplate potential abuse of structure or circumvention by design; therefore, actions that are carefully devised to take advantage of the loopholes in the rules are not sanctionable at all.

These cases reveal several patterns. *Firstly,* sanctions are typically monetary and relatively modest for most violations. *Secondly,* settlement is a

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[40] *In re* Premier Polyfilm Ltd., Adjudication Order No. Order/AS/DP/2024-25/31031, Securities & Exchange Board of India (Dec. 9, 2024).

common outcome, allowing companies to resolve matters without admission of liability and with penalties that are small relative to the transaction values involved. This eliminates any reputational deterrent and prevents the creation of a public record. *Thirdly,* the focus is on individual transactions that clearly crossed thresholds, not on patterns of fragmentation or avoidance.

IV. COMPARATIVE PERSPECTIVES: SUBSIDIARY RPT REGULATION IN SINGAPORE, THE UK, AND THE US

This section discusses the treatment of RPTs at the subsidiary level in three jurisdictions, namely Singapore, the UK and the US. These jurisdictions are chosen for their relevance: Singapore as an emerging Asian market with a comprehensive rule-based regime, the UK as the original country of the "comply or explain approach" to corporate governance, and the US as an example of a disclosure-based system with *ex post* enforcement.

A. SINGAPORE: GROUP-WIDE AGGREGATION AND SUBSTANCE OVER FORM

Singapore's approach to interested person transactions ("**IPTs**") is governed by Chapter 9 of the Singapore Exchange ("**SGX**") Listing Rules, and is similar to India's rule-based approach.[41] Similar to India, Singapore prescribes thresholds for disclosure as well as shareholder consent.[42] According to Chapter 9, IPTs entered into with the same interested person

[41] SINGAPORE EXCHANGE SECURITIES TRADING LTD., LISTING MANUAL r. 905 (ch. 9, Interested Person Transactions).
[42] *Id rr. 905–906 (ch. 9, Interested Person Transactions).*

are aggregated together in order to establish whether disclosure or shareholder approval thresholds are breached.[43] This aggregation is not only applied to individual subsidiaries but also to the group. Most importantly, the Singapore rules incorporate the notion of primary interested persons, that is, directors, CEOs and controlling shareholders of the issuer. To aggregate transactions, an entity at risk is subject to transactions with a primary interested person, and an associate of the primary interested person is subjected to transactions with the entity at risk. They are both considered transactions with an interested person. This ensures that RPTs are not entered into using the fragmentation strategy, allowed by the Indian framework, in which a promoter may deal through a variety of associates without requiring legal disclosure.

The aggregation principle has limits as it does not apply to associates of associates, but it goes much further in comparison to the entity-by-entity approach of India. Moreover, the SGX has discretionary power to aggregate separate IPTs below the $100,000 *de minimis* threshold if they are entered into during the same financial year, having regard to the substance rather than the form of the transactions.[44] This is a potent anti-avoidance device, which India does not have. The Singapore regulations apply specifically to transactions which are made by subsidiaries or related companies of the issuer. The aim of Chapter 9 is to protect against the risk of interested persons causing the issuer, its subsidiaries or related firms to make transactions that are going to have adverse impacts on the interests

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[43] *Id r. 904 (ch. 9, Interested Person Transactions).*
[44] *Id rr. 905(4) (ch. 9, Interested Person Transactions).*

of the issuer or its shareholders.[45] In the case of IPTs, which exceed the appropriate thresholds, Singapore demands elaborate disclosure, including, where practicable, the book value of the assets, the net profit which the assets can generate, and the most recent open market value.[46] The annual reports are required to reveal the character of the known relationship between the issuer and the interested person, and general requirements of IPTs are required to name interested persons but not by category. These demands provide a transparent regime.

India is administratively capable of implementing group-wide aggregation for much the same reason as Singapore: listed entities already prepare consolidated financial statements incorporating their subsidiaries, providing an established framework for accessing and assessing group-level financial information.[47] Section 129(3) of the Companies Act, 2013 requires companies with one or more subsidiaries to prepare consolidated financial statements.[48] Similarly, Ind AS 110 requires a parent that controls one or more entities to present consolidated financial statements. [49] The legal framework already requires listed entities to maintain and consolidate group-level financial information. Requiring listed entities to use this existing information infrastructure to aggregate RPTs across the group

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[45] Singapore Exchange Securities Trading Ltd., LISTING MANUAL ch. 9, Introduction (Interested Person Transactions).
[46] *Id* at rr. 905, 907 (ch. 9, Interested Person Transactions).
[47] The Companies Act, § 129(3) (India); INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA, Indian Accounting Standard (Ind AS) 110: Consolidated Financial Statements, G.S.R. 111(E), ¶¶ 4, 19 (Feb. 16, 2015).
[48] Companies Act, § 129(3) (India).
[49] INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA, Indian Accounting Standard (Ind AS) 110: Consolidated Financial Statements, G.S.R. 111(E), ¶¶ 4, 19 (Feb. 16, 2015).

would therefore build upon, rather than create, new compliance systems. Further, the Industry Standards already require listed entities to maintain RPT records, providing an existing compliance framework that could be extended to facilitate group-wide aggregation.[50] The addition of associates of key interested individuals deals with a particular weakness of promoters-led groups in India. Indian corporate setups are marked by intricate webs of organizations such as family trusts, partnership firms, privately owned companies, with formally different entities that are economically run by the same family of promoters.[51] The solution of Singapore to treat transactions with associates of primary interested persons as transactions with the interested person would seal the fragmentation envelope through which promoters may divide their RPTs across two or more related entities.

B. UK: PRINCIPLES-BASED OVERSIGHT AND AGGREGATION REQUIREMENTS

The UK Listing Rule 11.1.11 requires that RPTs be aggregated for a rolling 12-month period.[52] This aggregation applies across transactions with the same related party, and the Financial Control Authority ("**FCA**") has demonstrated its willingness to enforce this requirement. In a 2015

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50 SECURITIES AND EXCHANGE BOARD OF INDIA, INDUSTRY STANDARDS ON MINIMUM INFORMATION TO BE PROVIDED TO THE AUDIT COMMITTEE AND SHAREHOLDERS FOR APPROVAL OF RELATED PARTY TRANSACTIONS (Oct 13, 2025), https://www.sebi.gov.in/legal/circulars/oct-2025/minimum-information-to-be-provided-to-the-audit-committee-and-shareholders-for-approval-of-related-party-transactions_97281.html.

51 Tarun Khanna & Jan W. Rivkin, *Interorganisational Ties and Business Group Boundaries: Evidence from an Emerging Economy*, 17 ORG. SCI. 333 (2006).

52 FINANCIAL CONDUCT AUTHORITY, FCA HANDBOOK: LISTING RULES LR 11.1.11R (2024), https://handbook.fca.org.uk/handbook/uklr11/uklr11s1.

enforcement action against Asia Resource Minerals, the FCA fined the company for failing to aggregate three transactions with companies associated with a non-executive director.[53] Had the transactions been properly aggregated, the rules for smaller related party transactions would have applied, requiring notification to the FCA and confirmation that the transactions were fair and reasonable. This enforcement action shows that failure to abide by the law on-aggregation is considered a severe violation. The listed parent is subject to more scrutiny on subsidiary transactions under Rule 11.1.4 of the regime.[54]

In *Asia Resource Minerals*, the transactions were entered into by an Indonesian subsidiary, yet the FCA treated them as transactions subject to the related party requirements of the UK Listing Rules.[55] The case demonstrates that the listed parent bears responsibility for ensuring compliance with applicable RPT requirements across its group, preventing transactions undertaken through subsidiaries from circumventing requirements that would have applied had the listed parent been the counterparty.

Rolling 12-month aggregation would also be relatively straightforward to implement. The existing framework already requires aggregation of transactions during a financial year; extending this to a

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53 FINANCIAL CONDUCT AUTHORITY, FINAL NOTICE: ASIA RESOURCE MINERALS PLC (June 12, 2015), https://www.fca.org.uk/publication/final-notices/asia-resource-minerals.pdf.

54 FINANCIAL CONDUCT AUTHORITY, FCA HANDBOOK: LISTING RULES LR 11.1.4R, https://handbook.fca.org.uk/handbook/lr11/lr11s1?date=27-07-2024&timeline=true.

55 FINANCIAL CONDUCT AUTHORITY, FCA Handbook: Listing Principles Listing Principle, https://handbook.fca.org.uk/handbook/lr11/lr11s1?date=27-07-2024&timeline=true.

rolling 12-month period would primarily require listed entities to maintain a continuous cumulative record rather than reset the calculation at the end of each financial year.

It is the Kalyani Steels case,[56] where breaches took place over several years, that highlighted the importance of preventing fragmentation of RPTs to escape regulatory scrutiny. In India, the implication of attributing the subsidiary transactions to the parent is not yet fully practiced.[57] Under the Indian framework, however, transactions undertaken by subsidiaries are presently treated as subsidiary-specific transactions subject to oversight by the listed parent under Regulation 23(2), rather than being attributed to the listed entity for the purpose of aggregation. The UK approach, by contrast, treats transactions undertaken by subsidiary undertakings as transactions of the listed entity for the purposes of the related party framework, thereby facilitating group-wide aggregation.[58] This would involve amending Regulation 23 to consider transactions of any controlled entity as transactions of the listed entity, a formulation that builds on the definition of control that is in Companies Act and LODR Regulations.

The cases of Zuari Agro, Karma Energy, and Premier Polyfilm all included failures, which were symptoms of failure in internal processes,

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56 *In re* Kalyani Steels Ltd., 2026 SCC OnLine SEBI-SO 5.

57 LODR Regulations, reg. 23(2).

58 FINANCIAL CONDUCT AUTHORITY, FCA HANDBOOK: UKLR 8.2 REQUIREMENTS FOR RELATED PARTY TRANSACTIONS, HTTPS://HANDBOOK.FCA.ORG.UK/HANDBOOK/UKLR8/UKLR8S2.; FINANCIAL CONDUCT AUTHORITY, FINAL NOTICE: ASIA RESOURCE MINERALS PLC (FORMERLY BUMI PLC) (June 12, 2015), https://www.fca.org.uk/publication/final-notices/asia-resource-minerals.pdf.

rather than lapse of single nature. India has an opportunity to incorporate a principle which resembles UK Listing Principle 1 by means of SEBI guidelines and shift the regulation from an organisational-level regulation to a transaction-level one. The current powers of SEBI in Section 11B would facilitate the practice of such a principle and Industry Standards already tend towards this direction.[59]

C. US: Subsidiary Attribution Disclosure-Based Regulation

The core provision is Item 404 of Regulation S-K,[60] which requires disclosure of transactions since the beginning of the previous fiscal year involving a related person where the amount exceeds $120,000 and the related person has a direct or indirect material interest in the transaction.[61] The list of related persons also comprises directors, executive officers, nominees, and beneficial owners of over five per cent of any class of voting securities and their immediate family members.[62] The guidelines are clear that when it comes to subsidiaries, these transactions have to be taken into consideration.[63]

In one interpretive response, the Securities and Exchange Commission ("**SEC**") staff addressed a scenario where an officer and director of a wholly owned subsidiary who was not an officer or director of the parent had a brother who did business with the subsidiary in excess of

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[59] Securities and Exchange Board of India Act, § 11B.
[60] Regulation S-K, Item 404(a), 17 C.F.R. § 229.404(a) (2025).
[61] *Id instr. 4*.
[62] Regulation S-K, Item 404(a), 17 C.F.R. § 229.404(a).
[63] Securities Exchange Act of 1934, Pub. L. No. 73-291, § 10(b), 48 Stat. 881, 891 (codified as amended at 15 U.S.C. § 78j(b)).

the $120,000 threshold. The staff concluded that disclosure was not required because the officer was not a person described in the instructions.[64] The implication is that if the officer had been a director of the parent, or if the transaction had involved the parent directly, disclosure would have been required. Instruction 4 to Item 404 provides that in determining whether a related person has a direct or indirect material interest, the interest should be determined without regard to whether the interest is shared by all holders of a class of securities. The US regime is backed by the threat of enforcement action by the SEC and by private litigation. Material misstatements or omissions in RPT disclosures can give rise to liability under the securities laws. This *ex-post* enforcement creates incentives for careful attention to disclosure obligations.

Attribution of subsidiary transactions to the parent for disclosure purposes is achievable in India through the same mechanism described for the UK: deeming subsidiary transactions to be transactions of the parent for disclosure obligations. Half-yearly RPT disclosures are already required by regulation 23(9).[65] This lower-cost intervention is better than approval-based aggregation because it imposes only a reporting obligation, not prior approval, enabling shareholders and regulators to see currently invisible patterns without impeding business operations.

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[64] Division of Corporation Finance, United States Securities & Exchange Commission, *Item 404 of Regulation S-K - Transactions with Related Persons, Promoters and Certain Control Persons* (Aug. 8, 2007), https://www.sec.gov/divisions/corpfin/guidance/execcomp404interp.htm.
[65] LODR Regulations, reg. 23(2).

The US focus on materiality judgments can also be used to inform the purpose and effect test in India. Instruction 4 to Item 404 calls on materiality to be ascertained without consideration of whether such interest is common to all holders of a species of securities and with an eye to materiality to the pertinent person or firm, rather than materiality to shareholders. This principle would help Indian audit committees when utilising the purpose and effect test to shift it towards a substantive investigation. SEBI could similarly issue interpretive guidance, drawing on the SEC's approach, with examples of transactions structured through intermediaries that should nevertheless be treated as RPTs. Such adaptations would be feasible because they can build on the existing concepts of control and attribution, the disclosure requirements under Regulation 23(9), and materiality guidance issued through SEBI circulars.

D. COMPARATIVE ANALYSIS

Notwithstanding institutional differences, the regimes governing RPTS in Singapore, the UK and the US address the same structural problem of related party transactions within groups characterised by concentrated control using mechanisms that could be administratively feasible in India. Like India, Singapore's market is dominated by promoter-led business groups and concentrated ownership,[66] which renders its group-

[66] Singapore Exchange, *Consistent performers amongst SGX's family empire - linked plays,* THE EDGE MALAYSIA (June 12, 2019) https://theedgemalaysia.com/article/consistent-performers-amongst-sgxs-family-empirelinked-plays; Luh Luh Lan, *Corporate Governance in Singapore - The Road Thus Far,* (ECGI Working Paper Series in Law, Working Paper No 667/2022), https://www.ecgi.global/sites/default/files/working_papers/documents/corporategovernanceinsingaporeecgi_0.pdf.

wide aggregation of interested person transactions directly relevant to the Indian context.

Similarly, the UK's principles-based, systems-and-controls model is compatible with India's existing audit-committee and internal-control architecture under the Companies Act and SEBI's industry standards; requiring listed companies to maintain adequate procedures to identify, aggregate and disclose related party transactions. This approach would build on the current legal infrastructure rather than requiring creation of new institutions.[67] The US disclosure-based regime is equally pertinent: Indian listed entities already file periodic related-party disclosures and are subject to SEBI's ex-post enforcement powers, so that enhanced attribution and materiality guidance can be layered onto the existing reporting framework without overhauling the entire regime.

While importing foreign institutions wholesale is not feasible, adapting mechanisms that fit India's concentrated ownership patterns, its promoter-dominated corporate landscape, and its existing regulatory and reporting infrastructure is viable. However, there are aspects where the countries don't intersect. The comparative analysis shows that India has an outlier framework in three essential aspects. In contrast to Singapore, the UK and the US, where subsidiary transactions are consolidated to the parent entity, and some level of aggregation among entities is required, India makes consolidations within subsidiaries but not between them, which produces a fragmentation envelope, making exposure to the group invisible. In Singapore, regulators have discretionary authority to look

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67 Financial Conduct Authority, *supra* note 58.

behind the veil to uncover the substance of transactions,[68] while in India, strict rules treat the requirement for transactions to fit within an exemption as sacrosanct, regardless of their actual economic impact.[69].Further, in contrast to the UK, where systems and controls are required to guarantee compliance, the Indian framework is specific on the threshold details and does not mention the internal processes that the issuers are required to institute.[70] It is especially consequential that India introduces the requirement of approval rather than just disclosure, since fragmentation results in transactions which are completely hidden from all kinds of oversight, whether by the SEBI or by the general population.

V. REFORM PROPOSALS: RETHINKING THE ARCHITECTURE OF SUBSIDIARY OVERSIGHT

A. FROM ENTITY-LEVEL TO GROUP-LEVEL AGGREGATION

The lack of cross-subsidiary aggregation, whereby the transactions of each subsidiary are treated separately, enables a promoter to attain a significant aggregate related-party exposure by a myriad of entities even though each subsidiary is below the regulatory radar threshold. This gap

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68 Dan W. Puchniak & Umakanth Varottil, *Related Party Transactions in Commonwealth Asia: Complicating the Comparative Paradigm*, NUS Working Paper No. CALS-WPS-1901 (2019), https://law.nus.edu.sg/cals/publications/related-party-transactions-in-commonwealth-asia-complicating-the-comparative-paradigm-2/?utm.

69 SANDEEP PAREKH*, Evolution of Law Pertaining to Related-Party Transactions in India, in Corporate Governance in India: Change and Continuity* 226 (Asish K. Bhattacharyya ed., Oxford Univ. Press 2016), https://doi.org/10.1093/acprof:oso/9780199469321.003.0012.

70 Paul Davies, *Related Party Transactions: UK Model*, ECGI Law Working Paper No. 387/2018 (2018), https://www.ecgi.global/sites/default/files/working_papers/documents/finaldavies.pdf.

cannot be narrowed without a fundamental change in the level of aggregation, that is, from entity level to group level. Group-wide aggregation would involve making amendments to Regulation 23(2) of the LODR Regulations. Implementation can follow the Fifth Amendment notification procedure with a 6-12 month transition period, with SEBI issuing an operational circular under Section 11(1) of the SEBI Act,[71] specifying the format of the group-wide register.

