Reconstructing Justice: The Transformative Vision of India's New Criminal Legislation

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Abstract:

This article examines India's recent criminal law overhaul as a project of reconstructing penal justice rather than merely replacing colonial era codes. It analyses how the new legislation reconfigures substantive offences, evidentiary rules, and procedural safeguards, and asks whether these changes embody a genuinely victim-centric and rights-based vision. The study adopts a doctrinal and normative framework to evaluate the promises of efficiency, decolonization, and technological integration claimed for the reforms. It argues that beneath the rhetoric of transformation lie deep continuities and emergent risks, with significant implications for constitutionalism, state power, and everyday criminal justice practice in India.

Keywords: criminal law reform; penal justice; Indian criminal codes; decolonization; constitutionalism.

I. Introduction:

The promulgation of the Bharatiya Nyaya Sanhita (BNS), Bharatiya Nagarik Suraksha Sanhita (BNSS), and Bharatiya Sakshya Adhiniyam (BSA) in 2023 marks a significant moment in India's postcolonial legal trajectory, one that aspires to symbolically and substantively depart from the inherited colonial legal order. By repealing the Indian Penal Code (IPC) of 1860, the Code of Criminal Procedure (CrPC) of 1973, and the Indian Evidence *Act* (IEA) of 1872, the Indian legislature has presented these reforms as the culmination of a long-delayed project of "decolonizing" the nation's criminal justice architecture. According to the government's official narrative, these enactments are designed to realign criminal law with the normative commitments enshrined in the Constitution i.e. justice, liberty, equality, and fraternity; and to orient the criminal process away from a retributive, state-centric model of punishment toward a more citizen-focused notion of justice[1]. The rhetoric surrounding their introduction portrays the tripartite codes as not merely technical revisions or statutory consolidations but as the foundation of a new jurisprudential ethos deliberately freed from colonial categories and sensibilities.

Yet, a closer engagement with the texts and their interpretive implications reveals a profound dissonance between the lofty language of "decolonization" and the substantive content of these codes. Many commentators and legal theorists have pointed out that despite the terminological shift from "penal" to "nyaya," the internal logic, structural hierarchy, and procedural frameworks of the new statutes remain largely

1. Abhay Gupta & Shaiwalini Singh, Pressing Need for Reforming Archaic Legal Provisions of Criminal Law and Speedy Justice in India, 3 LAWFOYER INT'L J. DOCTRINAL LEGAL RSCH. 807 (2025).
2. Arudra Burra, 'Decolonising' the Law: The Wrong Answer to the Wrong Question, SOCIO-LEGAL REV. F. (Sept. 6, 2024).

continuous with their British colonial predecessors. The BNS, for instance, retains the broad architecture of the IPC in terms of offence classification, definitional techniques, and the overarching conceptualization of criminal liability. Similarly, the BNSS mirrors much of the CrPC's procedural architecture, preserving the wide discretionary authority of the police and the central role of the executive in prosecution and investigation. Even the BSA's evidentiary principles continue to reflect the same evidentiary paradigm fashioned under colonial administration, with only selective modernization of language and digital adaptability.

This continuity has led scholars like Arudra Burra to argue that the "decolonization" discourse animating these reforms may, in fact, be misdirected. As Burra contends, "decolonization" as a framework for legal reform risks conflating the historical origin of a law with its normative injustice, thereby assuming that replacing a colonial statute with an indigenous one necessarily produces democratic virtue or emancipatory outcomes. The mere indigenization of terminology—such as substituting "penal" with "nyaya" or "evidence" with "sakshya"—does not automatically transform the epistemic or institutional character of the criminal justice system[2]. In this sense, the invocation of cultural or linguistic nationalism in place of substantive doctrinal reform may reinforce, rather than dismantle, the hierarchical relationship between the state and the citizen that colonial criminal law historically entrenched.

Critics therefore describe these enactments as instances of "colonial continuity" rather than decolonial rupture, a rebranding exercise that modernizes the tools of governance while maintaining the same conceptual grammar of criminalization and surveillance[3]. The rhetoric of reform celebrates a shift from punishment to justice, but whether the BNS and its companion codes truly redistribute power away from the state toward the citizen remains uncertain. The real test of decolonization in criminal law, as some scholars suggest, lies not in linguistic symbolism or legislative substitution but in whether the normative foundations of state power, procedural fairness, and individual rights are re-imagined in a manner consistent with India's constitutional morality. Thus, the transition from the colonial "penal" framework to the so called "Bharatiya" system appears less as a radical departure and more as a managed continuity, an attempt to legitimate the machinery of state authority through the idiom of cultural authenticity and postcolonial self assertion[4].

