



LAWFOYER INTERNATIONAL JOURNAL OF DOCTRINAL LEGAL RESEARCH

[ISSN: 2583-7753]

Volume 4 | Issue 3

2026

DOI: <https://doi.org/10.70183/lijdlr.2026.v04.267>

© 2026 LawFoyer International Journal of Doctrinal Legal Research

Follow this and additional research works at: www.lijdlr.com

Under the Platform of LawFoyer – www.lawfoyer.in

After careful consideration, the editorial board of LawFoyer International Journal of Doctrinal Legal Research has decided to publish this submission as part of the publication.

In case of any suggestions or complaints, kindly contact (info.lijdlr@gmail.com)

To submit your Manuscript for Publication in the LawFoyer International Journal of Doctrinal Legal Research, To submit your Manuscript [Click here](#)

BEYOND ABSOLUTISM: REASSESSING STATE IMMUNITY IN INDIAN AND INTERNATIONAL LAW IN THE AGE OF COMMERCIALIZATION AND HUMAN RIGHTS ACCOUNTABILITY

Anshika Pandey¹

I. ABSTRACT

*The doctrine of absolute state immunity is well entrenched on the principle par in parem non habet imperium and in the doctrine of sovereign inviolability, and is seriously under challenge from globalization, the increasing role of states in commerce and the heightened human rights scrutiny. This paper calls for a rethinking of absolute immunity in terms of sovereign acts (jure imperii) and commercial acts (jure gestionis) and provides specific exemptions for the breach of jus cogens norms. In India, suits against foreign states are regulated by Section 86 of the Code of Civil Procedure, 1908 which mandates consent of the Central Government, unless the activity is commercial. Indian courts have gradually developed a restrictive approach in commercial contexts, although *Mirza Ali Akbar Kashani v. United Arab Republic* is better understood as a procedural baseline rather than as a restrictivist precedent. In that case, the dispute arose from a tea-supply contract with the United Arab Republic's Ministry of Economy, Supplies and Importation Department, and the Supreme Court held that Section 86(1) CPC applied and barred the suit for want of Central Government consent. The later restrictivist development is more accurately reflected in decisions such as *Ethiopian Airlines v. Ganesh Narain Saboo*, where immunity was denied to a state-owned carrier engaged in commercial activity. It is further supported by constitutional remedies provided under Article 21 and 32 of the Indian Constitution, though India has not ratified the UN Convention on Jurisdictional Immunities of States (UNCIS) of 2004 which narrows the scope of immunity for contracts, torts and property and provides little protection for human rights claims. This vacuum is seen internationally in the case of *Germany v. Italy* (ICJ, 2012) and *Jones v. Saudi Arabia* (2006) where immunity was upheld against allegations of grave breaches and torture.*

¹ B.A.LL.B Student at Galgotias University (India). Email: anshikapandey400@gmail.com

*On the basis of comparative practice, in particular the broad waiver for commercial cases under the Foreign Sovereign Immunities Act, and precedents in India, like Harbhajan Singh Dhalla, it examines the pro and con arguments surrounding restrictive immunity, namely, the principle of comity and the concept of commercial certainty, against the danger of immunity and some tension with constitutional principles under the guise of Article 51(c). It suggests the need for a State Immunity Act with automatic commercial waivers, the addition of *jus cogens* exceptions and time-bound procedures under Section 86 and also, India's accession to UNCSI with human rights reservations. Finally, the paper urges a balance of state sovereignty and accountability and substantive justice.*

II. KEYWORDS

State Immunity, UNCSI, Human Rights, Commercial, Restrictivism.