The existing consolidated reporting infrastructure under Section 129(3) of the Companies Act,[72] and Ind AS 110 already provide the necessary information base, and the Industry Standards already require RPT registers that can be extended to group-wide aggregation. Singapore's Chapter 9 regime validates the administrative feasibility of this approach,[73] and the UK's Asia Resource Minerals enforcement action confirms that aggregation requirements can be effectively enforced.[74]

B. *Adjusting the Metric Distortion: Paid-Up Capital to Net Worth*

In the consultation process before the Fifth Amendment, SEBI had suggested the employment of "certified net worth" that would be signed by a Chartered Accountant in the case of subsidiaries that lacked audited accounts.[75] This would have included retained earnings and accumulated

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71 Securities and Exchange Board of India Act, § 11(1).
72 Companies Act, § 129(3).
73 Singapore Exchange, SGX MAINBOARD LISTING RULES ch 9, r 907.
74 *Asia Resource Minerals plc & PT Berau Coal Energy Tbk v. Rosan Roeslani*, Final Award, SIAC Case No. 151 of 2014, Singapore International Arbitration Centre (Dec. 29, 2014).
75 *Case Study 1 - Related Party Transactions,* SECURITIES & EXCHANGE BOARD OF INDIA, CONSULTATION PAPER*, supra* note 10.

profits, which would have provided a more reliable view of the financial position of the subsidiary. This was replaced with paid-up capital merely on the ground of administrative simplicity and verifiability.[76] However, net worth incorporates paid-up capital, securities premium and retained earnings, indicating the true financial status of the subsidiary.[77] It is comprehensive and would serve as a better measure for the purposes of RPT disclosure assessments.

The certification of net worth involves the hiring of a Chartered Accountant and may create delays. In the case of small subsidiaries, the price can be disproportionate. Nonetheless, a tiered strategy can be used to find the right balance between accuracy and administrability: subsidiaries that are under a given threshold size might have the paid-up capital option, whereas bigger subsidiaries would have to be certified.

C. Addressing the Detection Vacuity: Requirement of Disclosure of Below-Patterns

Transactions that fall below the approval limits are unreported. No actor in the oversight architecture has visibility into subsidiary transactions which are deliberately structured to stay below thresholds. The result is that a promoter who fragments transactions across entities, layers them through tiers, and keeps them below thresholds can operate for years without any of that activity becoming visible to any oversight body. The annual report requires disclosure of RPTs that fall below the approval threshold in

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[76] Securities & Exchange Board of India, *supra* note 10.
[77] Companies Act, § 2(57).

aggregate, disaggregated by subsidiary. This subsidiary-level disclosure can obscure the aggregate value of transactions undertaken across subsidiaries with the same related party, making fragmentation difficult to detect.[78]

To remedy this, the framework should mandate annual disclosure of all subsidiary RPTs that fall below approval thresholds. The annual report would contain a table indicating: total transaction value with each related party, distribution across subsidiaries, number of subsidiaries involved, range of transaction sizes, and total amount by subsidiary. A promoter splitting transactions across ten subsidiaries would be forced to disclose the aggregate value, revealing to shareholders and regulators that substantial related party exposure exists despite no single transaction exceeding the limit.

D. AUDITING THE AUDIT CLIFF: BINARY THRESHOLD TO GRADUATED TRANSITION

The one-year audit requirement creates a sharp discontinuity in the applicable regulatory threshold. A subsidiary that expands rapidly during its first year remains subject to a capital-based threshold that may not reflect its scale; once it has audited financial statements for at least one year, the applicable threshold shifts to one based on turnover. This discontinuity may encourage promoters to defer transactions until the turnover-based threshold applies or to restructure subsidiaries approaching the one-year

[78] LODR Regulations, reg. 23 & sch. V, as amended by Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Fifth Amendment) Regulations, 2025 (India).

period.[79] The regulation offers no guidance on what constitutes a new subsidiary, leaving uncertainty and avoidance opportunities.

To address this, the binary one-year threshold should be replaced with a graduated transition that smooths the shift from the capital-based to the turnover-based metric. Rather than switching abruptly at the end of the twelfth month, the applicable threshold could progressively incorporate the subsidiary's audit history as follows:

i. Months 0-12 (pre-audit): 100% capital-based metric

ii. Months 13-24 (first audited year): 75% capital-based + 25% turnover-based

iii. Months 25-36 (second audited year): 50% capital-based + 50% turnover-based

iv. Months 37-48 (third audited year): 25% capital-based + 75% turnover-based

v. Thereafter: 100% turnover-based

This phased approach would reduce incentives to time transactions or restructure subsidiaries around the one-year threshold, and provide a more predictable transition between the two metrics.

This reform would require only a methodological change to Regulation 23(2). Listed entities already monitor subsidiary audit status; the additional administrative adjustment to track audit history length is minor.

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[79] MICHAEL A. CREW & DAVID PARKER, INTERNATIONAL HANDBOOK ON ECONOMIC REGULATION (Edward Elgar Publ'g 2006).

The resulting complexity of applying different thresholds across subsidiaries would be comparatively modest and could be managed through existing compliance systems.

VI. CONCLUSION

The Fifth Amendment to the LODR Regulations represents progress in India's corporate governance architecture. By bringing subsidiary transactions within the scope of parent audit committee oversight and making thresholds as per subsidiary size, it addresses vulnerabilities that long plagued the pre-amendment RPT framework. Yet, as this paper has demonstrated, regulatory improvement is not the same as regulatory effectiveness. The framework's design creates a paradox. The same features that make the framework administrable also create pathways for possible avoidance and render violations structurally invisible to enforcement.

The comparative analysis reveals that other jurisdictions have built mechanisms to mitigate these vulnerabilities mechanisms that India's framework lacks. Singapore's group-wide aggregation and discretionary override, the UK's systems-based accountability and rolling aggregation, and the US's disclosure framework with materiality judgments all offer lessons that can be adapted to the Indian context. The infrastructure for such adaptations already exists: consolidated reporting under the Companies Act, the definition of control in the LODR Regulations, SEBI's powers under Section 11B, and the circular mechanism used for the Industry Standards. What remains is the regulatory will to act.

The reforms proposed in this paper include group-wide aggregation, extension to all controlled entities, net worth certification, mandatory disclosure of below-threshold patterns, and meaningful sanctions. These are not radical departures from the present legal framework. They are interventions that would close the most significant gaps while preserving the framework's core structure. They would transform the framework, making visible what is currently invisible and creating accountability where none exists.

Therefore, the analysis reveals that rules alone are insufficient. The effectiveness of any framework depends not only on the precision of its drafting but also on the architecture of detection, the credibility of sanctions, and the willingness of regulators to look past the form and focus on substance. India's 2025 RPT framework, for all its sophistication, remains a framework of permissions, telling promoters exactly how much they can transact without oversight. Closing the loophole does not require additional regulation, rather a fundamental rethinking of the regulation's purpose: which is to protect those who cannot protect themselves. The subsidiary as shadow need not remain in shadow. But bringing it into light requires seeing clearly both, what the rules say, and what they fail to see.

Shobhit Goel & Shruti Singh Jayanti, *Codifying Protective Preliminary Orders: A Case For Section 17A of the Arbitration and Conciliation Act*, 1996, 12(2) NLUJ L. Rev. 118 (2026).

CODIFYING PROTECTIVE PRELIMINARY ORDERS: A CASE FOR SECTION 17A OF THE ARBITRATION AND CONCILIATION ACT, 1996

~ Shobhit Goel & Shruti Singh Jayant[*]

ABSTRACT

*The introduction of Protective Preliminary Orders under the Singapore International Arbitration Centre Rules 2025 established a new framework for temporary arbitral relief that the Indian legal system is not yet equipped to accommodate. The right and guarantee of a full opportunity to present one's case under Section 18 of the Arbitration and Conciliation Act, 1996 ("**Act**") is merely substantive and is protected by the expedited post-order hearing rather than a pre-order hearing.The paper identifies three constraints, namely temporal, procedural and enforcement that exists in the current Indian framework and highlights that interpretation alone is not sufficient to resolve them substantially. The paper, drawing on global landscape and Indian precedents, proposes the addition of a new Section 17A into the Act, providing a three-limbed test and procedural safeguards for implementation. The result is a framework balancing urgency and fairness.*

Keywords: *Protective Preliminary Orders; Emergency Arbitration; Ex Parte Relief; Procedural Fairness*

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I. INTRODUCTION

The rise of emergency arbitration has altered the temporal structure of adjudication in the International Dispute Resolution landscape. It enables a party to obtain early protection of vulnerable assets and evidence.[1] Yet, this acceleration exposes a deeper structural tension at the heart of arbitration.

While Emergency Arbitrators ("**EA**") are positioned as the primary forum for urgent interim relief, it lacks authority and command in some situations. The EA acts on a strict timeline; the mere notice or knowledge of the other party acts as a deterrent in the imposition of its power.[2] Where even the knowledge makes it that the goal of the prayed interim measure is lost, and the EA authority is diluted. This creates the need for an intervention in the original understanding, combined with the gradual complexity of commercial disputes, and warrants a change in its approach. Protective Preliminary Orders ("**PPOs**"), particularly those issued on an *ex parte* basis, represent this intervention.[3] They allow tribunals to preserve the status quo before notice where prior disclosure would defeat relief.[4] This raises concerns under the principles of natural justice such as *Audi Alterum Partum.*[5]This departure from the procedural

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[1] Kyriaki Karadelis, *Emergency Arbitrators: The Practice So Far*, 2014 Glob. Arb. Rev., no. 1, at 12 (U.K.).

[2] *See, e.g.,* ICC RULES OF ARBITRATION app. V, art. 6(4) (2021); SIAC RULES sch. 1, para. 9 (2016).

[3] SIAC RULES sch. 1, paras. 26–31 (2025).

[4]UNCITRAL, Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006, ¶ 28 (2008).

[5] *See* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 290 (1953).

safeguards has generated an assumption that the PPO mechanism is structurally incompatible with the Indian arbitration law, particularly in light of Section 18 of the Act, which mandates that each party is given "*full opportunity*" to represent themselves.[6]

The paper argues that the conflict arises from a rigid and incomplete understanding of procedural fairness. The Indian Framework treats due process as participation prior to the exercise of adjudicatory power. However, the contemporary arbitral practice reflects a different model where the right to be heard is not eliminated but temporally relocated to immediately follow the urgent relief.

Against this backdrop, the paper focuses on three claims. Section I, demonstrates that the current Indian framework resists PPOs not merely due to legislative silence but also due to the timing and the content of procedural requirements and their interpretation of the same in the Indian jurisprudence. Section II, provides a comparative analysis of other jurisdictions such as Hong Kong and Singapore, showing how they balance urgency and fairness by sequencing due process. Section III argues that Indian law can accommodate PPOs through a combination of interpretation and legislative reform, by reconceptualising due process as a temporary and flexible guarantee rather than a rigid procedural mechanism.

The paper situates PPOs within the Indian legislative framework without weakening either the effectiveness of the interim relief or the

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[6] Arbitration and Conciliation Act,1996, § 18 (India) [*hereinafter* "**ACA 1996**"].

procedural fairness. It aims to view PPOs as an exceptional mechanism. The difficulty is not that the PPOs are inherently incompatible, but rather the framework has been interpreted in a manner that leaves littleroom for procedural flexibility in situations of urgency. Therefore, reinterpreting this position is vital for resolving the problem.

II. NEED FOR *EX PARTE* PRELIMINARY ORDERS

Interim measures are designed to preserve the subject matter of the dispute from irreversible alteration pending the final award.[7]However, under the conventional emergency EA framework, advance notice to the respondent is ordinarily required before any interim relief is granted. This advance notice creates the paradox. In situations where the respondent controls the assets or evidence that the applicant seeks to protect. The notice ceases to be a procedural safeguard and instead becomes a strategic warning for the respondent.[8]

This problem is illustrated in *HSBC PI Holdings v. Avitel Post Studioz*. In this case, the dispute arose in 2011, when HSBC invested approximately USD 60 million for a 7.8% stake in Avitel on the basis of a representation that the company had secured a USD 1 billion contract with the BBC.[9]These representations were subsequently discovered to be fraudulent, and the invested funds had been siphoned through a complex

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[7] *Supra* note 1.

[8] Xuanxuan Liu, *Balancing Natural Justice and Urgency in Ex Parte Emergency Interim Relief: The SIAC Rules 2025 as a Blueprint*, KLUWER ARB. BLOG (Sept. 23, 2025), https://legalblogs.wolterskluwer.com/arbitration-blog/balancing-natural-justice-and-urgency-in-ex-parte-emergency-interim-relief-the-siac-rules-2025-as-a-blueprint/.

[9] HSBC PI Holdings (Mauritius) Ltd v Avitel Post Studioz Ltd., (2014) SCC OnLine Bom 102 (Bombay High Ct.) (India).

network of transactions. HSBC initiated arbitration under the Singapore International Arbitration Centre ("**SIAC**") Rules and obtained an award in its favour in 2014. However, the real difficulty arose in preserving the assets against which award could be enforced because by the time the claimants approached the court, substantial asset dissipation had already taken place, rendering any relief largely ineffective.

Despite the existence of an EA mechanism, the claimants were compelled to approach courts under Section 9 of the Act to secure interim protection.[10] This procedural duplication created delay, allowing the respondents a window to defeat the interim protection. The absence of an immediate notice mechanism allows the dissipation to occur before any binding restraint could take effect, making it a hollow victory.

The case reveals broader gap in interim relief. The notice requirement to be given to the respondent undermines this purpose in two ways. It alerts the respondent and creates a delay between risk and response as a result, the process becomes procedurally fair in form, but deficient in actual effect.

Ex parte PPO addresses this gap by reordering the right to be heard.[11] The respondent is heard immediately after the grant of urgent relief, rather than before it. This approach does not depart from the principle of *Audi Alterum Partem*, it rather adapts to the circumstances where prior notice would frustrate the very purpose of the measure sought. The

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[10] *Id.*

[11] Jacomijn van Haersolte-van Hof and Anne Katharina Hoffmann, *The Relationship Between the UNCITRAL Arbitration Rules and the UNCITRAL Model Law*, 29 ARB. INT'L 297 (2013).

legitimacy of this approach is reflected under Article 17B of the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**"), which expressly permits preliminary orders without prior notice in situations of urgency.

Ex Parte PPOs are therefore able to restore the preventive function of interim reliefs. They achieve this by allowing for immediate intervention to be made while also providing for prompt opportunity to be heard, thereby balancing urgency with fairness of process. As a result, they support the continued effect of interim reliefs as a tool to protect the arbitral process in both form and substance, as opposed to being mere formalities for reactive purposes.

III. THE INDIAN FRAMEWORK: GAPS AND THE GLOBAL STANDARD

The Indian framework, although has evolved with the global landscape, fails to incorporate the PPO mechanism in three different ways which are as follows:

Firstly, there is a temporal constraint. This majorly arises due to mismatch between the point at which urgent protection may become necessary and when the statutory protection becomes available. A PPO, in general, is sought in the narrow interval before the respondent is notified of the intended arbitral proceedings, since giving notice may itself. Enable the threatened conduct to occur and defeat the purpose of the relief. The difficulty is therefore one of timing: the protection may be required at a point when the arbitral process has not yet been triggered and the tribunal has not yet been seized of the dispute. Thus, although the substantive power to grant interim measures may exist once the statutory condition is satisfied, the Act does not expressly provide a mechanism for exercising that power within this critical pre-notice window. The precise scope of this temporal gap and its implications under Sections 17 and 21 are examined in detail under Part A below.

Secondly, there are procedural constraints. Section 18 and 24 (2) of the Act impose mandatory due process requirements, including equal treatment and advance notice. These provisions leave little room for any *ex parte* action. The position is better reflected in treatment of *ex parte* relief under the Code of Civil Procedure ("**CPC**"). Under Order XXXIX Rule 3 of the CPC, the court has the power to issue injunctions even without notice in case of delay which will render the object of the relief ineffective.[12] Such powers emanate from the nature of the civil courts as agencies of the state. Arbitral tribunals, on the other hand, derives such power only through statute and consent of parties, and there is no provision under the Act for granting such relief without notice. This is dealt in detail later in Part B below.

This principle was upheld in the case of *Godrej Properties Ltd. v. Goldbricks Infrastructure Pvt. Ltd,* wherein an order passed without notice under an arbitral process was set aside.[13] The court held that Order XXXIX Rule 3 does not apply to arbitral proceedings[14] and that Sections 18 and 24

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[12] Code of Civil Procedure, 1908,Ord. XXXIX, r. 3 (India) [hereinafter **CPC 1908**].
[13] Godrej Properties Ltd. v. Goldbricks Infrastructure Pvt. Ltd., 2019 SCC OnLine Bom 102 (Bombay High Ct.) (India).
[14] ACA § 18.

(2) of the Act require prior notice.[15] Notably, there was no discussion of prejudice, but mere lack of notice sufficed to set aside the order.

Finally, there is a lack of enforcement. The Act provides no mechanism to give PPO legal effect within India. Each of these constraints is analytically independent and requires a distinct response, which is discussed in Part IV. This part focuses on what each of these constraints consists of and why mere experience of other jurisdiction interpretation can't resolve them.

A. TEMPORAL CONSTRAINTS

Section 17 of the Act grants an arbitral tribunal the power to issue interim measures "*during the arbitral proceedings*."[16] This phrase is not defined individually, but is to be read with Section 21, which fixes the commencement of the arbitral proceedings at the date on which a request for arbitration is received by the respondent.[17] The phrase "*unless otherwise agreed by the parties*" in the section is significant. In situations where parties adopt institutional rules such as the SIAC Rules, the point of commencement may shift accordingly. In such cases, the temporal constraint does not arise in the same form, as the parties have contractually aligned the procedural framework with the mechanism they have chosen.

The difficulty arises when no such agreement exists or where a PPO is sought before an arbitral request has been communicated at all. At that stage, even a broad reading of Section 21 offers no assistance, as the

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[15] *Id.* § 24(2).
[16]*Id.* § 17.
[17]*Id. § 21.*

tribunal's authority under Section 17 has not been triggered, and there is no procedural footing on which a PPO can be issued. The Supreme Court's decision in *Amazon* operated precisely within this framework,[18]by holding that the EA are "*arbitral tribunals*" whose orders are made "*during arbitral proceedings*".[19] The court, hence, has accommodated the emergency arbitration within the existing legal framework without disturbing the foundation. By recognising EA as "*arbitral tribunals*" acting during arbitral proceedings, the court extended Section 17 to accommodate emergency arbitration, but it did not extend that logic to the pre-notice stage.

This limitation is reinforced by Section 34 of the Act, which permits an award to be set aside where a party was not given proper notice.[20]Read alongside Section 21, it underscores that notice is not merely procedural but foundational.[21] A PPO issued before such notice risks introducing a defect that could ultimately affect the validity of the proceedings themselves.

B. PROCEDURAL CONSTRAINTS

Section 18 of the Act mandates equal treatment of parties and guarantees each party "*a full opportunity*" to present their case.[22] The court in the *UOI v. Vedanta Ltd.* held this provision to be mandatory and non-derogable, providing a guarantee that party agreement and institutional

[18]Amazon.com NV Inv. Holdings LLC v. Future Retail Ltd., (2021) 9 S.C.C. 624 (India).
[19]*Supra* note 10.
[20]ACA 1996§ 34.
[21]ACA 1996§ 21.
[22]ACA 1996§ 18.

rules cannot dispose of this section.[23] Additionally, Section 24 (2) reinforces it by requiring "*sufficient advance notice*" of any hearing.[24]The court, confirmed that Section 18 is non-derogable and cannot be displaced by party agreement or institutional rules.