II. The Bharatiya Nyaya Sanhita (BNS): Reconfiguring Substantive Offences

The *Bharatiya Nyaya Sanhita* (BNS), 2023, represents the most significant overhaul of India's substantive criminal law since independence, as it supersedes the *Indian Penal Code* (IPC) of 1860. The restructured statute condenses the earlier 511 sections into 358, signaling an attempt to simplify and rationalize the organization of criminal offences. This reduction is intended to remove outdated provisions, harmonize overlapping categories, and present a more coherent legal framework suited to present day social and technological contexts. Yet, alongside this consolidation, the BNS introduces several controversial elements, particularly within the domains of offences against the State and sexual conduct. Critics point out that while the revised code claims to modernize definitions, it simultaneously embeds broader state-security provisions

3. S. M. Aamir Ali & Pritha Mukhopadhyay, Bharatiya Nyaya Sanhita: Decolonizing Criminal Law or Colonial Continuities?, 62 INT'L ANNALS CRIMINOLOGY 406 (2024).
4. Archita Garg, The New Criminal Laws: Just a Break from the Colonial Past or a Vision for a Citizen-Friendly Future?, 4 JUS CORPUS L.J. 379 (2024).

and retains conservative attitudes toward sexual morality, thereby generating debate about whether the law truly reflects de-colonial or constitutional transformation[5].

A. Sedition to Treason: The Semantics of Sovereignty (Section 152)

A major focal point in the analysis of the Bharatiya Nyaya Sanhita is the removal of Section 124A *of the* Indian Penal Code, which had long criminalized the offence of sedition. The government has framed this legislative decision as a symbolic and substantive move toward decolonizing India's criminal justice apparatus. Yet, this repeal is accompanied by the insertion of Section 152 in the new code, which establishes a fresh offence described as "acts threatening the sovereignty, unity, or integrity of India." The introduction of this provision raises important questions about continuity and change, whether it genuinely dismantles colonial modes of suppressing dissent or merely rearticulates them through the vocabulary of national security and sovereignty.

Doctrinal Analysis

Many constitutional and criminal law scholars observe that *Section 152* of the Bharatiya Nyaya Sanhita effectively revives the spirit of the sedition offence, albeit in a revised linguistic form that is potentially broader and less precise. Under the old *Section 124A* of the Indian Penal Code, the offence was defined around inciting "disaffection" against the government; by contrast, the reworded provision now penalizes any act or expression that promotes "subversive activities" or fosters "feelings of separatism[6]." This new terminology, though presented as a safeguard for national unity, remains undefined within the statute and leaves substantial interpretive discretion to enforcement authorities. Such vagueness increases the risk that legitimate political criticism, peaceful protest, or regional advocacy might be construed as criminal conduct.[7]

From a constitutional standpoint, this ambiguity has significant implications for freedom of speech and expression under Article 19(1)(a) of the Indian Constitution. By failing to specify the threshold for what constitutes a "subversive" act, the law potentially authorizes disproportionate restrictions on democratic dissent. The rhetorical shift from *Rajdroh* i.e. betrayal of the ruler, too i.e. *Deshdroh* betrayal of the nation, creates an impression of nationalistic reform but, in practice, may continue to equate disagreement with disloyalty. Consequently, while the sedition clause has been formally repealed, the new framework arguably

5. Pratiksha Gupta, Understanding the Purpose and Implications of Recent Amendments in Bharatiya Nyaya Sanhita and Bharatiya Nagarik Suraksha Sanhita 2023 (2024-25) (LL.M. Dissertation, Himachal Pradesh National Law University, Shimla).

6. Brij Mohan Pandey & Madhurima Naha, A Critical Analysis of Bharatiya Nyaya Sanhita, 2023, 13 INT'L J. LEGAL STUD. & RSCH. (2024).