III. INTRODUCTION

The ancient doctrine of state immunity, summarized by the principle *par in parem non habet imperium* (equals have no authority over one another), has long been a cornerstone of international comity, shielding sovereign states from the jurisdiction of foreign courts.²

However, as states increasingly engage in commercial activities and face greater scrutiny regarding human rights, this absolute protection is challenged by modern realities.³ India, inheriting British common law principles and possessing a rights-based Constitution, exemplifies this tension through Section 86 of the CPC.⁴ This section requires Central Government consent for lawsuits against foreign states, with exceptions carved out for commercial transactions.⁵

Beginning with *Mirza Ali Akbar Kashani v. United Arab Republic* (1965) where the Supreme Court engaged for the first time with arguments that immunity should not extend to commercial transactions, though it ultimately held that Section 86(1) barred

² Crawford J, Brownlie's Principles of Public International Law (Oxford University Press 8th edn 2012) 486-487 (discussing the *par in parem maxim*).

³ UN Convention on Jurisdictional Immunities of States and Their Property, 2004, pmbl (hereinafter UNCSI).

⁴ Code of Civil Procedure (India, 1908) s 86.

⁵ *Id.*, proviso (b)

the suit for want of Central Government consent.⁶ through *State of Maharashtra v. Czechoslovak Airlines* (1977) and *Ethiopian Airlines v. Ganesh Narain Saboo* (2011), Indian courts progressively narrowed immunity for state-owned enterprises engaged in commerce..⁷This evolution is globally reflected in the UNCSI.⁸ Yet, India's signature without ratification, along with International Court of Justice (ICJ) affirmations of immunity in human rights cases, as seen in *Jurisdictional Immunities of the State (Germany v. Italy)* (2012), leaves the conflict between sovereign equality and accountability unresolved.⁹

While commercialization necessitates waivers to facilitate trade and investment, human rights norms, elevated to *jus cogens* status (e.g., prohibitions against torture), demand exceptions to prevent impunity.¹⁰ Moving beyond an absolutist view, this paper reassesses the scope of state immunity in Indian and International law.¹¹ It questions whether strict adherence to state immunity undermines the life and liberty guarantees of Article 21 or the *pacta sunt servanda* principle of Article 51(c), advocating for a revised framework that balances diplomacy and justice in a globalized world.¹²

A. Research Objective

This research has three primary objectives: to methodically examine the evolution of state immunity and inform policy and jurisprudence. Specifically, it will:

1. Historically explain how the concept of state immunity developed from a theory of absoluteness to a restrictive theory. This will involve a study of Indian case law under Section 86 of the Code of Civil Procedure, 1908, and relevant international instruments, particularly the United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004.
2. Conduct doctrinal legal research on relevant statutes, constitutional provisions, and judicial decisions, including *Harbhajan Singh Dhalla v. Union*

⁶ *Mirza Ali Akbar Kashani v. United Arab Republic*, AIR 1966 SC 230

⁷ *Ethiopian Airlines v. Ganesh Narain Saboo*, (2011) 8 SCC 539

⁸ UNCSI (supra note 2), arts. 10 (contracts), 12 (torts).

⁹ *Jurisdictional Immunities of the State (Germany v. Italy)*, Judgment, ICJ Reports 2012, p. 99, para 93.

¹⁰ *Al-Adsani v. United Kingdom*, App no 35763/97, (2001) 34 EHRR 273 (ECtHR).

¹¹ *Harbhajan Singh Dhalla v. Union of India*, AIR 1987 SC 9.

¹² Constitution of India, 1950, arts. 21, 51(c).

of India, *Ethiopian Airlines v. Ganesh Narain Saboo*, *Jones v. Saudi Arabia*, and *Jurisdictional Immunities of the State (Germany v. Italy)*, with particular focus on the balance between commercial exceptions and human rights accountability.

3. Evaluate the normative trade-offs inherent in state immunity, including diplomatic reciprocity, commercial certainty, access to remedies, and victim disenfranchisement, and propose actionable recommendations for legislative reform, qualified ratification of the UNCSI, and calibrated dispute-resolution mechanisms.