An *ex parte* PPO fails to satisfy these requirements of providing notice with the participation of respondent. This is not a procedural irregularity that can be cured later but questions the legality of the order itself.

The Court's decision in *Godrej v. Goldbricks* is the cleanest judicial statement of the applicable principle.[25] The court set aside an arbitral interim order made without prior notice, holding that the distinction between civil courts and arbitral tribunals is foundational, as the court derives authority from the State and may act pre-emptively under Order 39 Rule 3 of the CPC.[26] While the arbitral tribunals derive their power solely from statute and consent. They are strictly bound by the mandatory standards of Sections 18 and 24.[27] The court did not delve into whether the respondent had suffered prejudice, rather it focused on whether the procedural standard was satisfied at the time the order was made and could not be remedied thereafter. This position also constrains party autonomy.

While parties may adopt institutional rules permitting PPOs, such an agreement cannot override mandatory statutory provisions. Rule 1.6 of

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[23]Union of India v Vedanta Ltd., (2020) 10 S.C.C. 1 (India).
[24]ACA 1996§ 24(2).
[25]*Supra* note13.
[26]CPC 1908, Ord. XXXIX, r. 3.
[27]*Supra* note 22.

the SIAC Rules itself acknowledges this hierarchy.[28] The adoption of PPO-capable rules does not incorporate PPOs into Indian law, but it incorporates a mechanism that may be rendered inoperative at the seat. Hence, even the parties' right to opt out of the context of any PPO mechanism would be vitiated at its crux, merely due to the absence of such a provision in Indian law.[29]

The Draft Bill, 2024, aims to substitute the phrase "*full opportunity*" in Section 18 with "*fair and reasonable opportunity*."[30] This change reflects the introduction of proportionality as an element to be used in determining the adequacy of procedures used in a process and creates a doctrinal base for determining if *ex parte* forms of action are to be evaluated within a larger set of fairness-based concepts. This introduces a more flexible and context-based standard, which also allows for the use of delayed hearing models,[31]such as *ex parte* order followed by a prompt review. However, the proposal fails to provide any procedural timeline, safeguards, or mechanisms that govern such procedures.

As a result, the proposed changes only partially support PPOs and do not provide the structure needed for their effective use.

C. ENFORCEMENT CONSTRAINTS

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[28] SIAC RULES r. 1.6 (2025).

[29] Payel Chatterjee, *SIAC Rules 2025: Could Protective Preliminary Orders Face Enforcement Challenge in India?*, KLUWER ARB. BLOG (Apr. 28, 2025), https://legalblogs.wolterskluwer.com/arbitration-blog/siac-rules-2025-could-protective-preliminary-orders-face-enforcement-challenge-in-india/.

[30] Arbitration and Conciliation (Amendment) Bill (draft) § 18 (India).

[31] Stavros Brekoulakis, *The Notion of the Right to Be Heard in International Commercial Arbitration*, 32 AM. REV. INT'L ARB. 451 (2021).

The third constraint arises at the stage of enforcement. Following *the Amazon* judgement, the tribunal issued interim orders that are enforceable under Section 17(2) similar to the orders of a civil court. This pathway is, however, only available to orders issued in "*arbitral proceedings*".

Since PPOs are issued prior to the formal commencement of any such proceedings, they fall outside this framework. Thus, the only other viable remedy under Section 9isthat the applicant approach a civil court for relief.[32]

The availability of Section 9 does not, however, eliminate the enforcement difficulty. Section 9 provides a judicial avenue for obtaining interim protection, including, where the statutory requirements are satisfied, relief without prior notice under the procedural framework applicable to civil courts. Its availability therefore demonstrates that Indian law recognises the need for urgent interim protection; it does not, however, provide an equivalent mechanism for giving a PPO issued within the arbitral framework immediate legal effect. Resort to Section 9 would require the claimant to seek protection through a separate judicial proceeding rather than through the arbitral mechanism contemplated by the PPO. The relevant gap is therefore not the absence of any enforceable interim remedy, but the absence of a clear statutory mechanism through which a pre-commencement PPO can bind the respondent and obtain coercive effect while remaining subject to prompt inter-party review. Without such a mechanism, recognition of PPOs at the temporal or procedural level would not, by itself, ensure their practical effectiveness.

[32] *Supra* note 25, at 9.

D. <u>THE GLOBAL FRAMEWORK</u>

The constraints identified above are not without precedent in the global arbitration landscape. What distinguishes India is not the novelty of these problems but the absence of the legal responses that other jurisdictions have already developed.

Hong Kong offers the most complete response to the issues mentioned in this section. Its Arbitration Law clearly includes Articles 17B and 17C of Model Law.[33] This allows arbitral tribunals to issue preliminary orders without prior notice if advance disclosure would defeat the purpose of the relief. Crucially, the legislative framework that makes this possible separates the binding effect from court enforcement. Under Article 17C (5), a preliminary order is binding on the parties as a matter of arbitral obligation, but is not directly enforceable by the court unless and until it is confirmed following an inter-party hearing.[34]

This structure addresses the conflict between natural justice and commercial effectiveness. The respondent is then obligated to comply before having a chance to be heard, but the enforcement power of the State is withheld until the respondent has had that opportunity.[35] This bifurcated model reconciles urgency with due process by sequencing, rather than eliminating the procedural safeguards.

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[33] UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION arts. 17B–17C (1985, as amended 2006).

[34] UNCITRAL Modelart. 17C(5).

[35] Rohin Pujari, *Enforcement Through Emergency Arbitration in Hong Kong*, CONVENTUS L. (Nov. 6, 2023), <u>https://conventuslaw.com/report/enforcement-through-emergency-arbitration-in-hong-kong/</u>.

Singapore achieves a similar functional outcome through judicial pragmatism. Its courts evaluate natural justice based on actual harm instead of just formal compliance. This permits temporary *ex parte* orders, followed by quick reviews to ensure procedural fairness. The Singapore Court of Appeal in the case of *Soh Beng Tee v. Fairmount*, affirmed that natural justice is grounded in the principles of *Audi Alteram Partem*, and *Nemo Judex In Causa Sua*, but also recognised that these principles must be applied in a manner that is responsive to the procedural context.[36] This approach also aligns with Article 18 of the Model Law, which guarantees a full opportunity to present one's case without rigidly prescribing its timing.[37]

Further, the respondent must be given an opportunity to be heard at the earliest practicable stage, with the EA required to promptly address any objections and, if necessary, modify or confirm the preliminary order.[38] Additionally, the inclusion of the opt-out provision preserves party autonomy and allows parties to exclude the PPO mechanism if they choose to do so.[39]

The Singapore model is particularly relevant to India because the proposed reform does not require the creation of an entirely new form of adjudicatory authority. India already recognises emergency arbitration and Section 17 already provides arbitral tribunals with powers to grant interim measures. The legislative reform would thus create a procedural mechanism for urgent pre notice relief and to prescribe safeguards governing its

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36 Soh Beng Tee & Co Pte Ltd v Fairmount Dev. Pte Ltd [2007] SGCA 28(Sing.).
37 UNCITRAL Model Lawart. 18.
38 CVG v. CVH (2022), [2022] SGHC 249 (Sing.).
39 SIAC RULES sch. 1, para. 25 (2025).

duration, review and enforcement. Moreover,the SIAC framework imposes strict timelines for *ex parte* interim relief. Once the application is accepted, EA must be appointed within 24 hours and issue a decision within 24 hours.[40] The applicant is then required to notify all parties within 12 hours, failing which the PPOs lapses within 3 days.[41] In any case, the PPO expires after 14 days unless renewed. These timelines ensure prompt notice to the respondent while maintaining automatic expiry as a safeguard against misuse. The pattern in both jurisdictions is the same. For PPOs to operate effectively, they have to be supported either by an explicit statutory framework or a judicial approach that tolerates procedural flexibility. India currently possesses neither. Thus, making the incompatibility with PPOs a structural gap rather than an incidental one.

IV. INTERPRETATIVE AND LEGISLATIVE PATHWAYS

The previous chapters have mapped the terrain of what PPOs are, why there is a need for their introduction in the Indian framework; what remains is the doctrinal framework as to how the PPOs can be accommodated within the Indian Arbitration framework. Section 18 of the Act mandates that "*parties shall be treated equally and … given a full opportunity to present his case*", this coupled with Section 24's mandate of advance notice of any hearing, reinforces the principle of *Audi Alteram Partem* that finds itself entrenched into the core of the Act.[42]

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40 SIAC RULES sch. 1, paras. 7, 26 (2025).
41 SIAC RULES sch. 1, para. 27 (2025).
42 ACA 1996 §§ 18, 24; *Protective Preliminary Orders: The New Frontier in SIAC Arbitration and India's Legal Readiness*, THE ARBITRATION DIGEST,

This is further strengthened by Section 17 of the Act, which only confers the power of Interim measures "…*during the arbitral proceedings*".[43] While the premise of PPO and its very nature is outside this paradigm due to its inherent *ex parte* nature, the same is not completely barred from the Act; This can be evidenced from the preamble of the Act itself, which acknowledges the Model Laws to be the basis of the Act.[44] Moreover, the purpose of the Act should be construed to advance the parties' legitimate expectations and the efficient objectives of the arbitral process.[45]The nature of an *ex parte* order or injunction is also found under Order XXXIX Rule 3 of the CPC which provides for an exception to the general principle of *Audi Alteram Partem* to include situations wherein the "*object … would be defeated by the delay*".[46]

However, this does not entirely resolve the problem that the proposed framework addresses. Section 9 requires the claimant to invoke the jurisdiction of a judicial forum despite having agreed to arbitrate, thereby introducing court intervention at the very stage at which the need for an emergency mechanism arises. The proposed mechanism is however not premised on this; the mechanism does not import Order XXXIX into

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https://thearbitrationdigest.com/protective-preliminary-orders-the-new-frontier-in-siac-arbitration-and-indias-legal-readiness/ (last visited Apr. 10, 2026).

43 ACA 1996 § 17; *SIAC Emergency Arbitration: Enforcement in India*, CNLU: CCADR BLOG, https://ccadr.cnlu.ac.in/blog/arbitration/siac-emergency-arbitration-enforcement-india/ (last visited Apr. 10, 2026).

44 ACA 1996 pmbl.; LAW COMM'N OF INDIA, 246TH REPORT: AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT, 1996, ¶¶ 47–53 (Aug. 2014).

45 PASL Wind Sols. Priv. Ltd. v GE Power Conversion India Priv. Limited (2021) 7 SCC 1

46 CPC 1908, Ord. XXXIX, rr. 3, 3A; Morgan Stanley Mut. Fund v. Kartick Das, (1994) 4 S.C.C. 225 (India).

arbitral proceedings or treat it as an independent source. Rather, this new mechanism by virtue of its help with Order XXXIX Rule 3 provides a procedural likeness to demonstrate that *ex-parte* interim protection is recognised within the current law, where delay would defeat the object of relief. What the availability of the mechanism under Order XXXIX demonstrates or provides for, is that dispensing with prior notice is not, in itself incompatible with Indian law.

The court has previously also debated on such an idea. In the case of *Godrej v. Goldbricks*, while holding that *ex parte* orders would be procedurally defective, the court opined that the concern with such a mechanism is not one of doctrinal approach but a lack of procedural safeguards of the same in the Act as of now.[47]Thus, the proposed framework preserves the right to be heard but places it immediately after the decision.

Starting with the objective of the PPO, the objections to PPO primarily concern itself with the procedural aspects; however, the new SIAC Rules with its incorporation include an opt-out clause.[48] This makes that the mechanism is itself by default incorporated in the process, and when the respondent receives an order, they cannot complain of such a violation, when it was ex-ante agreed upon by their blanket consent to the overall mechanism. This defuses the claim against the objection of *Audi Alteram Partem* in the sense that the procedural asymmetry of any e*x parte*

47 Godrej Props. Ltd. v. Goldbricks Infrastructure Pvt. Ltd., 2015 SCC OnLine Bom 8683 (Bombay High Ct.) (India).
48 SIAC RULES sch. 1, para. 25 (2025).

functioning was subject to bilateral consent. If we were to illustrate the same, the respondent's argument for lack of consent on his order is itself contradicted by his prior consent to the rules.

The first approach is thus one of interpretation, and without any legislative amendment, when Section 17 of the Act itself provides for any order of the tribunal to be deemed to be an order of a civil court, the application of Order XXXIX does not seem far-fetched.[49] Taking a closer look at Rule 3 of the same, it posits a closer approach to that of the Model Law.[50] The section provides for an order to be delivered to the opposing party immediately after granting of such an order, and Rule 3A further provides for a strict timeline of 30 days from the granting of the injunction to dispose of the application.[51]

This interpretation, if applied to Section 17 of the Act, would provide for the granting of an interim *ex parte* injunction, while at the same time not disturbing the right to present one's case under Section 18.[52]These merit a substantive interpretation of Section 18, balanced by an expedited post-order hearing. This interpretation does not take away or infringe the right of knowledge of the respondent; it provides the respondent with a full opportunity to contest and reverse it within the strict 30-day timeline under Section 3A of the CPC.[53] The primary purpose of the same in this

49 ACA 1996 § 17(2); CPC 1908, Ord. XXXIX.
50 CPC 1908, Ord. XXXIX, r. 3.
51 *Id. r. 3A.*
52 ACA 1996 §§ 17, 18.
53 CPC 1908, Ord. XXXIX, r. 3A.

interpretation then turns to the objective of maintaining the status quo till an actual arbitral order is provided by the tribunal.

The second approach is one of legislative amendment to keep the Model Laws on priority, while the Model Laws are themselves suggestive in nature for a uniform arbitration regime; their relevance in the Indian context is of prime importance, with the increasing arbitration-centric framework gradually coming about in the nation. This approach takes the interpretative idea into an explicit nature with the insertion of a Section 17A in the Act itself.[54] The purpose is to provide for an exhaustive insertion of a PPO regime with the balanced timeline as sought under the Model Laws.

The intent of the same would not be to grant an injunction or order on any whims and fancies of the petitioner, but an objective showcase of urgency as a three-limbed test that draws itself from CPC Rule 3A to act as an already working framework in respect of ex-parte orders and Article 17A & 17B of the Model Laws.[55]*First*, the applicant must satisfy the extreme nature of urgency such that if a notice or any opportunity is given to the respondent, the same would result in such a delay that would hamper the initial objective of that interim order. *Second*, the applicant must establish this urgency beyond the threshold of an ordinary injunction, showcasing that the respondent has already moved in his intent to disperse assets or any such activity that, if not put an immediate stop to, would dilute the authority of the tribunal itself. *Lastly*, the applicant must show that there would be irreparable and irreversible harm caused to the applicant if the

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[54] Law Commission of India, 246th Report ¶¶ 47–53.

[55] UNCITRAL Model Law arts. 17A–17B; CPC 1908, Ord. XXXIX, rr. 3, 3A.

PPO were not granted, and the same would not be quantifiable by compensation.

This test is in itself not enough to dissipate the demand for an exception to the principle of Audi Alteram Partem, but must be anchored by the procedural safeguards protecting the right of the respondent not to be prejudiced. The basis of these safeguards finds its basis in the Model Laws, with a strict timeline of 24 hours from the delivery of the order to notify the respondent.[56] This provides for an immediate knowledge of the proceedings to the respondent with all the details of the applicant and the reason for granting the same. The next approach to protect the rights of the respondent is to have an expiry for the order itself. While the Model laws provide for a strict limit of 20 days for expiry, the SIAC Rules provide for a 14-day expiry unlessrenewed, and the CPC provides for a 30-day timeline for the overall hearing and adjudication of such an application and order.[57] To balance the same for urgency, a strict timeline of 20 days for the expiry of an order and an overall timeline of 30-days from the application of such an order till its final adjudication provides for a strict but also well-kept timeline.

The last but an inherent right of the respondent that needs protection is the right of the respondent for a first hearing of any contestation, the Model Laws, though, do not provide for any time period but mention the phrase "*at the earliest practicable opportunity*".[58] Our aim with

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56 UNCITRAL Model Law art. 17C(4).
57 *Id.* art. 17C(5); SIAC RULES sch. 1, para. 29 (2025); CPC 1908, Ord. XXXIX, r. 3A.
58 UNCITRAL Model Law art. 17C(4); SIAC RULES sch. 1, para. 31 (2025).

the legislative approach is to provide for an exhaustive set of procedural guidelines that don't prejudice the respondent, and hence, the earliest possible opportunity could itself be vague and against the respondent. While the phrase itself is not defined, the purpose of the same is achieved or seen to be achieved if the same is done within a period of a maximum of 7 days.

The need for the proposed framework is particularly evident in cases involving imminent asset dissipation. For instance, PPO enables the tribunal to intervene at a pre-notice stage, not to provide for any prejudice against one party but to stop the escalation of any action that would affect the final relief. This coupled with the post-order procedure and hearing, would restore the procedural fairness on the part of the respondent while also preserving the claimant from suffering from any irreversible harm.

The main idea for the proposed framework has been to establish the PPO, not as a mechanism violative of principles of Natural Justice, but one that supports it with certain safeguards in place. The understanding that the right to be heard is not abolished but merely relocated to the next earliest opportunity, which is justified by the sense of urgency and harm that is assumed to be taken on the part of the applicant.

V. PROPOSED STRUCTURE FOR SECTION 17 A

While the interpretative approach offers limited flexibility and a partial fix, they remain unable to address the structural issues discussed earlier. Amore permanent solution lies in legislative intervention.

The proposed framework is the author's suggestion and is drawn upon two sources: the exception to prior notice recognised under Order XXXIX of the CPC, the framework for PPO under Model Laws. The goal of this structure is not to displace or remove the principle of natural justice, but to alter it by sequencing the right to be heard as the immediate next step and not one that precedes it. This structure, therefore, aligns itself with the principles of procedural fairness and the contemporary developments in international arbitration.