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9. Law Commission of India, Usage of the Law of Sedition, Report No. 279 (2023).

preserves its essence under the emotive banner of protecting sovereignty and integrity, thus maintaining the same structural tension between state authority and individual liberty[8].

Law Commission's Stance

In its 279th Report, the 22nd Law Commission of India advocated for the continuation of the offence of sedition, suggesting that the provision be retained with enhanced penalties. The Commission justified this position on the ground that such a restriction constitutes a "reasonable limitation" permissible under Article 19(2) of the Constitution, emphasizing its necessity for maintaining national security and addressing activities deemed detrimental to the unity and integrity of the nation.[9] The BNS appears to align with this rationale, effectively overruling the spirit of the Supreme Court's stay order in *S.G. Vombatkare v. Union of India*, which had put the sedition law in abeyance.[10]

B. Sexual Offenses: "Deceitful Means" and Marital Rape

The Bharatiya Nyaya Sanhita seeks to update and rationalize the legal regime governing sexual offences; however, it has attracted criticism for its uneven commitment to a victim-focused perspective and for preserving underlying patriarchal assumptions within its provisions.

1. Sexual Intercourse by Deceitful Means (Section 69):

Section 69 of the Bharatiya Nyaya Sanhita (BNS) specifically penalizes sexual intercourse procured through deceitful means or under a false promise of marriage. This provision establishes a separate offense, distinguishing it from the earlier approach under the Indian Penal Code (IPC), where such acts were prosecuted as rape based on a "misconception of fact" under Section 90[11].

- **Judicial Interpretation:** The courts have consistently differentiated between a false promise made with deceptive intent from the outset and a mere breach of promise arising from a later change of intention. In *Anurag Soni v. State of Chhattisgarh* (2019), the Supreme Court affirmed that only the former situation amounts to rape[12]. While Section 69 formalizes this legal position, it also raises concerns about overreach, as it may inadvertently criminalize consensual relationships that later deteriorate. Such an approach could undermine women's agency by portraying them as passive subjects misled by deceit[13].

10. S.G. Vombatkare v. Union of India, (2022) 7 SCC 433.
11. Bhoopendra Karwande, Criminalisation of False Promise to Marry and Deceptive Sex in Bharatiya Nyaya Sanhita 2023, INT'L J. L. MGMT. & HUMAN. (2025).
12. Anurag Soni v. State of Chhattisgarh, (2019) 13 SCC 1.
13. Gupta & Singh, supra note 1.
14. Bharatiya Nyaya Sanhita, 2023, § 63, No. 45, Acts of Parliament, 2023 (India).

- **Retention of the Marital Rape Exception (Section 63):** Despite being projected as a progressive and women-oriented reform, the BNS continues to uphold the marital rape exception under Section 63, which provides that sexual intercourse by a husband with his wife, if she is over eighteen years of age, does not amount to rape.[14]
- **Doctrine of Coverture:** The continuation of this exception reflects the influence of the Victorian-era coverture principle and Sir Matthew Hale's 17th-century assertion that a wife, through marriage, irrevocably consents to sexual relations with her husband.[15]

- **Violation of Fundamental Rights:** The persistence of the marital rape exception directly undermines the constitutional values of bodily integrity, personal autonomy, and dignity. These principles have been strongly affirmed by the Supreme Court in landmark decisions such as "Independent Thought v. Union of India" and "Justice K.S. Puttaswamy v. Union of India". By exempting marital sexual violence from criminal scrutiny, the provision conflicts with the recognition of an individual's right to make autonomous choices regarding their body and privacy, thereby weakening the broader constitutional commitment to gender equality and human dignity.[16] Scholars argue this creates an unreasonable classification under Article 14, denying married women the same protection against sexual violence afforded to unmarried women.[17]

- **C. Community Service: Restorative Justice or Forced Labor?**

One of the notable innovations introduced by the Bharatiya Nyaya Sanhita is the inclusion of *community service* as a form of punishment for minor offenses under Section 4(f). This provision applies to relatively less serious crimes such as defamation, petty theft involving property valued below ₹5,000, and even attempted suicide. The measure appears to embody a shift toward restorative justice, emphasizing reparation and social contribution over incarceration. However, its implementation also raises critical questions about voluntariness, proportionality, and the potential for exploitation if community service is applied in a coercive or punitive manner.[18]