Suggested legislative framework for Section 17A

Section 17A. Protective Preliminary Orders

(1) *The arbitral tribunal may, upon application by a party, grant a Protective Preliminary Order (PPO) directing any party not to take any action that may frustrate the authority or ability of the tribunal to grant any other effective relief under Section 17, provided that the conditions set forth are fulfilled.*

(2) *An Application for a PPO may be made without prior notice or service upon the other party, such that-*

   a. *The applicant in such case discloses all material facts that are known to the applicant and relevant to the granting of such an order, including any such facts that may weigh against the applicant in writing; and*

   b. *The applicant in such case discloses to the tribunal any prior application of such extent and the Order of such application.*

(3) *The tribunal shall grant a PPO, based on the facts placed before it as under (2) and satisfaction of conditions set forth in a cumulative nature-*

   a. *The applicant must show that the Order prayed for is of urgency and such that if the same is not addressed, the risk would be substantially* *aggravated, and the granting of any prior notice would defeat the purpose of such application;*

b. *The applicant must show that the harm likely to be caused as a result of a refusal of such Order would not be adequately reparable and of such nature that it would be incapable of being compensated by any damages awarded to the applicant;*

c. *The applicant must show that the refusal of granting of such an Order would risk frustrating the ability and authority of the tribunal to grant any subsequent remedy; and*

d. *That any such application should be decided by the tribunal within a period of 4 days from such an application.*

(4) *Any Order granted in such an instance should be immediately, within a period of 24 hours, followed by -*

a. *Service of the Order granted, and all material facts placed before the tribunal by the Applicant; and*

b. *The reasons for granting of such an order given by the tribunal in writing.*

(5) *That such an Order shall take effect from the date of granting of such an Order and shall automatically cease to have effect upon the expiry of 20 days from the date on which the Order was granted and/or any such date specified by the tribunal.*

Provided that, such an Order can be extended on the discretion of the tribunal, provided that the tribunal is satisfied that there persist extraordinary circumstances that warrant the grant of such extension and giving all parties an opportunity to be heard on such extension, to not prejudice the respondent party.

Provided that such an extension should not violate the overall 30-day timeline for determination of such an Order.

(6) *That any such Order granted under (3) shall be in all cases followed by an expedited inter-parties hearing, on a date fixed by the tribunal within a period of 7 days from the date of granting of such an Order and shall be determined within a period of 13 days from the date of such hearing.*

Provided that the date for such hearing can be extended if the respondent gives in writing for such extension, which in all cases is not more than the overall timeline of 30 days for an application of such Order.

Provided that all procedural aspects, relating to but not limited to the hearing and determination of such Order, shall be governed by the relevant sections of the Act.

VI. CONCLUSION

The argument that this paper has proposed is not that natural justice should yield to commercial efficacy; it is that, when properly understood, natural justice was never incompatible with PPOs to begin with.

The right to be heard, protected under Section 18 and a core principle of dispute resolution, must be exercised meaningfully. It does not require a hearing at every stage or before every protective measure. When urgency is justified, and the risk of frustration is imminent, moving the hearing to the earliest possible time after the order is made does not breach this right; in fact, it is the only way to ensure it is upheld.

India's current framework resists this interpretation, not due to its incapacity but because it has never been asked to interpret it explicitly in such a manner. The interpretative route offers merely a partial fix, which can be estopped by future changes, but the proposed Section 17A offers something durable and explicit. With its strict timelines and mandatory hearings, it provides for a commitment to fairness even in matters of urgency.

India has consistently adopted a pro-arbitration approach. The SIAC Rules have moved in their institutional landscape for a new dawn. The question that persists is whether India, with its developing credentials as a global arbitration hub, will also join the same. The answer, this paper argues, should be in the affirmative, and the way forward is already paved.

Logesh Parameshwar, *Posthumous Assisted Reproduction and the Conundrum of Consent: Should the Voice of the Deceased Be Heard?*, 12(2) NLUJ L. Rev. 144 (2026).

POSTHUMOUS ASSISTED REPRODUCTION AND THE CONUNDRUM OF CONSENT: SHOULD THE VOICE OF THE DECEASED BE HEARD?

~Logesh Parameshwar[*]

ABSTRACT

*Life ends with death, but the person lives on forever. With unprecedented advancements in Assisted Reproductive Technologies ("**ART**") and proliferation of ART clinics across the country, posthumous reproduction and postmortem parenthood are no longer myths in India. However, the emergence of such medically assisted posthumous reproduction poses a plethora of complexities, particularly with regard to establishing the consent of the deceased. Almost every dispute pertaining to posthumous reproduction in India, and even across the globe, centres on resolving this conundrum. Demystifying the question of whether a deceased has any reproductive rights surviving his death, this article further seeks to resolve the consent conundrum by analysing the ethical and legal feasibility of shifting from the existing 'informed consent' framework to a potential 'presumed consent' or 'inferred consent' framework.*

Keywords: *Posthumous Assisted Reproduction; ART; Reproductive Autonomy; Informed consent; Inferred consent; Presumed consent.*

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I. INTRODUCTION

"*We were very unlucky; we lost our son. But the court has given us a very precious gift. We will now be able to get our son back.*"[1] These were the words of a deceased man's mother after the Delhi High Court permitted the posthumous use of her son's cryopreserved sperm for procreation[2]. While the desire of the parent was adequately recognised by the court, to what extent did the voice of the deceased matter? With a gradual boom in cases of Posthumous Assisted Reproduction ("**PAR**") in India[3], it is high time this question found an answer. Despite burgeoning international attention, there is a dearth of legal research in India on this particular issue, which inspired the author to undertake a comprehensive analysis of one of its significant aspects, setting the stage for future research.

Posthumous reproduction is not a novel phenomenon, since it has always been a part and parcel of natural human life. It can be classified into 3 categories: Posthumous birth, posthumous conception and posthumous retrieval of gametes[4]. The posthumous birth of a child occurs when one of its biological parents dies after the conception of the child but before its actual birth. Since it is a naturally occurring phenomenon, there has been

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[1] Geeta Pandey, *Our son died. Now we can use his sperm to have a grandchild,* BBC (Oct. 9, 2024), https://www.bbc.com/news/articles/cnvdgv6rejvo.
[2] *Id.*
[3] Asok Kumar Chatterjee v. Union of India, 2021 SCC OnLine Cal 84; Stuti Rakesh Painter v. State of Gujarat, R/Special Civil Application No. 10400 of 2021; Gurvinder Singh v. Govt. of NCT of Delhi, 2024 SCC OnLine Del 6902; Heena v. The State of NCT of Delhi, W.P.(C) 956/2025; X v. Union of India, 2026 SCC OnLine Ker 3731; Vidya, *Court orders preservation of dead man's semen as mother seeks it for lineage,* INDIA TODAY (June 28, 2025, 3:15 PM), https://www.indiatoday.in/india/law-news/story/bombay-high-court-orders-preservation-of-dead-mans-semen-as-mother-seeks-it-for-lineage-2747633-2025-06-28.
[4] Stav Oved Ovics et al., Perimortem and Postmortem Sperm Acquisition: Review of Clinical Data, 39 J. ASSIST. REPROD. GENET. 977, 977 (2022).

little dispute regarding its legal recognition. However, more complex questions arise in the other two categories of posthumous reproduction, often referred to as PAR, where conception itself occurs, through medical assistance, after the death of the individual whose gametes are used. In particular, conception through postmortem retrieval of gametes, sperm in most cases, which involves extracting them after the individual's death, poses greater ethical and legal challenges than conception through gametes that were consensually obtained before their death. The primary challenge with regard to posthumous sperm retrieval ("**PMSR**") arises from its strict temporal limitation, which requires the gametes be retrieved within 24-36 hours after death for a successful fertilization[5]. Beyond a plethora of such limitations and constraints, disputes in the vast majority of litigations concerning PAR/PMSR predominantly centre on one grey area: **the consent of the deceased.** The question of consent often arises in two dimensions: where the deceased had cryopreserved his gametes before death, the issue concerns his consent to their posthumous use, and where no such cryopreservation occurred, the question of consent to PMSR comes into play.

Primarily concerned with the central and contested issue of consent in PMSR, this paper does not undertake a detailed examination of the underlying legal concerns surrounding PAR, including the personhood-property debate over reproductive materials, the recognition of posthumous grandparenthood, and the rights and welfare of posthumously conceived children, among others.

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[5] Andrew R. Zinkel et al., *Postmortem Sperm Retrieval in the Emergency Department: A Case Report and Review of Available Guidelines*, 3 CLIN. PRACT. CASES EMERG. MED. 405, 407 (2019).

Part II of the paper begins with an overview of how PAR emerged as a globally contentious subject, tracing its origins to the French case of Alain Parpalaix and the British case of Diane Blood. Part III turns to India's recent experiences with PAR, particularly the curious case of *Gurvinder Singh* v. *Government of NCT of Delhi*[6], and examines the relevant provisions of the ART Act, 2021, which provide some initial insight into the issues pertaining to consent. Laying the groundwork for resolving the consent conundrum, Part IV seeks to demystify, through an intensive jurisprudential analysis, the question of whether a person's reproductive rights survive death. Part V, the most crucial part of this article, attempts to resolve the conundrum of consent by squaring the circle between the three forms of consent often invoked or proposed in the context of posthumous assisted reproduction: informed consent, presumed consent, and inferred consent.

II. FROM "PARPALAIX" TO "DIANE BLOOD": THE GLOBAL EMERGENCE OF PAR JURISPRUDENCE

Unlike posthumous birth, posthumous conception of a child has become possible only with the advancement of reproductive technologies, particularly the emergence of cryopreservation, a process involving the storage of gametes at sub-zero temperatures for their potential future use[7]. The seeds for PAR were sown in the year 1953, when researchers Sherman and Bunge achieved, for the first time, three successful pregnancies by artificially inseminating cryopreserved sperm[8]. Nearly after two decades, the

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[6] Gurvinder Singh v. Govt. of NCT of Delhi, 2024 SCC OnLine Del 6902.
[7] Ivana Barac, *Posthumous Reproduction: Life after Death?,* 14 PRAV. ZAP. 438, 438-39 (2023).
[8] Eric M Walters et al., *The History of sperm cryopreservation,* in SPERM BANKING: THEORY AND PRACTICE 1, 2-4 (Allan A. Pacey & Mathew J. Tomlinson eds., 2009).

first publicly known and successful case of PAR was reported in England in the year 1977, following which the possibility of PMSR was unveiled in 1978[9].

The earliest litigation concerning PAR emerged in France in 1984, when a posthumous claim arose over the sperm of a French citizen, Alain Parpalaix, which he had deposited with a sperm bank ("**CECOS**") following his diagnosis with testicular cancer[10]. When Parpalaix' widow and her in-laws contended that his sperm constituted an inheritable property, the French court rejected their contention, holding that it is rather "*the seed of life.. tied to the fundamental liberty of a human being to conceive or not to conceive*"[11]. The court, however, ordered the release of the sperm to Mrs. Parpalaix by inferring the ante-mortem 'intent' of the deceased to conceive a child with her, as evidenced by their marriage just two days before the anticipated death of Parpalaix[12]. Quite contrarily, in *Hecht v. Superior Court*[13], the California Court of Appeal in the United States treated sperm as a property capable of being bequeathed, and upheld the validity of a suicide victim's will bequeathing his sperm to his girlfriend. It is pertinent to note that, beyond the property debate, the consent/intent of the deceased played a pivotal role in both decisions, one inferred from the circumstances and the other expressly communicated through a will. Despite the subsequent

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[9] Stav Oved Ovics et al., *supra* note 4, at 978.
[10] E. Donald Shapiro & Benedene Sonnenblick, *Widow and the Sperm: The Law of Postmortem insemination,* 1 J.L. & HEALTH 229, 229 (1986).
[11] *Id.* at 232.
[12] *Id.*
[13] Hecht v. Superior Court, 16 Cal. App. 4th 836, 20 Cal. Rptr. 2d 275 (Ct. App. 1993).

failure of insemination process in both cases[14], the judicial approaches illustrate the significance attached to the consent of an individual in reproductive matters and laid the foundation for respecting their procreative interests even after death.

Intensifying the conundrum of consent pertaining to PAR/PMSR and bringing it to international attention for the first time[15], the controversial case of Diane Blood in the United Kingdom marked the beginning of legislative efforts to regulate posthumous reproduction. Unlike in the aforementioned cases, in *Diane's case,* the retrieval of the sperm itself was performed without the prior written consent of Diane's husband Stephen Blood, while he was in a comatose state immediately preceding his death[16]. For this reason, Mrs. Blood's request for either being treated with her deceased husband's sperm or for exporting the same was rejected by the concerned Authority, which found such request violative of the Human Fertilization and Embryology Act, 1990[17]. When the matter came before the Appellate Court, it partly ruled in favour of Mrs. Blood by permitting the exportation of gametes, while refraining from endorsing the legality of non-consensual PMSR itself. The Court made it clear that:

> *"Our decision means that, unless fresh sperm are being used, there will always be a need for a written consent which complies with the schedule. It seems,*

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14 *Widow Fails to Conceive With Mate's Sperm,* LOS ANGELES TIMES (Jan. 11, 1985, 12.00 AM), https://www.latimes.com/archives/la-xpm-1985-01-11-mn-8319-story.html; Devon D. Williams, *Over My Dead Body: The Legal Nightmare and Medical Phenomenon of Posthumous Conception Through Postmortem Sperm Retrieval*, 34 CAMPBELL L. REV. 181, 185 (2011).

15 Frances R. Batzer, Joshua M. Hurwitz & Arthur Caplan, *Postmortem Parenthood and the Need for a Protocol with Posthumous Sperm Procurement,* 79 FERTIL. STERIL. 1263, 1263 (2003).

16 R v. Human Fertilisation and Embryology Authority, ex parte Blood [1997] 2 All ER 687.

17 *Id.*

therefore, that in the future, those who are responsible for treating a man and woman together should take the precaution of having the necessary consent not only to storage but also to enable that treatment to continue if the man should have the misfortune to die before the sperm is used."[18]

Pursuant to the order of the court, Mrs. Blood exported the sperm to Belgium and gave birth to two children, years after Stephen's death, and also obtained a paternity order in his name[19]. The Court's emphasis on the deceased's consent in posthumous reproduction was, however, largely overshadowed by the persistent legal battles fought by Diane Blood and the resultant amendment to the UK's Human Fertilization and Embryology Act, 1990[20]. Despite a general emphasis on consent, the questions left unanswered by the Court, with regard to the non-consensual extraction and use of Stephen's gametes, furthered the debates around the ethicality and legal vacuum on posthumous conception, particularly in balancing the interests of the deceased and that of the living. In later years, with a boom in technological advancements, disputes and discussions pertaining to non-consensual PAR/PMSR have also begun emerging in several countries around the world, India being one of the most recent additions to the list.

III. INDIA'S EXPERIENCE WITH PAR

India reportedly witnessed its first recorded case of PAR in 2008, when a 32-year-old nurse from Kolkata conceived through artificial

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[18] *Id.* at 697.

[19] Clare Dyer, *Diane Blood to have second child,* THE GUARDIAN (Feb.9, 2002, 1:21 PM), https://www.theguardian.com/uk/2002/feb/09/health.healthandwellbeing.

[20] Clare Dyer, *Diane Blood law victory gives her sons their 'legal' father,* THE GUARDIAN (Sep. 19, 2003, 2:34 PM), https://www.theguardian.com/science/2003/sep/19/genetics.uknews.

insemination using her husband's frozen sperm two years after his accidental death[21]. Since the sperm had been consensually obtained from the deceased during his lifetime as part of the couple's infertility treatment, the lack of a separate and specific consent for its posthumous use and the legal vacuum pertaining to it did not attract substantial criticism. Discussions around the legal vacuum on posthumous reproduction in India first emerged in the aftermath of an incident that occurred at AIIMS, Delhi, where a medical team, while performing autopsy on the body of a deceased individual, rejected his wife's request for PMSR[22].

Despite the absence of empirical data on the matter, cases of PAR have been reported across the country over the last decade[23]. Unlike the foreign cases discussed earlier, the consent of the deceased has not received due emphasis in India. This approach can be particularly observed in the earliest instances of litigation pertaining to PAR, which emerged in the wake of the introduction of the Assisted Reproductive Technology (Regulation) Bill, 2020 ("**ART Act**"). In *Asok Kumar Chatterjee v. Union of India (2021)*[24]*,* the father of the deceased who was a patient of thalassemia, claimed rights

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[21] *Love, science revive life after death,* HINDUSTAN TIMES (May 9, 2008, 2:16 AM), https://www.hindustantimes.com/india/love-science-revive-life-after-death/story-YRmjFMwd4RLpQkInlY5bTI.html.

[22] Durgesh Nandan Jha, *Widow asks doctors for dead hubby's sperm to have baby*, THE TIMES OF INDIA (Jul. 11, 2016, 12:31 PM), https://timesofindia.indiatimes.com/city/delhi/widow-asks-doctors-for-dead-hubbys-sperm-to-have-baby/articleshow/53145982.cms.

[23] *Pune Woman who lost son to cancer becomes grandmother to twins from Dead Son's Preserved Semen,* INDIA TODAY (Feb. 15, 2018), https://www.indiatoday.in/fyi/story/pune-woman-becomes-grandmother-with-dead-sons-preserved-semen-1170040-2018-02-15; Srinivasa Rao Apparasu, *Woman Gives Birth Through IVF*, *11 Months After Husband's Covid Death*, HINDUSTAN TIMES (Apr. 9, 2022), https://www.hindustantimes.com/india-news/woman-gives-birth-through-ivf-11-months-after-husband-s-covid-death-101649442478495.html.

[24] Asok Kumar Chatterjee v. Union of India, 2021 SCC OnLine Cal 84.

over his son's cryopreserved sperm, which was rejected by the Calcutta High Court on the ground that no person other than the wife has a right to the deceased man's sperm when he was in a subsisting matrimonial relationship at the time of his death. The decision relied entirely upon the absence of consent from the surviving spouse of the deceased, without the court undertaking any substantive inquiry into the deceased's own reproductive intent or consent. The rational thus suggests that, had the wife been the claimant in the case, the cryopreserved sperm would have been released to her regardless of the absence of the deceased's consent.

In the same year, the Gujarat High Court, in *Stuti Rakesh Painter v. State of Gujarat*[25], was confronted with a medico-legal dispute concerning PMSR, and subsequently PAR. In this case, a man found to have developed severe covid-19 symptoms was admitted to the Critical Care Unit of a hospital, following which his wife sought the court's intervention to permit PMSR. Since the man was incapable of providing informed consent for the procedure and was also on the verge of his death, and given the temporal limitations on sperm retrieval, the court treated the matter as one of 'extraordinary urgency' and granted interim relief to his wife, permitting PMSR. What is more problematic, however, is that the court even allowed her to conceive posthumously using the sperm without the consent of the deceased, noting the absence of any legal restraints in that regard and the fact that the ART Bill was also still under consideration.