Implementation Challenges: Although community service under the BNS is envisioned as a reformative alternative to traditional punishment, its practical application remains uncertain due to the absence of a defined administrative framework. Unlike several Western systems that rely on established probation institutions to supervise and coordinate such sentences, India currently lacks comparable infrastructure or procedural clarity. In the absence of uniform standards and monitoring mechanisms, the enforcement of community service orders risks becoming inconsistent and arbitrary. More critically, if the nature of "service" is influenced by entrenched caste-based labor practices, it may perpetuate social hierarchies and contravene the constitutional safeguard against forced labor enshrined in Article 23 of the Indian Constitution.[19] The

15. Radhika Dutt, Whose Body, Whose Rights? A Socio-Legal Analysis of Marital Rape and Sexual Autonomy in India, CRITICAL DEBATES HUMAN., SCI. & GLOB. JUST. (Sept. 10, 2025).
16. Independent Thought v. Union of India, (2017) 10 SCC 800; Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.
17. Gupta, supra note 5.
18. Vinay Kumar, Comparison between Old Criminal Law and New Criminal Law in India, 35 SUPREMO AMICUS (2024).
19. Aryaman Jaiswal & Shaiwalini Singh, Evolving Paradigms of Criminal Law in Contemporary India: Challenges, Reforms, and the Quest for Justice in a Digital Age, 3 LAWFOYER INT'L J. DOCTRINAL LEGAL RSCH. 839 (2025).

success of this provision depends entirely on the creation of a robust, non-discriminatory infrastructure for supervision.[20]

III. The Bharatiya Nagarik Suraksha Sanhita (BNSS): Procedural Power and Civil Liberties:

The Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) replaces the long-standing Code of Criminal Procedure (CrPC) with the stated objective of modernizing procedural law. While it introduces several technological reforms, such as digital filings, electronic summons, and defined timelines aimed at speeding up investigations and trials—it simultaneously confers broader powers upon the police and investigative authorities. This expansion of state authority has sparked significant concern among legal scholars and civil rights advocates, who argue that these provisions may erode procedural safeguards and infringe upon the fundamental right to life and personal liberty guaranteed under Article 21 of the Constitution. Thus, the BNSS embodies a tension between efficiency and accountability in the criminal justice process.

A. Police Custody: The 15-Day Expansion and House Arrest (Section 187)

One of the most debated procedural shifts under the BNSS relates to the extension of police custody. Previously, Section 167 of the Code of Criminal Procedure (CrPC) restricted police custody to the initial 15-day period following arrest. However, Section 187 of the BNSS redefines this framework by permitting the 15-day police custody to be availed "either in whole or in parts" at any point during the broader remand period. This extended timeline spans up to 40 days for offenses carrying imprisonment of up to ten years, and up to 60 days for graver offenses. While this provision ostensibly offers greater flexibility to investigators, it also raises serious concerns about potential misuse, custodial violence, and the dilution of constitutional protections against arbitrary detention.[21]

Constitutional Critique:

Risk of Torture: From a constitutional standpoint, the revised provision weakens the safeguards designed to protect individuals from custodial abuse. Allowing police authorities to regain custody of accused even weeks after the initial remand effectively undermines the protective purpose of judicial custody. This reversionary power increases the risk of coercion and mistreatment, as it disrupts the continuity of judicial oversight intended to shield accused persons from torture or undue pressure. Consequently, the change raises serious concerns regarding compliance with constitutional guarantees under Articles 20 and 21, which uphold the rights to dignity, personal liberty, and protection against cruel or inhuman treatment.[22] This modification effectively overturns the procedural safeguard articulated in *CBI v. Anupam J. Kulkarni* (1992), where the Supreme Court held that police custody cannot extend beyond the initial 15 days following arrest. The Court emphasized that any further detention must occur under judicial custody to prevent potential abuses of power and protect the accused from coercion or torture. By departing from this precedent, the BNSS provision significantly alters the balance between investigative efficiency and individual liberty, raising concerns about constitutional due process and the erosion of judicial oversight in custodial matters.[23]

20. Id.
21. Tauheed Alam & Afkar Ahmad, Comparative Analysis of Remand Provisions Under the CrPC and the BNSS: Legal Implications and Challenges, 1 J. L. & A.I. 1 (2025).
22. Id.
23. CBI v. Anupam J. Kulkarni, (1992) 3 SCC 141.