It is a significant matter of concern that the consent or interests of the deceased were not accorded sufficient weight in any of the aforesaid

[25] Stuti Rakesh Painter v. State of Gujarat, R/Special Civil Application No. 10400 of 2021.

cases of PAR, regardless of whether they reached the courts or were performed without judicial intervention. The author particularly views the approach of according greater weight to the consent and interests of the surviving spouse over to that of the deceased as deeply rooted in the cultural notions of 'eternality' and 'oneness' in Indian marriages, which, nevertheless, fails to recognize the individual rights and dignity of the dead.

A. ART ACT, 2021: A WELCOME CHANGE?

With rapid technological advancements in medically assisted reproduction, the Parliament enacted the ART Act as a comprehensive legislation to regulate ART clinics and banks, and to ensure their procedural compliance. Section 22 of the Act specifically mandates such clinics and banks to obtain "*written informed consent*" from all concerned parties prior to the performance of any ART treatment/procedure, the cryopreservation of gametes, and the use of human reproductive materials[26]. Section 22(2), in particular, is of considerable relevance to PAR, as it not only necessitates informed consent for the cryopreservation of gametes but also requires "*specific instructions*" from the concerned parties regarding the use of such gametes in the event of their death or incapacity[27].

Section 24(f), the only provision that expressly addresses PMSR, further extends the mandatory prior consent requirement to cases involving posthumous retrieval of gametes. The provision reads as: "*the collection of gametes posthumously shall be done only if prior consent of the commissioning couple is*

[26] The Assisted Reproductive Technology (Regulation) Act, 2021, § 22, No. 42, Acts of Parliament, 2021 (India).
[27] *Id.* at § 22(2).

available in such manner as may be prescribed"[28]. However, the use of the word "*commissioning couple*" adds to the confusion. Since the Act defines a commissioning couple as "*an infertile married couple who approach an assisted reproductive technology clinic or assisted reproductive technology bank for obtaining the services authorised of the said clinic or bank*"[29], Section 24(f) categorically excludes fertile couple and those infertile couple who had not approached an ART clinic/bank prior to the deceased partner's death from the ambit of PMSR. Similar sort of ambiguity is also embedded in section 22, which identifies the parties to an ART treatment/procedure as either a "*commissioning couple*" or "*woman and the donor*"[30]. If the second category applies, the deceased spouse would be reduced to the status of a mere donor, and a plethora of complications would arise with regard to the paternity and other rights of the posthumously conceived child.

Reinforcing the misconception that ART is merely an infertility treatment, the existing law disregards the nuances of PMSR and PAR, which, unlike usual ART procedures involving a living couple, rarely have anything to do with infertility. In most cases, requests for posthumous assisted reproduction come from a fully fertile surviving partner following the unforeseen death of an equally fertile spouse, and not from an infertile couple. Though the Act could have offered a near solution to the issues pertaining to posthumous assisted reproduction, particularly the question of consent, its limitations in recognising these peculiar aspects of PAR/PMSR have rendered its applicability uncertain.

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[28] *Id.* at § 24(f).
[29] *Id.* at § 2(1)(e).
[30] *Id.* at § 22.

B. THE CURIOUS CASE OF GURVINDER SINGH

Despite years of legislative efforts and landmark precedents, ample judicial uncertainty still persists around the world, including in India, regarding the balance between the interests of the deceased and those of the living when it comes to PAR requests. One such uncertain situation emerged before the Delhi High Court, after the enactment of the ART Act, in the case of *Gurvinder Singh v. Govt of NCT of Delhi*[31]. The case involved a complex scenario where the deceased was an unmarried man, in contrast to the preceding cases. When he was diagnosed with cancer and was about to undergo chemotherapy, the doctors warned him about the possibility of infertility and recommended cryopreservation of his semen as a precautionary measure. After consenting to the same and having his semen stored, he unfortunately passed away within three months. With a view to continuing his legacy, his parents requested the hospital management to release his frozen gametes, which was eventually rejected by the hospital. When this dispute came before the Delhi High Court, the court, taking a stance quite opposite to that of the French Court in the *Parpalaix* case, treated the semen as an inheritable property and ruled in favour of the deceased man's parents, recognizing them as the rightful legal heirs under the Hindu Succession Act, 1956[32].

Unlike in *Asok Kumar Chatterjee* and *Stuti Rakesh Painter,* the consent of the deceased was also taken into consideration in the present case, which nevertheless appears to be more of extended consent rather than specific,

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31 *Id.* at 6.
32 *Id.* at para 126.

informed consent for posthumous use[33]. The court also directed the Ministry of Health and Family Welfare to assess the legal gaps in regulating PAR/PMSR[34], thereby sparking a more intense debate among the medico-legal community than the preceding cases. Further exacerbating the debate, the Central government has recently challenged the order passed in *Gurvinder Singh* before a division bench of the Delhi High Court, with particular criticism directed towards its take on the deceased man's "*consent*"[35].

In line with the Centre's challenge, the author argues that the decision in *Gurvinder Singh* substantially undermines the reproductive autonomy of the deceased by erroneously presuming that his consent to cryopreservation extends to the posthumous use of his frozen gametes.

Reinforcing a similar concern, in another recent case before the Delhi High Court, i.e., *Ms. X v. Union of India*[36], the court, while granting permission for sperm retrieval from an Indian Army soldier in a persistent vegetative state ("**PVS**"), recognised the reproductive autonomy of his competent wife who made the request, but not adequately that of the incapacitated soldier. The mutual consent of the couple to commence IVF procedure, given before he reached the PVS state, was extrapolated to permit both the retrieval and any future use of his sperm, after he became

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[33] *Id.* at para 141.
[34] *Id.* at para 146.
[35] *If an unmarried man dies, can his parents use his sperm to continue the family? Case pits Centre against Delhi HC over inheritance law,* THE ECONOMIC TIMES (Feb. 02, 2026, 2:51 PM), https://m.economictimes.com/news/new-updates/if-an-unmarried-man-dies-can-his-parents-use-his-sperm-to-continue-the-family-case-pits-centre-against-delhi-hc-over-inheritance-law/articleshow/127857450.cms.
[36] Ms X v. Union of India, 2026 LiveLaw (Del) 382.

incapacitated[37]. Though the case does not directly involve PAR/PMSR, the court's reliance on *Gurvinder Singh*[38] and its approach towards the question of consent has serious implications on posthumous reproduction.

Despite the ART Act's strong emphasis on informed consent for performing any ART procedure, the judiciary has, in several PAR/PMSR cases beyond the ones discussed above, diverged from this mandate of consent for safeguarding the interests of the living, which shall be elaborately dealt with in Part V of the paper. Before delving into resolving the consent conundrum, a more fundamental issue needs to be addressed amid the judicial uncertainty around PAR: Whether a person who is deceased retains any reproductive rights at all?

IV. REPRODUCTIVE RIGHTS OF THE DEAD: DO THEY HAVE ANY?

A. *REPRODUCTIVE AUTONOMY, BODILY INTEGRITY, AND THE QUESTION OF POSTHUMOUS RETENTION*

*"Privacy is the constitutional core of human dignity... Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, **procreation,** the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life."*[39]

An individual's decisional autonomy in matters of procreation, commonly referred to as 'reproductive autonomy', forms an intrinsic part

[37] *Id.* at para 19.
[38] *Id.* at para 17.
[39] Justice K.S. Puttaswamy (Retd.) v. Union of India, 2019 (1) SCC 1, at paras 322, 323.

of their fundamental right to privacy under Article 21. The constitutional status of reproductive autonomy has also been explicitly affirmed by the Apex Court in multiple landmark cases, recognizing both its positive and negative dimensions, that is, the 'right to reproduce' as well as the 'right not to reproduce'[40]. While such recognition has been predominantly limited to women's rights in India, with only a handful of exceptions such as *B.K. Parthasarathi v. Government of Andhra Pradesh*[41], the burgeoning demand for posthumous assisted reproduction in the recent past necessitates equal recognition of men's reproductive autonomy. This is because almost every case of PAR reported in India to date concerns deceased men and non-consensual retrieval and use of their sperm after death. Nevertheless, regardless of gender, a more fundamental question posed by PAR is whether the right of reproductive autonomy extends beyond an individual's death.

While posthumous use of a person's gametes obtained before their death raises concerns about their reproductive autonomy, posthumous retrieval of gametes raises an additional concern regarding their bodily integrity. Any physical intervention on an individual's body without or against their consent is violative of their bodily integrity, and the right also extends to any non-consensual medical procedure performed on them, as affirmed by the Apex Court in *Jacob Puliyel v. Union of India (2022)*[42]. Pursuant to the ruling, it can be argued that any medically assisted reproduction

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[40] Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1; Devika Biswas v. Union of India, (2016) 10 SCC 726; X v. Principal Secretary, Health and Family Welfare Department, Civil Appeal No. 5802 of 2022.
[41] B.K. Parthasarathi v. Government of Andhra Pradesh, AIR 2000 AP 156.
[42] Jacob Puliyel v. Union of India, 2022 SCC OnLine SC 533.

involving the extraction and use of an individual's gametes without their specific, informed consent is in direct violation of their bodily integrity. The more difficult question, however, is whether such protection extends beyond death. Though the Court in *Common Cause v. Union of India* observed that "*the right cannot be negated for a* ***person*** *who is not able to take an informed decision due to terminal illness or being in a persistent vegetative state*"[43], the vesting of this right in a deceased remains unclear, since the personhood status of the deceased is itself a contentious issue in India.

While the Indian judiciary in *Parmananda Katara v. Union of India* and several other cases has recognised the right to dignity of the dead, such recognition has been mostly confined to its physical dimensions such as decent burial and fair treatment of the body[44], leaving a vacuum on the decisional dimension, particularly in respecting their reproductive choices. While the "*fair treatment*" argument may be advanced against the physical intervention involved in PMSR to a certain extent, it cannot be extended in its current form to PAR as a whole. This is because of its confinement to the dignified treatment of the 'corpse', which does not address the retentive force of the person's reproductive rights held before death.

Therefore, evaluating the rights of the deceased in the context of posthumous reproduction gives rise to a set of fundamental questions that require intensive jurisprudential analysis: Should posthumous reproduction using the reproductive material of the deceased be permitted in the absence

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43 Common Cause v. Union of India, AIR 2018 SC 1665.

44 Parmanand Katara v. Union of India, 1995 (3) SCC 248; Ashray Adhikar Abhiyan v. Union of India, AIR 2002 SC 554.; S. Sethuraja v. Chief Secretary, 2007 (5) MLJ 404.; Pradeep Gandhy v. State of Maharashtra, 2020 SCC OnLine Bom 662.; Anandhi Simon v. State of Tamil Nadu, 2021 (3) MLJ 479.

of his prior and explicit consent in that regard? Conversely, do his bodily integrity and reproductive autonomy retain any legal force or recognition beyond death to categorically foreclose the possibility of posthumous reproduction in the absence of his approval/consent?

B. JURISPRUDENTIAL ANALYSIS

In every discussion concerning the jurisprudence of legal rights, two rival theories play a pivotal role: the will theory and the interest theory.

i. Will Theory and the Inherent Limitation

According to H. L. A. Hart, a prominent will theorist, an individual cannot hold a right unless he is capable of exercising control over another's duty, either by waiving or enforcing its performance[45]. In case of posthumous reproduction, a deceased cannot be considered a right-holder under the will theory because of his inability to directly control the retrieval, storage and/or the use of his gametes. This theory has, nevertheless, been subjected to criticism for such capability-oriented approach, which also excludes children, animals, and mentally incapable adults from holding rights, despite their recognition as legal persons[46]. Though Hart later changed his stance to adopt a representative-based model for children and other incapable persons[47], ambiguity persists regarding the applicability of Hart's revised stance to the deceased. The ambiguity comes from his explicit assertion that a representative may exercise powers on behalf of an

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45 H.L.A. Hart, *Are There Any Natural Rights?,* 64 PHILOS. REV. 175, 181 (1955), in VISA A.J. KURKI, A THEORY OF LEGAL PERSONHOOD 66 (Oxford Univ. Press 2019).

46 *Id.*

47 H.L.A. HART, ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY 184 (Oxford Univ. Press 1982).

incompetent individual only for the 'period of disability'[48] i.e. until they become sui juris, which implies that the incompetence must be temporary or reversible (minority or a comatose state), rather than permanent (death)[49].

ii. Interest Theory and Feinberg's Conception of 'Surviving Interests'

Interest theorists generally regard "*rights*" as instruments that foster the interests or well-being of their holders, rather than giving primacy to their competency[50]. Therefore, to critically examine the concept of posthumous reproductive rights, the author seeks to rely on the interest theory, as developed by Joel Feinberg. Since Feinberg himself has attempted to demystify the conundrum surrounding the interests of a deceased, his works on posthumous interests will be of greater significance in evaluating the rights of the deceased with regard to PAR/PMSR.

Joel Feinberg considers possession of interests as both 'necessary and sufficient' to recognize an entity as right-holder[51], which leads to the immediate question of whether an individual has any procreative interests that survive his death. Feinberg addresses this question by classifying interests into three categories: 'self-regarding', 'other-regarding', and 'self-centred'[52]. 'Self-regarding interests' are exclusively limited to one's personal achievements and experiential pleasures, which do not survive the

[48] *Id.*
[49] DANIEL SPERLING, POSTHUMOUS INTERESTS: LEGAL AND ETHICAL PERSPECTIVES 67 (Cambridge Univ. Press 2008).
[50] Robert Mullins, *Rights, Roles, and Interests,* 16 J. ETHIC SOC. PHILOS. 95, 95 (2019).
[51] VISA A.J. KURKI, A THEORY OF LEGAL PERSONHOOD 62 (Oxford Univ. Press 2019).
[52] Joel Feinberg, *Harm and Self-Interest,* in LAW, MORALITY AND SOCIETY: ESSAYS IN HONOUR OF H.L.A HART 285, 304-305 (P.M.S. Hacker & Joseph Raz eds., 1977).

individual's death[53]. 'Other-regarding interests' and 'Self-centred interests', on the other hand, are collectively regarded as their 'surviving interests'[54], which include "*an interest in the well-being of another*" (other-regarding)[55] and the "*interests in being thought of in certain ways by others*" (self-centred)[56]. Relying on this theoretical justification, the author contends that while the self-regarding interests of a person in reproduction, such as the desire to experience parenthood and other lived aspects of procreation, do not survive death, their surviving procreative interests continue to be held by them even after their death. For instance, a man may not have desired to be identified as the 'father' of a posthumously conceived child, and because that identity is permanent, extending for generations beyond his death, the non-consensual use of his gametes in such cases could have the effect of imposing "*forced fatherhood*" upon him[57]. Similarly, he may have other-regarding interests in the well-being of his wife, desiring her remarriage and a fresh start in life after his death, rather than wanting her to succumb to pressure from her in-laws to continue the family lineage through PAR. He may also have concerns regarding the psychological welfare of the child sought to be conceived posthumously using his sperm, and even the guilt of imposing 'planned orphanhood' upon the child[58]. With such ample

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53 *Id.* at 304.
54 *Id.* at 305.
55 *Id.* at 290.
56 *Id.* at 308.
57 Michael J. Higdon, *Fatherhood by Conscription: Nonconsensual Insemination and the Duty of Child Support,* 46 GA. L. REV. 409 (2012).
58 Bella Savitsky, *Reasons for opposition to posthumous reproduction and prior consent: attitudes of Jewish men during the ongoing armed conflict*, 14 ISR. J. HEALTH POLICY RES. 1, 4 (2025).

procreative interests surviving an individual's death, it cannot be simply said that their reproductive rights extinguish after their lifetime.

Providing a unique intersection of rights, interests and harm, Feinberg posits that a setback to one's interest constitutes harm[59], which, in turn, amounts to a violation of the corresponding right. In this context, the next question that arises is whether a setback to the surviving procreative interests of a deceased individual, particularly through the posthumous extraction and use of their gametes against their wish or without their consent, is capable of constituting harm to them. Rejecting the notion that a postmortem person can be subjected to harm, Feinberg nevertheless advances the concept of the *"antemortem person",* that is, the person as he existed before death, as the proper subject of harm caused to his surviving interests[60]. Therefore, according to Feinberg's theory, reproductive rights continue to be held posthumously by an antemortem person, to the extent that they intersect with their surviving interests.

The theory, however, is not devoid of criticism. Drawing on the doctrine of 'Backward Causation', Joan Callahan critiques Feinberg's theory as providing for a logically impossible scenario where the effect precedes the cause of the harm[61]. Since the antemortem person does not exist at the time the non-consensual posthumous extraction and/or use of his reproductive materials occurs, they cannot be the subject of such posthumous harm unless the harm somehow travels back in time to affect them. Building on this "*backward causation*" criticism, Professor Daniel

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[59] *Id.* at 285.
[60] JOEL FEINBERG, HARM TO SELF XI (Oxford University Press 1986).
[61] Joan C. Callahan, *On Harming the Dead,* 97 ETHICS 341, 345 (1987).

Sperling proposes the "*Human Subject*" model as an alternative to Feinberg's "*antemortem person*"[62]. Sperling critiques the confinement of human existence entirely to the physical form of "*personhood*", contending that a person exists in a logical and non-material form even after death, the form being called the "*Human Subject*"[63]. While partially agreeing with Feinberg's theory on posthumous harm by recognising his concept of "*surviving interests*"[64], Sperling suggests the metaphysically existent "*Human Subject*" as the proper interest-holder rather than the non-existent antemortem person.

Therefore, a combined reading of Feinberg's and Sperling's theories would yield a strong theoretical justification for the recognition of posthumous reproductive rights. To the extent that these surviving interests continue to be held by the Human Subject, including self-centred interests regarding their own identity and reputation, and other-regarding interests in the welfare of the posthumously conceived child, the well-being of their surviving partner, and the continuance of family legacy, it may be contended that the person for whom the human subject holds the interests retains their rights of reproductive autonomy and bodily integrity. Therefore, a deceased individual's ante-mortem consent with regard to their reproductive fate should be strictly respected without any liberal or extrapolated judicial interpretations, which, otherwise would seriously undermine their retained reproductive rights. A more complex challenge, nevertheless, lies in decoding the antemortem consent of the deceased, particularly when no express consent was given by them.

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[62] SPERLING, *supra* note 49, at 34-36.
[63] *Id.* at 35,36.
[64] *Id.* at 21.

V. THE CONUNDRUM OF CONSENT

Consent is the practical expression of one's autonomy. It is for this reason that the ART Act has mandated obtaining written informed consent. However, unlike other ART procedures, obtaining written informed consent of the concerned party becomes impracticable in many instances of PAR/PMSR due to the unpredictable nature of death. As a result, diverse approaches to consent have been proposed around the world to decipher the unexpressed intent of the deceased, as an attempt to respect their reproductive choices. Conversely, certain approaches also tend to prioritise the interests of the living over the rights and choices of the deceased. This section seeks to solve the conundrum.

A. INFORMED CONSENT V. PRESUMED CONSENT

Construing non-consensual medical interventions as a form of trespass to the person for the first time, Justice Benjamin Cordozo, in his landmark decision in *Schoendorff* v. *Society of New York Hospital (1914)*[65], catalysed debates surrounding consent frameworks in medical jurisprudence. Building on the debate, and following the Nuremberg Trials in the 1940s, several countries around the world have incorporated the mandate of informed consent into their medico-legal frameworks, so as to ensure the ethicality of medical procedures and research. However, in certain posthumous medical interventions, particularly organ donation, obtaining informed consent faced serious practical impediments. Stringent consent requirements resulted in an acute shortage of life-saving organs,

65 Schloendorff v. Society of New York Hospital, 211 N.Y. 125 (1914).

which triggered many countries around the world to shift towards a more flexible 'presumed consent' framework[66].

The doctrine of 'presumed consent', otherwise known as the 'opt-out' system, refers to a practice originally developed to address concerns surrounding post-mortem organ donation, whereby the consent of the deceased to the procedure is presumed unless the individual had expressly objected prior to his death[67]. Since death is often sudden and unforeseen, which limits the possibility of obtaining prior informed consent from the deceased, certain scholars have argued for extending the applicability of the 'presumed consent' framework to posthumous reproduction. A prominent argument in this regard has been advanced by Kelton Tremellen and Julian Savulescu, who contend that posthumous sperm retrieval is ethically more justifiable than organ procurement for invoking presumed consent, as the former involves less disfigurement and offers greater benefit to the deceased's family[68]. However, the crux of the rationale that prompted the evolution of the 'presumed consent' framework for organ procurement, despite the ethical concerns it raises regarding an individual's autonomy, has not been sufficiently assessed by Tremellen and Savulescu.

As distinguished by Anne Schiff, the primary drive behind adopting a presumed consent framework for organ donation is its 'socially desirable' nature,[69] a utilitarian justification that does not hold true for posthumous

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[66] Jyotika Kaushik, *Organ Transplant and Presumed Consent: Towards an "Opting out" system,* 6 INDIAN J. MED. ETHICS 149, 150 (2009).
[67] *Id.* at 149.
[68] Kelton Tremellen & Julian Savulescu, *A discussion supporting presumed consent for posthumous sperm procurement and conception,* 30 REPROD. BIOMED. ONLINE. 6, 7-8 (2015).
[69] Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation,* 75 N.C.L. REV. 902, 932 (1997).

reproduction. By using the term 'socially desirable', Anne Schiff does not refer to presumed consent as a normative preference of the State, but rather a situational compulsion to meet the burgeoning demand for life-saving organs in the broader public interest[70]. While organ procurement largely depends on cadaveric donors, the demand for gametes in ART treatments can be adequately met by living donors, and their posthumous use does not serve any life-saving necessity as well.[71] Schiff further argues that, unlike organ donation, posthumous reproduction is more intrinsically tied to an individual's identity,[72] requiring utmost respect for their decisional autonomy. The intrinsic value of gametes is mainly attributed to their reproductive or 'life-creating' potential, a characteristic that is absent in other tissues and organs extracted from the corpse. Further, in posthumous reproduction, every surviving interest about the retention of an individual's reproductive right originates from this 'life-creating' nature of gametes, while its absence in organ procurement limits the posthumous survival of any interests and retention of decisional autonomy in that regard.

Therefore, the author is of the view that invoking presumed consent for PMSR and PAR, solely in the interest of the surviving partner or the family of the deceased, would seriously undermine the reproductive autonomy of the deceased. It is also pertinent to understand the conflict of interests involved in presuming consent for posthumous reproduction based on the family members' proxy consent, a framework proposed by Kelton and Julian. Since the family members have direct personal interests

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70 *Id.* at 932.
71 *Id.* at 932, 933.
72 *Id.* at 933,934.

in the outcome of such a procedure, unlike in post-mortem organ donation, the consent of the deceased cannot be presumed with the proxy consent/desires of the family.

B. JUDICIAL UNCERTAINTY IN INDIA

Along the lines of Kelton and Julian, Indian courts have also raised concerns regarding the inherently unanticipated nature of death, which, in their opinion, limits the opportunity for the deceased to provide informed consent for PMSR/PAR. Therefore, given the temporal and consent limitations involved in PMSR/PAR, the courts tend to prioritize the desires of surviving family members over the dignity and autonomy of the deceased or the incapacitated, at least to the extent of permitting the retrieval and cryopreservation of sperm for potential future use. The Kerala High Court, for instance, passed interim orders permitting the extraction and cryopreservation of the sperm of the petitioners' spouses without their written informed consent in two cases: *A.N. Anu* v. *Union of India (2024)*[73]*,* where the spouse was unable to provide informed consent due to his life-threatening medical condition, and *X* v. *Union of India (2026),*[74] where the spouse was declared brain-dead. However, in neither case did the court permit any further use, including posthumous use, of the cryopreserved sperm without its specific directive, provisionally limiting the consent waiver to preservation alone. A similar stance was taken by the Delhi High

[73] A.N. Anu v. Union of India, W.P.(C) No. 29231 of 2024 (D).

[74] X v. Union of India, 2026 SCC OnLine Ker 3731.

Court in *Heena* v. *State of NCT of Delhi (2025)*,[75] albeit the case involved a PMSR request from the parents and sister of a suicide victim.

Though these precautionary judicial interventions did not directly endorse the posthumous use of the retrieved gametes, they nonetheless reflect an emerging shift towards the 'presumed consent' framework envisaged by Kelton and Julian, by prioritising the interests of the surviving family members over the reproductive rights of the deceased statutorily recognised under Sections 22(2) and 24(f) of the ART Act. These interim judicial orders call for the Parliament's immediate attention towards the complex issues arising out of posthumous reproduction, intensifying the need for tailored laws or guidelines. The need for such legislative intervention can be further inferred from *XX* v. *State of Maharashtra (2025)*[76], where the Bombay High Court, on the request of the deceased's mother and given the paramountcy of the questions involved in posthumous reproduction, ordered that the sperm consensually obtained before the death of the deceased be preserved during the pendency of the petition, awaiting an appropriate enactment or guidelines, despite the deceased's explicit instruction in the consent form to discard the sperm after his death.

C. 'Inferred Consent' as a Middle Ground?

With regard to PAR, the judiciary has granted permission for posthumous conception in at least one case: *Gurvinder Singh v. Govt of NCT of Delhi*[77]. In *Gurvinder Singh,* as discussed earlier, the Delhi High Court

[75] Heena & Ors. v. The State of NCT of Delhi, W.P.(C) 956/2025.
[76] XX v. State of Maharashtra, WP No. 7589 of 2025.
[77] I*d.* at 6

ordered the release of the deceased's cryopreserved sperm to his aged parents for begetting a child through a surrogate or otherwise. However, the decision was not a blanket ruling, nor was it made without placing any reliance on the consent of the deceased. The court extrapolated his consent to posthumous reproduction from the prior consent he had given for cryopreservation[78], shedding light on a third dimension of consent, that is, inferred consent. Though inferred consent could serve as a strong middle ground between stringent explicit consent and blanket presumed consent in cases of posthumous reproduction, the inference should nevertheless be grounded in solid evidence rather than mere speculation or an overstretched extension from the consent given for a different purpose. The author disagrees with the Delhi High Court's extrapolation of consent, as the prior consent of the deceased to cryopreservation was given in anticipation of infertility, not death. Since chemotherapy would have rendered him infertile, he consented to the cryopreservation of his sperm to enable him to achieve and experience fatherhood at any time in the future. Even the court itself has acknowledged his state of mind at the time of consenting to cryopreservation, by observing that *"He may have hoped to live after chemotherapy but nature willed otherwise"*[79]. There is no solid evidence to substantiate the inference that he would have similarly consented to the posthumous use of his sperm had he contemplated his death and been informed of the consequences of PAR.

Further, such extrapolation of a patient's consent directly contravenes the Supreme Court's holding in *Samira Kohli v. Prabha*

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[78] *Id.* at para 141.
[79] *Id.* at para 141.

Manchanda, where the court observed that, except in life-saving situations, "*consent given for a specific treatment procedure will not be valid for conducting some other treatment procedure*"[80].

While the ART Act now mandates the provision of 'specific instructions' regarding posthumous use of one's gametes at the time of cryopreservation itself, semen samples obtained for cryopreservation before the enactment of the Act are highly prone to face similar issues as in *Gurvinder Singh*. Cases involving claims of PMSR or sperm retrieval from incapacitated individuals are equally prone to be faced with such concerns of extrapolated consent, as seen in *X* v. *Union of India*[81]. To resolve the issue, the author hereby argues in favour of sticking to the existing informed consent framework, regardless of the limitations attached to it, since inferring the consent of the deceased to PAR/PMSR, despite its ability to serve as a balancing middle ground, is nearly impossible. This is because even if a man desires to become a father during his lifetime, it cannot be erroneously inferred that his desire extends to achieving postmortem parenthood. It is implausible to think that a man would wish to become a father without the intention of rearing the child or experiencing fatherhood. Moreover, regardless of his desire to become a father, the man may not intend to deliberately bring a fatherless child into existence.

Certain empirical studies on men's attitudes towards posthumous reproduction also reveal a similar inference. For instance, in a study conducted in Israel amid the growing number of requests for PAR, a substantial population of men disfavoured posthumous reproduction

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[80] Samira Kohli v. Prabha Manchanda, AIR 2008 SC 1385, para 32.
[81] Ms X v. Union of India, 2026 LiveLaw (Del) 382.

primarily on the perception of "the unethical nature of planned orphanhood"[82]. Therefore, even if a person has registered for ART treatment or expressed their parental desires in any other way, consent to PAR, PMSR, or ante-mortem sperm retrieval at the time of incapacity cannot be inferred from that registration or expression alone. Posthumous assisted reproduction being entirely different from its experiential counterpart of ante-mortem reproduction, any attempt of inferring the consent of the deceased to PAR from his ante-mortem parenthood aspirations would largely end up as extrapolated consent rather than true inferred consent.

D. GLOBAL PERSPECTIVES

While countries like France and Germany prohibit posthumous assisted reproduction in its entirety[83], prior informed consent is the norm in a considerable majority of other countries that regulate PAR/PMSR. In the United Kingdom, for instance, Schedule 3 of the Human Fertilization and Embryology Act, 1990 mandates the "*effective consent*" of a person in writing for the storage as well as use of their gametes or embryo, including their posthumous use[84]. Para 3 of the Schedule further solidifies the consent requirement by requiring the provision of a 'proper counselling' and 'relevant information' to the person regarding the potential implications of the proposed process[85]. Despite the statutory stipulation, the UK Judiciary

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[82] *Supra* note 58, at 4.
[83] Shelly Simana, *Creating life after death: Should Posthumous Reproduction be legally permissible without the deceased's prior consent?,* 5 J.L.B 329, 331 (2018).
[84] Human Fertilization and Embryology Act 1990, c. 37, sched. 3 (UK).
[85] *Id.* at para 3.

has, in exceptional cases[86], read down the requirement and opted for an inferred consent approach. Such inferred consent is, however, not merely an extrapolation from the deceased's experiential parental desires held before death, but based on actual inference of their specific desire towards posthumous reproduction[87]. Amid the recognition of such limited exceptions, the Family Division of the England and Wales High Court has, in *G v. Human Fertilization and Embryology Authority*[88], recently affirmed the primacy of the statutory requirement of 'written informed consent' by rejecting a mother's claim over her deceased daughter's cryopreserved eggs. The facts of the case are quite similar to *Gurvinder Singh,* except for the gender of the deceased. The daughter of the claimant, before her death, consented to the cryopreservation of her gametes after being diagnosed with breast cancer, and also consistently expressed her desire to have a child. Based on this ante-mortem parental desire, the claimant sought to infer the consent of her daughter for posthumous use of her frozen eggs. However, the court, reinforcing the statutory norm, refused to entertain her claim due to the absence of 'informed consent' specifically expressed for the purpose of posthumous reproduction[89].

The mandate of 'prior informed consent' in writing to undergo PAR/PMSR has also been incorporated into the legislative frameworks of

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[86] Warren v. Care Fertility (Northampton) Limited and Other, [2014] EWHC 602 (Fam); Y v. A Healthcare NHS Trust & Ors [2018] EWCOP 18; SB v. The University of Aberdeen and Others [2020] CSIH 62; Jennings v. Human Fertilisation and Embryology Authority (HFEA) [2022] EWHC 1619 (Fam).

[87] *Id.*

[88] G v. Human Fertilisation and Embryology Authority [2024] EWHC 2453 (Fam).

[89] *Id.*

other European countries like Spain[90], Italy[91], and Belgium, with Belgium particularly prescribing a cooling-off period of 6 months from the date of death and a maximum time-limit of 5 years from that date for opting for such posthumous use[92].

In the North American region, Canada is one of the very few countries that explicitly regulates PAR, requiring written informed consent for both the retrieval and use of a person's gametes after their death[93]. However, in *K.L.W.* v. *Genesis Fertility Centre*[94]*,* the Supreme Court of British Columbia in Canada permitted PAR even without the deceased's prior informed consent, which was also cited by the Delhi High Court in support of its inferred consent approach in *Gurvinder Singh*[95]. It is nevertheless pertinent to note that the British Columbia Court of Appeal, the highest judicial body in the province, later rejected a similar request for PMSR based on inferred consent, and upheld the indispensability of written informed consent in such cases[96]. The Court clarified that the earlier case decided by the Supreme Court was factually different from the one at hand, since the deceased in that case had expressly communicated his specific desire for posthumous reproduction to multiple witnesses, despite the absence of his written consent[97].

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90 Law 35/1988, art. 9 (Spain).

91 Costanza Raimondi et al., *The New Italian Guidelines for Assisted Reproduction Technologies (ART): Ethical and Medico-Legal Issues,* 13 HEALTHC. (BASEL) 195 (2025).

92 Costanza Raimondi et al., *Posthumous Assisted Reproduction and Post-mortem paternity,* 8 FRONT. REPROD. HEALTH. 1, 2-3 (2026).

93 Assisted Human Reproduction Act, S.C. 2004, c. 2, art. 8 (Can.).

94 K.L.W. v. Genesis Fertility Centre (2016 BCSC 1621).

95 *Id* at 6, para 34.

96 L.T. v. D.T. Estate (2020 BCCA 328).

97 *Id.*

Israel is the only country currently considering the enactment of a "*presumed consent*" framework, which is nonetheless not a deliberate choice but a crisis response to the rising number of PAR requests amid war-related deaths[98]. Otherwise, at present, no major countries in the world that regulate PAR statutorily acknowledge the 'presumed consent' or 'inferred consent' approach, and they have always upheld the primacy of prior informed consent in writing.

VI. RECOMMENDATIONS

1. **"Prior Informed Consent" as a norm:** Whose voice should prevail in posthumous reproduction? Based on the above analysis, the author is of the firm opinion that consent or desire of the family members could never serve as an equivalent proxy to the informed consent of the deceased. Any such attempt of performing PAR/PMSR without consent or through extrapolated/presumed consent of the deceased would violate their retained reproductive rights, and also thwart their surviving interests in procreation. Therefore, as stipulated in the ART Act, 2021, 'prior informed consent' of the deceased in writing should be the indispensable norm for permitting PAR/PMSR, and no extrapolation in the guise of inferred consent could equal its primacy. However, stringent written consent is not always feasible, particularly when death is not foreseeable. In such exceptional cases, if the consent of the

98 *Knesset advances bill to expand use of sperm from fallen soldiers,* THE TIMES OF ISRAEL (May 4, 2023, 10:45 AM), https://www.timesofisrael.com/knesset-advances-bill-to-expand-use-of-sperm-from-fallen-soldiers/.

deceased specifically for posthumous assisted reproduction can be unambiguously demonstrated from his ante-mortem words or actions, as exemplified by *Parpalaix* and *KLW,* PAR may be permitted after a careful and thorough consideration by a judicial or a quasi-judicial body. In every such consideration, nevertheless, the best interests of the deceased and that of the potential offspring shall always override the subjective desires of other family members.

2. **Preliminary Evidence for permitting PMSR:** In cases involving urgent PMSR requests, as seen in *Stuti Rakesh Painter* and *A.N. Anu*, a two-stage approach is essential to resolve the tension between the reproductive rights of the deceased and the 24-36 hours temporal limitation pertaining to post-mortem sperm retrieval. *First*, the retrieval and cryopreservation of the sperm shall be provisionally permitted on the basis of any preliminary evidence, which may even include the demonstration of the deceased's antemortem parenthood aspirations. *Second*, the extracted sperm shall be permitted to be used for conceiving a child only after the specific consent/intent of the deceased for the purpose of posthumous reproduction is unambiguously demonstrated. This differential yet balanced approach between PMSR and PAR can be justified on the grounds that the surviving procreative interests of the deceased, as elucidated in the previous sections, are primarily thwarted only when the retrieved reproductive material is ultimately used for 'life

creation', rather than at the stage of extraction or cryopreservation itself.

3. **Amendment to the ART Act, 2021:** The ART Act, 2021, in its current form, fails to recognize the nuances of PAR and PMSR, particularly limiting the scope of its consent requirement provisions entirely to infertile commissioning couple. Given the exclusion of fertile couples from the definition of commissioning couples, it remains ambiguous whether the consent form provided in the ART Rules, 2022 is open to couples outside the ambit of the definition. Since PAR rarely has anything do with infertility, and request for the same often arises from the unforeseen death of an otherwise fertile individual, it is high time that the law recognised this distinct attribute of PAR and that the provisions pertaining to the requirement of consent for PAR/PMSR are amended accordingly.

4. **Cooling-off period:** Certain studies have warned about hasty and emotional decisions taken by surviving partners with regard to conceiving a child with their deceased partner's reproductive material[99]. The well-being of the surviving partner, as well as her ability to make an informed and emotionally stable decision regarding PAR, are some of the significant aspects of a deceased's

[99] G. Pennings et al., *ESHRE Task Force on Ethics and Law 11: Posthumous assisted reproduction,* 21 HUM. REPROD. 3050, 3052 (2006).; Asit Kumar Sikary, O.P. Murty & Rajesh V. Bardale, *Postmortem Sperm Retrieval in Context of Developing Countries of Indian Subcontinent,* 9 J. HUM. REPROD. SCI. 82, 84 (2016).

surviving procreative interests. Therefore, to avoid hasty decisions taken out of emotional attachment with the deceased, it is pertinent to enact a law similar to that in Belgium, mandating a minimum cooling-off period of 6 months before a surviving partner could opt for posthumous reproduction, regardless of the deceased's consent to the procedure. Further, if the surviving partner's desire for PAR persists even after the cooling-off period, they shall be required to undergo a 'proper counselling' regarding the implications of PAR before commencing the procedure.