Rejection of House Arrest: The BNSS expressly stipulates that detention must occur within a "police station" or "prison," thereby excluding the possibility of house arrest as a legitimate form of custody. This position marks a clear departure from the progressive interpretation advanced by the Supreme Court in "Gautam Navlakha v. National Investigation Agency", where house arrest was recognized as a constitutionally permissible and humane alternative to incarceration, particularly in cases involving age, health, or other mitigating circumstances. By insisting on custodial confinement only within carceral spaces, the BNSS overlooks the principle of using the "least restrictive measure" enshrined under Article 21. This rigidity not only undermines judicial discretion but also raises broader questions about the proportionality and humaneness of pre-trial detention in a rights-based legal framework.[24]

B. Handcuffing: Legislative Reversal of Judicial Precedent

Legislative Reversal of Judicial Precedent Section 43(3) of the BNSS authorizes police officers to employ handcuffs in cases involving "habitual" or "repeat" offenders, as well as for individuals accused of grave offenses such as terrorism, organized crime, or serious violent conduct. This provision marks a significant legislative shift, effectively reversing decades of judicial restraint on the use of physical restraints. While the stated rationale emphasizes public safety and the prevention of escape, it reignites constitutional debates surrounding the dignity of the accused, proportionality in law enforcement, and compliance with human rights standards governing custodial treatment.[25]

Human Dignity Concerns:

The statutory authorization of handcuffing under the BNSS directly conflicts with the Supreme Court's foundational ruling in Prem Shankar Shukla v. Delhi Administration (1980). In that judgment, the Court unequivocally declared that the routine or automatic use of handcuffs is prima facie inhuman, degrading, and inconsistent with the constitutional guarantee of personal dignity and liberty protected under Article 21. The Court emphasized that physical restraints should be employed only in exceptional circumstances, justified by concrete and demonstrable necessity. By reintroducing such powers legislatively, the BNSS risks normalizing a practice that the judiciary once condemned as antithetical to the principles of humane treatment and procedural fairness within the criminal justice system.[26] By authorizing handcuffing solely on the basis of the type of offense rather than the specific behavior or threat posed by the accused, the BNSS shifts the focus from individualized assessment to categorical presumption. This framework disregards judicially established safeguards that require restraint measures to be justified by a demonstrated risk of escape or violence. In doing so, the legislation transforms a context-sensitive procedural discretion into an automatic administrative power, thereby eroding the spirit of constitutional due process. Such an approach prioritizes a performative notion of "security theater" over the core principle of human dignity, effectively nullifying judicial protections against cruel, inhuman, and degrading treatment that have been a cornerstone of Indian constitutional jurisprudence.[27]

C. Bail Reforms and Undertrial Prisoners (Section 479)

24. Gautam Navlakha v. National Investigation Agency, (2021) SCC OnLine SC 382.
25. Bharatiya Nagarik Suraksha Sanhita, 2023, § 43(3), No. 46, Acts of Parliament, 2023 (India).
26. Prem Shankar Shukla v. Delhi Administration, (1980) 3 SCC 526.
27. Alam & Ahmad, supra note 21.

Section 479 of the BNSS introduces a noteworthy reform aimed at addressing the long-standing issue of undertrial incarceration. It provides that individuals with no prior criminal record i.e., first-time offenders are entitled to be released on a bond once they have spent a duration in custody equivalent to one-third of the maximum imprisonment prescribed for the offense charged. This provision seeks to promote fairness by preventing undue pre-trial detention and alleviating the chronic problem of overcrowded prisons. At the same time, it reflects an acknowledgment of the principle that detention before conviction should remain an exception rather than the norm within a just and humane criminal justice system.[28]

Operational Impact: In Inhuman Conditions in 1382 Prisons, the Supreme Court ordered the retrospective implementation of this measure to ensure the prompt decongestion of prisons, reinforcing the need to alleviate overcrowding and uphold humane detention conditions.[29] However, the denial of this relief to individuals under investigation for multiple offenses substantially narrows its scope. In practice, law enforcement agencies frequently categorize alleged habitual offenders under several overlapping charges, a strategy that may effectively deprive the most marginalized undertrial prisoners of the intended benefit of this provision.[30]

IV. The Bharatiya Sakshya Adhiniyam (BSA): Evidence in the Digital Age

The *Bharatiya Sakshya Adhiniyam (BSA), 2023* replaces the Indian Evidence Act, emphasizing the incorporation of electronic evidence within the legal framework.