5. **Renewal of consent:** To prevent future complexities regarding the posthumous use of gametes cryopreserved before the enforcement of the ART Act, 2021, the concerned individuals whose gametes were obtained for cryopreservation prior to that date should be mandated to renew their consent, along with specific instructions regarding the posthumous use of such gametes. Further, every person who opts/opted for cryopreservation of their gametes be required to renew their 'consent' and 'specific instructions' regarding posthumous use every 5 years, which could provide them with an opportunity to express any change of mind amid altered circumstances.

VII. CONCLUSION

Indians often prioritise genetic and biological linkage with their children, which is also a reason for the low adoption rates in the country[100]. Even while entering ART treatments, they tend to prefer their own gametes to donor gametes[101]. These genetic preferences and the desire to preserve biological lineage, alongside the rapid expansion of ART clinics across the country, foreshadow a greater demand for PAR in India than is currently observed in Western countries. The fact that many people in India, both men and women, are opting for gamete cryopreservation amid changing lifestyles and perceptions further substantiates this inference. Moreover, beyond the complexities involved in deciphering the consent of the deceased, the emerging PAR/PMSR requests raise a plethora of other concerns, most notably the legal lacunae pertaining to the rights of posthumously conceived children, particularly with regard to their paternity, inheritance and psychological welfare, among others. Therefore, it is pertinent that the law keeps pace with the changing circumstances and provides tailored rules and guidelines to address the peculiar concerns arising from posthumous assisted reproduction.

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100 Shreya Kalra, *The Reasons for Low Levels of Adoption in India are Manifold,* THE WIRE (Oct. 29, 2018), https://m.thewire.in/article/society/the-reasons-for-low-levels-of-adoption-in-india-are-manifold.

101 Kaberi Banerjee & Bhavana Singla, *Acceptance of Donor Eggs, Donor Sperms, or Donor Embryos in Indian Infertile Couples,* 11 J. HUM. REPROD. SCI. 169, 169–71 (2018).

Ashar Nezami & Mohd. Arslaan, *When Disclosure Falls Short: Assessing Materiality and Regulatory Gaps in SEBI's Related Party Transaction Framework*, 12(2) NLUJ L. Rev. 181 (2026).

WHEN DISCLOSURE FALLS SHORT: ASSESSING MATERIALITY AND REGULATORY GAPS IN SEBI'S RELATED PARTY TRANSACTION FRAMEWORK

~ Ashar Nezami & Mohd. Arslaan[*]

ABSTRACT

*The Securities and Exchange Board of India's ["**SEBI**'] recently made amendments in the SEBI Listing Obligations and Disclosure Requirements, 2015["**LODR Regulations**"] for ease of doing business. It has changed the threshold for assessing materiality in Related Party Transactions ["**RPTs**"] to a scale-based approach. This piece applauds the position of SEBI's materiality calculation by analysing it through the lens of the Linde India case. It further highlights the issue of de facto delisting, where entities separate their transactions and transfer growth-intensive sectors in future arrangements without formally delisting the entity.*

*The paper highlights the following issues in the LODR regime. Firstly, while the regulation does allow the inclusion of future arrangements while calculating the RPTs, it does not provide any method for calculating the valuation of future transactions. Moreover, the current method of calculating materiality relies on a cross-year model, due to which transactions separated across different Financial Years ["**FY**"] do not get accounted for.*

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*This position is further aggravated by the separation of these transactions across different subsidiaries. In order to tackle these issues, this piece recommends the use of Companies (Registered Valuers and Valuation) ["**RVV**"] rules for the assessment of future transactions in accordance with the Institute of Chartered Accountants of India ["**ICAI**"] valuation standard. Finally, it suggests the calculation of transactions on a cross-year basis with a control/influence-based assessment to prevent regulatory evasion through subsidiaries.*

***Keywords**: RPTs, LODR regulations, cross-year transactions, materiality assessment, aggregation of transactions.*

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I. INTRODUCTION

RPT refers to those transactions that are entered into with a person or an entity with whom someone is associated.[1] Section 2(76) of the Companies Act, 2013,[2] read with Rule 3 of Companies (Specification of definitions details) Rules, 2014,[3] defines a related party. It refers to any person or entity who is close enough to influence the decision-making of the company. It can include directors, key personnel, entities, and clubbed companies linked to them. It may also include persons or companies that act on their instructions. Moreover, LODR regulation lays down stringent disclosure requirements for RPTs involving listed companies.[4] Since major RPTs are associated with listed entities, LODR regulations become a significant framework for governing RPTs in the current lacuna.

Recently, SEBI has been mulling over regulatory issues related to RPTs, which has led to some significant suggestions for revisions and updates in these transactions.[5] In this context, recent decisions like those against Linde India Ltd ["**LIL**"] highlight significant issues within the regulatory framework that governs RPTs.[6] This article discusses the materiality framework in RPTs. It applauds SEBI's position on calculating

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1 Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, Regulation 2(zb).

2 Companies Act, 2013, § 2(76).

3 Companies (Specification of Definitions Details) Rules 2014, Rule 3.

4 Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015.

5 The Economic Times, *SEBI revises related party transaction rules,* THE ECONOMIC TIMES, Jun. 28, 2025, https://economictimes.indiatimes.com/markets/stocks/news/sebi-revises-related-party-transaction-rules/articleshow/122123127.cms?from=mdr.

6 Linde India Ltd. v. Securities and Exchange Board of India, Appeal No 527 of 2024(December 5, 2025).

materiality and including future ventures within the assessment of RPT. Furthermore, it argues that RPTs are not effectively governed through the LODR framework due to the gap in the legislative texts. By analysing it through the lens of decisions such as that of the LIL, it highlights that the current regulation is not equipped with adequate safeguards to maintain financial integrity in RPTs.

II. ROLE OF MATERIALITY IN REGULATING RPTS

Regulation 23 of the LODR regulations governs the RPTs related to listed entities.[7] It lays out disclosure and approval requirements for RPTs involved in transactions over a certain financial threshold. The framework works to protect the rights of shareholders as it ensures that entities do not engage in transactions that go against the rights of minority shareholders.[8]

Regulation 23(1) acts as one of the most significant regulations for the governance of RPTs in relation to listed entities.[9] It defines materiality in the context of related transactions. If all the transactions taken together in a single FY exceed the scale-based threshold given in Schedule XII, it is considered material.[10] Once an RPT becomes material, shareholder

[7] Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, Regulation 23.

[8] SEBI, *Order in the Matter of Kirloskar Oil Engines Ltd. & Anr. v. SEBI*, W.P. No. 495 of 2025, Sept. 23, 2025, https://www.sebi.gov.in/enforcement/orders/sep-2025/order-in-the-matter-of-kirloskar-oil-engines-limited-and-anr-vs-sebi-wp-no-495-of-2025-_97971.html.

[9] Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015, Regulation 23(1).

[10] Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015, Schedule XII.

approval becomes mandatory.[11] Therefore, shareholders receive protection under this regulation, which prevents certain types of transactions without their approval.

A material RPT is characterised according to certain defined financial thresholds, which will be explained in the subsequent section. Since high valued RPTs become subject to shareholder approval, any material RPT which might be abusive can be prevented, as approval from shareholders becomes a mandatory requirement.

SEBI has recently changed its position on materiality assessment to a scale-based threshold. The earlier materiality threshold had an upper limit of INR 1000 crore, which confined high-value firms to shareholder approval for regular transactions.[12] The new scale-based threshold tries to tackle this problem by dividing the scale according to multiple turnovers. This allows companies with high net worth to carry on their business with ease.

A. ***SEBI'S RECENT AMENDMENTS IN RPT: A SHIFT IN MATERIALITY ASSESSMENT***

SEBI amended the LODR regulations bringing some significant changes in the assessment of materiality of transactions.[13] This amendment

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[11] Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015, Regulation 23(4).

[12] SEBI, *Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 [Last amended on December 16, 2025],* SEBI, Dec. 16, 2025, https://www.sebi.gov.in/legal/regulations/dec-2025/securities-and-exchange-board-of-india-listing-obligations-and-disclosure-requirements-regulations-2015-last-amended-on-december-16-2025-_98594.html.

[13] *Id.*

was first notified through a consultation paper, which was brought out in August 2025 for public comments.[14]As mentioned earlier, the upper limit for a material RPT was fixed at INR 1000 crore, which means that the materiality amount may not be substantive in comparison to turnover and scale of operations. Companies with high consolidated turnover may be regularly involved in transactions near the INR 1000 crore mark. This essentially limits them to shareholder approval for frequent transactions, which becomes an issue of business efficiency. The new scale-based threshold[15] tackles this problem by creating buckets for calculating materiality, which essentially divides the assessment according to different turnover.

Range of the Annual Consolidated Turnover	**Materiality Threshold**
Up to INR 20,000 Crore	10% of the annual consolidated turnover
Between INR 20,001-40,000 Crore	INR 2,000 Crore + 5% of the annual consolidated turnover above the INR+ 20,000 Crore mark
Beyond INR 40,000 Crore	INR 3,000 Crore + 2.5% of the annual consolidated turnover above the 40,000 Crore mark

[14]SEBI, *Consultation Paper on Amendments To Provisions Relating To Related Party Transactions Under SEBI (LODR) Regulations, 2015 And Circulars Thereunder,* SEBI, Aug. 4 2025, https://www.sebi.gov.in/reports-and-statistics/reports/aug-2025/consultation-paper-on-amendments-to-provisions-relating-to-related-party-transactions-under-sebi-lodr-regulations-2015-and-circulars-thereunder_95824.html.

[15]Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015, Schedule XII.

	OR INR 5,000 Crore, whichever is lower

The new materiality assessment creates a shift in RPTs for ease of doing business. Companies with substantially high turnovers do not need to take shareholder approval for transactions as low as INR 1000 crore. This ensures efficiency and financial stability in companies that engage in these transactions on a frequent basis due to their significantly high annual turnover.[16] The proposed differentiation in materiality assessment for various buckets of turnovers further ensures efficiency by increasing the materiality limit in accordance with the consolidated turnover.

SEBI's recent change marks a pragmatic step in materiality assessment. Additionally, its position for assessing materiality remains positively consistent, which shows that SEBI has been reinforcing some positive reforms in the laws governing RPT. For assessing materiality, it aggregates transactions over a year with a single related party.[17] This essentially means that transactions in continuously related dealings with a single related party are combined for evaluating the materiality of the concerned RPT. This position allows SEBI to effectively prevent those transactions from sidestepping shareholder approval requirements, which may be separated across different contracts or multiple dealings.

[16]Srijan & Tamanna, *Materiality or Mirage? Rethinking SEBI's Reforms on Related Party Transactions,* THE INDIAN REVIEW OF CORPORATE AND COMMERCIAL LAWS, Oct. 25, 2025, https://www.irccl.in/post/materiality-or-mirage-rethinking-sebi-s-reforms-on-related-party-transactions.

[17]Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015, Regulation 23(1).

III. MATERIALITY ASSESSMENT IN LIGHT OF SAT'S DECISION AGAINST LIL'S RPT

SEBI's consistent position on materiality assessment was recently upheld by the Securities Appellate Tribunal ["**SAT**"].[18] SAT dismissed LIL's appeal against SEBI's direction,[19] holding that the entirety of a related party's dealings forms the basis for materiality, not the value of any single transaction or contract viewed on its own.

LIL and Praxair India Pvt. Ltd ["**PIPL**"] entered into a Joint Venture ["**JV**"] and Shareholders Agreement ["**SHA**"], where both entities divided the stake in Linde South Asia Services Pvt. Ltd. ["**LSASPL**"] equally, i.e., 50% each. However, SEBI started receiving several investor complaints that the business allocation in the JV started undermining the interests of public shareholders.

LIL and PIPL, allegedly involved in a material RPT as per Regulation 23, did not take the shareholders' approval for the same. SEBI made it clear that for the calculation of materiality in RPTs, cumulative transactions in a year should be considered, and not transactions under a common contract. However, the company, relying on three legal opinions backed by a guidance note of the Institute of Company Secretaries of

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[18] Linde India Ltd. v. Securities and Exchange Board of India, Appeal No 527 of 2024(December 5, 2025).

[19] SEBI, *Order in the matter of Linde India Ltd.* SEBI, Jul. 24, 2024, https://www.sebi.gov.in/enforcement/orders/jul-2024/order-in-the-matter-of-linde-india-ltd-_84952.html.

India,[20] argued that only contracts of a similar nature should be added up, while testing the materiality of the RPT.[21]

The court relied on G.P Singh's Principles of Statutory Interpretation to hold that the statutory interpretation under Regulation 23 does not support the interpretation advanced by the company.[22] The text does not in any way confine the materiality threshold to a common contract, as contended by LIL. The literal interpretation of the Regulation was not ambiguous. . Therefore, the court rejected LIL's argument as inserting the condition of a "common contract" in the regulations would amount to the introduction of words that the regulations were not intended for.

Moreover, if LIL's position were adopted, it would defeat the purpose of RPT norms. Companies would end up separating their transactions and consequently bypassing LODR norms. For all RPTs that would be separated into different contracts within the financial limits, no shareholder approval would be required. Therefore, SEBI's approach to collectively examine the RPTs in a single FY for materiality assessment is the correct position of law.

IV. RPTS AS A TOOL FOR DE FACTO DELISTING

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[20]The Institute of Companies Secretaries of India, *Guidance Note on Related Party Transactions*, THE INSTITUTE OF COMPANIES SECRETARIES OF INDIA, Jan. 2023, https://www.icsi.edu/media/webmodules/GN5_Guidance_Note_on_Related_Party_Transactions.pdf.

[21]*Supra* note 18.

[22]G. P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION 64 (15th ed., LexisNexis 2021).

The decision against the LIL and PIPL JV brings out another significant concern regarding the use of RPTs as a tool for pseudo-delisting. After the merger of LIL and PIPL, there was an attempt by the promoters to delist LIL. However, the delisting failed because the price quoted through the shareholder bids was much higher than the floor price set by the promoters.

After the delisting failed, the promoters tried various alternatives to achieve synergy between LIL and PIPL. Consequently, a JV was set up between the respective entities. The agreement divided future business opportunities between the two companies, which included the allocation of certain regions to respective entities. Moreover, various segments such as HyCo and hydrogen-related activities with huge future potential were transferred to PIPL without shareholder approval.[23]

Shareholders argued that transferring future business rights also amounts to RPTs, and a decision regarding this cannot be taken without shareholders' approval. LIL contended that since no active transfer of shares took place, this did not amount to an RPT. The tribunal held that transferring future business rights between related parties amounts to RPTs and, hence, requires shareholder approval.[24] Consequently, it held that LIL violated the LODR regulations by taking part in an unapproved RPT.

By including the transfer of future business rights under the purview of RPT, SEBI ensured that companies do not use delisting to

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[23] *Supra* note 18.
[24] Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015, Regulation 23(4).

sidestep LODR norms.[25] If a company tries to transfer its major potential areas through JV and future business agreements, it deprives minority shareholders of the ability to make informed decisions. Since the most profitable parts are shifted to related entities, shareholders no longer benefit from the company's growth. While this goes on, the company remains formally listed, which means it does not need any approval for this slow-paced value transfer. This weakens the listed company without delisting it, and since no current transfer of physical assets takes place, the promoter argues that this value transfer to a related party is not a material RPT.[26]

SEBI went beyond the assessment of actual transfer of physical assets and looked at the broader economic impact through the future business ventures.[27] Securities regulation should adopt this broader approach while evaluating financial transactions.

V. AMBIGUITY IN LODR'S MATERIALITY FRAMEWORK

While SEBI's consistent position on materiality assessment, along with its recent stance in the LIL decision, remains in the right direction, the holding fails to address certain existing issues in the RPT framework. Currently, the regulations do not consider the following discrepancies:

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[25] Ramgovind Kurppath, Megha Krishnamurthi & Varnika Pasricha, *SEBI's Hammer and the RPT Nail: Navigating SEBI's Principles-Based Oversight of Related Party Transactions*, CYRIL AMARCHAND MANGALDAS BLOGS, Sept. 23 2024, https://corporate.cyrilamarchandblogs.com/2024/09/sebis-hammer-and-the-rpt-nail-navigating-sebis-principles-based-oversight-of-related-party-transactions/.

[26] Shreyas Bhushan, Shreejith R & Ruchir Sinha, *Public M&A: JV's with exclusivity under SEBI's scanner – The Linde Case*, RESOLUT PARTNERS, Jun. 2, 2024, https://resolutpartners.com/research/public-m-a-jv-s-with-exclusivity-under-sebi-s-scanner-the-linde-case.

[27] *Id.*

i. **Valuation in Future-Business Transactions**- LODR allows future transactions to be included in RPT.[28] However, the valuation for future ventures might differ according to different experts. The LODR regulation lacks a specific method to calculate valuation for future transactions, which creates ambiguity for the Audit Committee and shareholders to approve these transactions.

ii. **Cross-Year Transactions**- If a party separates its transactions across multiple FY, then it may sidestep materiality norms, as discussed in the subsequent sections.

VI. AMBIGUITY OVER VALUATION METHOD

In the LIL matter, while SEBI and SAT correctly expanded the scope of RPTs to include the transfer of future business rights, the case exposed a critical valuation gap within the LODR framework.[29] The allocation of high-growth segments such as HyCo and hydrogen-related activities to the Praxair JV had significant long-term economic implications for Linde India's public shareholders. However, neither the SEBI order nor the SAT decision articulates a transparent methodology for valuing such future-oriented rights while assessing materiality. In the absence of prescribed valuation standards for intangibles like regional allocations or pipeline business opportunities, the determination of whether the

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[28]Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements)
Regulations 2015, Regulation 23.

[29]*Supra* note 18.

materiality threshold under Regulation 23 is crossed risks becoming subjective and case-specific. This uncertainty weakens regulatory predictability and leaves boards, auditors, and shareholders without clear guidance on how future value transfers should be quantified for approval purposes.

This gap undermines the basic principle of the LODR framework, which works to protect the rights of minority shareholders.[30] Currently, the regulation only requires the disclosure of the valuation for these transactions.[31] The calculation for this valuation, especially for future ventures are not defined, which makes decision-making complicated.

The resulting information asymmetry from the lack of a valuation methodology particularly affects minority shareholders. Since the minority shareholders are not active participants in the decision-making, they rely heavily on these public disclosures available to the broader group.[32]

However, the lack of a standard methodology prejudices this disclosure. By leaving the valuation to be decided by the majority shareholders/promoters, the correct valuation may be arrived at through a methodology that favours their transaction.[33] This gap in standardisation

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[30]Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements)
Regulations 2015, Regulation 23.

[31]SEBI, *Disclosure obligations of listed entities in relation to Related Party Transactions*, SEBI, Nov. 22, 2021, https://www.sebi.gov.in/legal/circulars/nov-2021/disclosure-obligations-of-listed-entities-in-relation-to-related-party-transactions_54113.html.

[32]Bill Hanneman, *Fairness Opinions: How Fair?,* ZACHARY SCOTT, Apr. 15, 2022, https://zacharyscott.com/fairness-opinions-how-fair/.

[33]*Id.*

undermines the reliability of disclosure and ultimately impairs the shareholders' ability to judge a transaction's questionable fairness.

SEBI, in its Report of the Committee on Corporate Governance, has already made it clear that protecting the right of minority shareholders is a key focus in RPTs.[34] Since promoters hold a significant portion of shares in a company, they often indulge in transactions for personal benefits at the expense of shareholders' interests.[35] Moreover, the SEBI works to prevent invalid structurisation that intends to bypass regulatory scrutiny.[36] Therefore, the ambiguity highlighted above creates a gap that does not attract scrutiny from the securities regulator and, therefore, needs urgent attention.

Additionally, the "*Circular on Minimum Industry Standards*"[37] published by the Industry Standards Forum ["**ISF**"] lays out the minimum disclosure requirements for transactions involving RPTs. However, it fails to truly account for the gap highlighted in the preceding section. According to the standards, the management of a listed entity should share valuation reports

[34] SEBI, 'Report of the Committee on Corporate Governance, SEBI, Oct. 5, 2017, https://www.sebi.gov.in/reports/reports/oct-2017/report-of-the-committee-on-corporate-governance_36177.html.

[35] Ami Galani & Nathan Rehn, Related Party Transactions: Empowering Boards and Minority Shareholders to Prevent Abuses, 22 Nat'l L. Sch. India Rev. 29 (2010).

[36] The Chairman, SEBI v. Shriram Mutual Fund & Anr, AIR 2006 SC 2287.

[37] CII, ASSOCHAM & NSE, *Industry Standards on "Minimum information to be provided to the Audit Committee and Shareholders for approval of Related Party Transactions,* NATIONAL STOCK EXCHANGE, Jun.26, 2025, https://nsearchives.nseindia.com/web/sites/default/files/inline-files/NSE_Circular_26062025_4.pdf.

with the audit committee, if available.[38] Moreover, the shareholders should also gain access to valuation reports with the help of links or QR codes.[39]

While the standards mention a multitude of factors to be kept in mind while disclosing information, it does not elaborate sufficiently on the aspect of valuation. The standard method asks to disclose the valuation of transactions, but it does not explicitly answer the question of how this valuation is arrived at. Even though ongoing transactions might not need this answer, future arrangements depend on it significantly. Therefore, the valuation issue remains intact, with no specific answers for the same.

A. Strategic Materiality: Beyond Pure Financial Thresholds

The current LODR framework bases its assessment on specific financial thresholds.[40] With the LODR holding and the inclusion of growth-intensive segments in the calculation of materiality, the sole criterion of financial limit may not be sufficient to look at the actual value of the asset in question. It may include technology rights, exclusive territorial allocations, intellectual property, renewable energy projects, hydrogen-related businesses, and other emerging sectors whose economic significance materialises over time. While the assets related to these segments may not cross the materiality threshold at the time of transaction,

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[38] *Id.*
[39] *Id.*
[40] Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015, Regulation 23.

they have the potential to have a long-term impact on minority shareholders.

The Linde India saga correctly exemplifies this take; the allocation of growth-intensive future segments may be difficult to quantify at the time of the concerned transaction; however, the future implications might be overlooked.[41] The deeper issue is the timing mismatch: materiality is assessed at the time of the transfer of the asset. However, its value may be realised at a much later stage, especially where it involves technology or resources that may develop over time.[42] Therefore, a threshold-based assessment should incorporate the potential change in the value of assets whose valuation may grow or alter over time.

Another dimension that merits consideration is the informational asymmetry inherent in future-oriented transactions. Unlike conventional asset transfers, the economic value of future business opportunities often depends on projections, technological developments, market expansion, regulatory approvals, and strategic positioning that may not be readily apparent to minority shareholders.[43] Consequently, promoters and controlling shareholders may possess substantially superior information regarding the long-term benefits associated with such arrangements.[44] In

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[41] Brajesh Kumar, *SAT upholds SEBI's directions on Linde India's related-party deals; dismisses firm's appeal,* MONEY CONTROL, Dec. 10, 2025, https://www.moneycontrol.com/news/business/markets/sat-upholds-sebi-s-directions-on-linde-india-s-related-party-deals-dismisses-linde-s-appeal-13718357.html.

[42] Yvette Austin Smith, *Valuation Analysis of Related-Party Transactions*, 37 ABI J., no. 3 (Mar. 2018).

[43] *Id.*

[44] Zohar Goshen & Assaf Hamdani, Corporate Control and Idiosyncratic Vision, 125 Yale L.J. 560 (2016).

the absence of a standardised valuation framework and enhanced disclosure requirements, shareholders may be unable to accurately assess whether the proposed transaction reflects fair value.

VII. <u>CROSS-YEAR TRANSACTION ISSUE</u>

In addition to the valuation issue, the LODR framework also fails to address the potential breach through transactions stretched across different years. LODR only assesses materiality over a single FY.[45] This gap allows companies to sidestep regulatory scrutiny, which runs counter to the board's intended goal of prioritising the interests of minority shareholders. For instance, a company can enter into RPTs with the amount close to the materiality threshold near the end of the FY and subsequently breach it the next FY. This separation effectively allows them to sidestep the shareholder approval requirement, as the threshold would not be breached in a single FY.

Although the company was prevented from sidestepping regulatory norms in the LIL case,[46] promoters can still take advantage of this lacuna in LODR regulations. Promoters can break down value-based transfer into much smaller parts and transfer them over a larger period of time, exceeding a single FY. This way, the calculation of discrete transactions, even if accumulated together, would not fulfil the materiality threshold. Since the transactions would take place beyond a year's time, the

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[45]Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015, Regulation 23(1).
[46]*Supra* note 18.

aggregation of transactions would not be able to protect shareholders' rights.

A. RPT THROUGH SUBSIDIARIES: EXACERBATING THE REGULATORY ISSUE

RPTs, carried out through a subsidiary, further exacerbate the issue of cross-year transactions. Regulation 23(4) sets out requirements and approvals for a listed entity and its subsidiary in case the subsidiary enters into an RPT.[47] According to this Regulation, the approval by the parent entity's shareholders for a material RPT entered into by the subsidiary is not required if the subsidiary qualifies to be subjected to Regulation 15(2) and regulation 23.[48] Regulation 15(2) makes it clear that the RPT framework under the LODR regulation applies to the entities where:

i. The paid-up equity capital is more than ten crore or

ii. The net worth of the entity is more than Rs. 25 crores as per the last FY.

Therefore, if a subsidiary crosses the above-mentioned threshold in an RPT, it has to comply with the materiality threshold under regulation 23(1). However, since the subsidiary will already be required to comply with the corporate governance requirements under LODR regulations,[49] the

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[47] Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015, Regulation 23(4).

[48] Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015, Regulation 15(2).

[49] Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015, Regulations 17-27.

shareholder approval of the parent entity would not be required. This is because regulation 23(4) explicitly lays out that for a transaction done by a listed subsidiary, approval from the parent's shareholder is not required, and approval by the subsidiary's shareholder is sufficient.

While the intention of this provision is positive, it aggravates the issue highlighted in the previous sections. Suppose a parent company separates its transactions through different subsidiaries, which are individually related to different related parties. It is possible that the individual materiality threshold for the subsidiaries does not get triggered. When the transaction of subsidiaries is aggregated for calculating materiality, they cross the threshold under Schedule XII. As of now, the text of Regulation 23 only mentions accumulation with respect to a single related party; whether the transactions of different subsidiaries with their respective related parties can be accumulated for calculating materiality remains an issue that is open to interpretation. Therefore, the shareholder approval requirement is not triggered in this situation, which creates a route for a potential bypass.

At the same time, while regulation 46(2)(s) mandates a listed entity to provide a consolidated financial statement of its subsidiary at the end of a FY,[50] it still does not completely accommodate the gap highlighted above. As per the "*Master circular on compliance with LODR regulations*", the financial statement contains information related to profit/loss, assets & liabilities, cash flow statements, and segment information such as revenue and

[50] Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015, Regulation 46(2)(s).

unallocated items.[51] The circular also mandates an audit report of the company, which should include the accounts of its subsidiaries. Despite all this information being provided to shareholders, the route of misuse remains open. These statements do not contain sufficient information or disclosures to assess the transactional separation across different subsidiaries. Even if the information fully discloses all details indicating a potential breach, the breach would have already occurred by the time such information becomes available, as the relevant statements are published only at the end of the FY.

VIII. THE WAY FORWARD

In order to account for the regulatory gaps highlighted in the preceding sections, SEBI needs to tackle the valuation issue, the cross-year issue, and the potential risk of evasion through subsidiaries. For this purpose, SEBI's position in determining material RPTs requires a significant overhaul to prevent regulatory escape.

A. FILLING THE GAP FOR A VALUATION METHOD

As a means of resolving uncertainty in the valuation of rights and arrangements of entities in future business, the transfer of future rights in RPTs can be mandated by a registered valuer under the RVV Rules, 2017.[52]

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[51] SEBI, *Master circular for compliance with the provisions of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 by listed entities,* SEBI, Nov. 11, 2024, https://www.sebi.gov.in/legal/master-circulars/nov-2024/master-circular-for-compliance-with-the-provisions-of-the-securities-and-exchange-board-of-india-listing-obligations-and-disclosure-requirements-regulations-2015-by-listed-entities_88388.html.

[52] Companies (Registered Valuers and Valuation) Rules, 2017.

This is similar to how the Insolvency and Bankruptcy Board of India's ["**IBBI**"] "*Circular pertaining to valuation required under the provisions of the Companies Act and the Insolvency and Bankruptcy Code*" works.[53] This circular lists certain types of transfers and transactions to be valued by a registered valuer under section 247(1) of the Companies Act, 2013.[54] Transactions with the transfer of future rights can be included in the list under this circular.

This will solve the problem for a valuation method because the RVV rules already provide the prescribed standard to be followed by the registered valuer when carrying out the valuation of certain transactions. Rule 18[55] mandates the registered valuer to follow the ICAI valuation standard.[56] This valuation can be done using recognised financial techniques as specified in ICAI Valuation Standard-103.

The three primary methods under this standard are the market method, the income method, and the cost method. According to the market method, the company's value is determined by comparing it with companies of the same genre or with recent deals for the same assets. This method presupposes that the prices that willing sellers and buyers pay in an active market represent the actual value of an asset. Under this method, one of the few common approaches is the market price technique. In this

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[53] IBBI, *Circular on Valuation required under the provisions of the Companies Act, 2013 and the Insolvency and Bankruptcy Code, 2016,* IBBI, Sept. 16, 2019, https://ibbi.gov.in//uploads/legalframwork/fc079317863706b25d7d688d3596c327.pdf.

[54] Companies Act, 2013, § 247(1).

[55] Companies (Registered Valuers and Valuation) Rules 2017, Rule 18.

[56] The Institute of Chartered Accountants of India, *ICAI Valuation Standards 2018*, ICAI, Jun. 2018, https://resource.cdn.icai.org/51432vsb41162.pdf.

approach, the average trading price is used to assess a transaction's value. The valuation also includes a comparison with similar past transactions, whose valuations are applied to the current scenario.

The income method measures a firm by how it generates future economic benefits, with the most predominant approach being the Discounted Cash Flow ["**DCF**"]. This technique involves the process of estimating the future cash flows that the company is bound to earn and then discounting the future values by a process called discounting. Discounting is based on the idea that the money in the present is more valuable than the same amount in the future because of several factors, such as inflation, the possibility of loss of money, and opportunity cost. In order to discount future cash flows, there is an application of a discount rate, which is the expected return and risk of the investment. The future cash flows are discounted using the present value and the future value (which is the value of the business after the forecast period), and their sum will provide the value of the company today. The cost method is less common in valuing a business, where the company is valued based on the cost that is needed to replace the company's assets, including depreciation and obsolescence.

The registered valuer may use any of the three methods to determine the valuation for transactions involving future rights. This will account for the gap in the valuation method, which will allow the audit committee and shareholders to make informed decisions.

B. SOLVING THE CROSS-YEAR ISSUE

SEBI can make changes related to the calculation of value aggregation for testing materiality in a single year. SEBI should change its legislative text to include a previous 12-month assessment for calculating materiality instead of calculating it strictly for a single FY. This change will prevent potential evasion through transactions separated over multiple FYs. Since the assessment will look at the previous 12 months for materiality evaluation, evasion will become difficult, and transactions separated across different years will be accounted for.

The listing requirements in the UK are governed by UKLR, which supports this position.[57] UKLR 7.2.11 aggregates transactions related within a defined circumstance.[58] It calculates this aggregation over the preceding 12 months in time, starting from the initial transaction. When this aggregation exceeds a certain threshold, enhanced disclosure obligations under UKLR 7.3 are triggered.[59] Importantly, the UKLR 7.2.14 grants discretion to the Financial Conduct Authority ["**FCA**"] of the UK to modify rules for the aggregation of transactions in scenarios other than those given in regulation 7.2.[60] This means that the FCA has the power to modify rules at its discretion to avoid transactions where dealings are structured to avoid disclosure requirements or shareholder approval.

The UKLR assesses continuous related transactions across a year by calculating the 12-month period from any point in time. The LODR lacks such a provision, which accounts for continuous cross-year

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[57]UK Financial Listing Rules 2024.
[58]UK Financial Listing Rules 2024, Rule 7.2.11.
[59]UK Financial Listing Rules 2024, Rule 7.3.
[60]UK Financial Listing Rules 2024, Rule 7.2.14.

transactions. SEBI can take inspiration from UKLR and change the material assessment of RPTs to accommodate cross-year transactions. SEBI should add an explicit explanation for this purpose to strengthen its approach in the evaluation of material RPTs. By shifting materiality assessment from rigid FY boundaries to economic continuity, SEBI would ensure that shareholders' rights are not diluted through slow value transfers that may escape regulatory scrutiny.

C. PREVENTING REGULATORY EVASION THROUGH SUBSIDIARIES

SEBI can incorporate an additional requirement of shareholder approval for transactions where the parent entity is controlling or routing its transactions through different related parties. This requirement can assess the routing of transactions through the influence exercised by the parent entity on RPTs entered into by its subsidiary. The focus shifts from relatedness with the party to the exercise of control and influence on the subsidiary.

This idea is supported by Hong Kong's Listing Regulation ["**HKLR**"], which defines related party transactions as transactions between any connected person[61] under HKLR 14A.25.[62] HKLR 14A.01 extends the application of requirements for connected transactions to subsidiaries of the listed issuer as well.[63] It introduces the concept of a connected subsidiary based on influence and control. The person at the

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[61]Hong Kong Exchanges and Clearing Limited Listing Rules 2014, Rule14A.07.
[62]Hong Kong Exchanges and Clearing Limited Listing Rules 2014, Rule 14A.25.
[63]Hong Kong Exchanges and Clearing Limited Listing Rules 2014, Rule 14A.01.

issuer level is said to have influence when they exercise or control at least 10% of the voting power.[64]

SEBI can build on these regulations and introduce the concept of control/influence in a subsidiary to assess RPTs through subsidiaries. The framework of RPTs can be clarified to accommodate the separation of transactions across multiple subsidiaries so that the parent entity does not use its shell companies to circumvent materiality regulations. Transactions carried out by multiple subsidiaries with a related party of the parent entity should be accumulated to assess materiality for the parent entity.

Such an approach is consistent with the principle under Schedule III of the Companies Act, 2013, which treats corporate groups as a single economic unit and directs mandatory consolidated financial statements during disclosures. This principle is further supported by the ratio in the Vodafone case,[65] which acknowledged the treatment of entities functioning together as a single economic unit. Accordingly, SEBI can amend Regulation 23 to aggregate transactions attributable to the same promoter group and thereby close an existing gap in the LODR regime.

Another concern relates to the consolidation of subsidiary financial information only at the end of an FY.[66] This means that potentially material subsidiary-level RPTs may become visible only after the relevant threshold has already been crossed. In order to solve this issue, SEBI should introduce a quarterly disclosure mechanism for subsidiary-level RPTs. This

[64]Hong Kong Exchanges and Clearing Limited Listing Rules 2014, Rule 14A.16.
[65]Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613.
[66]Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements)Regulations 2015, Regulation 46(2)(s).

tiered trigger framework, whereby an immediate disclosure obligation will arise once the transaction goes beyond a certain financial limit, say 5% of the parent entity's turnover, will account for this issue.[67] A mechanism like that would also decrease the chances of subsidiaries slowly increasing transaction values over a couple of quarters to avoid shareholder scrutiny. SEBI will move the current system from largely retrospective reporting to a preventive governance mechanism that can identify and address issues before material harm to minority shareholders occurs, with a mid-year disclosure trigger.

IX. CONCLUSION

Materiality constitutes the fulcrum of RPT regulation. On the one side lies proper calibration of this criterion, such that the regime ensures shareholder oversight of potential conflicts of interest. On the other hand, lie all the loopholes of the current disclosure framework, each created precisely because the test failed somewhere. In the SEBI saga of LIL, spanning several iterations since 2009 until the SAT verdict finally put it to rest last year, one observes a definite trend in favour of adopting an economic substance test. This paper contends that this move in itself marks progress, but that there remains unfinished business yet to be attended to.

The three deficiencies discussed above arise out of the same exploitable gap – an opportunity to shift the location of a material effect in order to avoid triggering disclosure requirements by manipulating where

[67]Technical Committee of the International Organization of Securities Commissions, *Principles for Periodic Disclosure by Listed Entities*, IOSCO, Feb. 2010, https://www.iosco.org/library/pubdocs/pdf/IOSCOPD317.pdf.

the materiality inquiry ends. The RVV requirement and the UKLR approach both constitute parts of the solution towards closing off this opportunity along two axes, i.e., valuation ambiguity and fiscal years, respectively. As such, they naturally complement each other. However, in conjunction with the HKLR subsidiary disclosure test, their combination extends far beyond the LODR regime into a third dimension. The challenge, therefore, is to close these avenues for regulatory arbitrage without imposing disproportionate compliance burdens that undermine ease of doing business.