A. Electronic Records as Primary Evidence

Under Section 61, the BSA designates electronic records as primary evidence, marking a major shift from the IEA, which required certification for their admissibility as secondary evidence.[31] The term “document” has been expanded to expressly cover electronic and digital materials, including server logs and mobile devices.[32] This reform seeks to simplify the rules of admissibility by eliminating the earlier distinction that subordinated electronic records to physical documents.[33]

B. Certification and Hash Values (Section 63)

Although electronic records are now classified as primary evidence, Section 63, corresponding to the former Section 65B of the IEA, still requires a certification for their admissibility. Notably, the BSA’s Schedule specifies that this certificate must include the hash value of the concerned electronic record.[34]

Forensic and Legal Challenges:

Hash Value:

A hash value functions as a unique digital identifier used to verify the authenticity of electronic evidence. Although conceptually a strong safeguard against tampering, experts note that its mandatory application places a heavy procedural and technological burden on law enforcement. Many police stations lack the necessary cyber-forensic infrastructure to generate hash values at the time of evidence collection, which could

28. Bharatiya Nagarik Suraksha Sanhita, 2023, § 479, No. 46, Acts of Parliament, 2023 (India).
29. Inhuman Conditions in 1382 Prisons, In re, (2024) SCC OnLine SC 183.
30. Jeyamurugan S. & Nandhini Priya S. P., Bail or Jail? Assessing the Rise of Carceral Justice in India's BNSS Framework, 2 INT'L J. LEGAL RSCH. & ANALYSIS 4652 (2025).
31. Kshitij Rai et al., The Bharatiya Sakshya Abhiniyam, 2023: Navigating The Complexities of Digital Evidence in India's Legal Landscape, in 2 BHARATIYA SAKSHYA ADHINIYAM: A TRANSFORMATIVE LEGAL JOURNEY (2025).
32. Bharatiya Sakshya Adhiniyam, 2023, § 2(1)(d), No. 47, Acts of Parliament, 2023 (India).
33. Pranav Verma, Unmasking the Rhetoric of Reform - The Bharatiya Sakshya Adhiniyam 2023 in Context, 36 NAT'L L. SCH. INDIA REV. (2025).
34. Id.

result in large volumes of electronic material being ruled inadmissible or in procedural inconsistencies during trials.[35]

Tampering and Deepfakes:

The BSA falls short of adequately tackling the emerging issue of deepfakes and AI-fabricated digital content. In the absence of stringent forensic standards to authenticate the origin and integrity of such records, the evidentiary presumption of accuracy attached to digital materials may be misused, increasing the risk of admitting falsified or manipulated evidence in court.[36]

V. Conclusion:

The introduction of the Bharatiya Nyaya Sanhita, Bharatiya Nagarik Suraksha Sanhita, and Bharatiya Sakshya Adhiniyam marks a nuanced blend of reform and retention. Provisions such as Zero FIR, community service, and the formal recognition of digital evidence signify long-overdue modernization within a system rooted in colonial-era legislation.[37] Yet, the claim of "decolonization" becomes contested when viewed alongside the consolidation of state authority. The BNS's expansive definition of "subversive activities," the extended duration of police custody under the BNSS, and the legislative sanctioning of handcuffing collectively indicate a shift toward a crime-control orientation at the expense of due process safeguards.[38] Moreover, the omission of crucial reforms, such as the continued exception for marital rape and the unresolved ambiguities surrounding custodial confessions, suggests that certain aspects of the overhaul are more symbolic than genuinely transformative.[39] In the final analysis, the effectiveness of these enactments will largely hinge on judicial interpretation, particularly on whether the courts temper their harsher provisions to conform to the "fair, just, and reasonable" procedural standard of Article 21, and on the state's capacity to establish the institutional and technological infrastructure necessary to implement the new forensic and digital requirements.[40]

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35. Jaiswal & Singh, supra note 19.
36. Rai et al., supra note 31.
37. Garg, supra note 4.
38. Ali & Mukhopadhyay, supra note 3.
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