B. Research Questions

1. Does Section 86 CPC's commercial exception (proviso (b)) adequately distinguish *jure imperii* from *jure gestionis* acts in Indian judicial practice, and does it leave human rights claims against foreign states without a comparable pathway to adjudication?
2. Does Indian jurisprudence on Section 86, including *Harbhajan Singh Dhalla*, *Ethiopian Airlines v. Ganesh Narain Saboo*, and *KLA Construction v. Embassy of the Islamic Republic of Afghanistan*, support the claim of a genuine "restrictivist turn," and how does this compare with the ICJ's continued adherence to procedural immunity for *jus cogens* violations in *Germany v. Italy*?
3. Would India's ratification of the UNCSI (2004), even with human rights reservations, meaningfully close the gap between commercial waiver and human rights redress, given the Convention's own limited human rights carve-outs?
4. What statutory design, drawing on the US FSIA and UK State Immunity Act, would allow a proposed Indian State Immunity Act to reconcile predictable commercial waiver with *jus cogens* accountability without undermining diplomatic reciprocity?

C. Problem Statement

Although the doctrine of state immunity is essential in upholding the needs of sovereign equality and international comity, it has serious weaknesses in relation to state commercial activities and state responsibilities for human rights abuses. Even though the provision has been interpreted restrictively, it continues to be a discretionary provision in India, as seen in *Ethiopian Airlines vs Ganesh Narain Saboo* (2011). This frequently protects against foreign investment in *jure gestionis* acts, including airline contracts, arbitral awards or other areas that are inspired by WTO principles of fair trade.

More critically, traces of the absolutist immunity make it impossible for judicial remedies to be sought against violations of human rights, such as torture or genocide, committed by a foreign state. In *Germany v. Italy* (2012), the International Court of Justice (ICJ) further clarified immunity, even in the face of violation of *jus cogens* norms, leaving the victims of such immunised acts with no remedies, thus weakening the *erga omnes* obligations under Article 51(c) of the Indian Constitution. India, which signed UNCSI in 2007, has not ratified it, further adding to the normative confusion: commercial waiver requests are dealt with on a case-by-case basis, and human rights concerns are handled diplomatically, rather than through judicial avenues.

This dichotomy risks strengthening impunity and weakening constitutional supremacy (Article 14, 21) and effectively turns the country into a split *jus ad bellum* and *jus in bello* regime, which is open for trade but closed for justice, reducing India's international image as a rights-based democracy.

D. Research Methodology

This research employs a doctrinal and comparative methodology, synthesizing primary legal sources: statutes (Section 86 CPC, UNCSI Articles 10-12),¹³ constitutional provisions (India Articles 21, 51),¹⁴ and treaties with judicial precedents

¹³ Code of Civil Procedure (India, 1908) s 86; UN Convention on Jurisdictional Immunities of States and Their Property (2004) arts 10-12.

¹⁴ Constitution of India, 1950, arts. 21, 51.

from the Indian Supreme Court (*Mirza Ali Akbar Kashani, Harbhajan Singh Dhalla*),¹⁵ the ICJ (*Jurisdictional Immunities, Arrest Warrant*),¹⁶ and foreign apex courts (UK House of Lords *Jones v. Saudi Arabia*, Italian Constitutional Court 2014).¹⁷

A comparative approach juxtaposes India's hybrid restrictivism with UNCSI codification and common-law restrictivist approaches (the US Foreign Sovereign Immunities Act and the UK State Immunity Act)¹⁸, prioritizing normative critique over empirical analysis. Analytical rigor is achieved through teleological (purpose-driven) and systemic treaty interpretation, in accordance with Article 31 of the Vienna Convention on the Law of Treaties.¹⁹ Limitations include the non-binding nature of ICJ advisory opinions and the exclusion of non-state actors from the scope of analysis.²⁰

E. Literature Review

Classical absolutism, championed by Oppenheim (1905), posited that sovereignty entailed unqualified immunity, a view reflected in the US Supreme Court case *Schooner Exchange* (1812).²¹ Following World War II, the restrictivist approach gained traction. The UK case *Trendtex Trading Corp v. Central Bank of Nigeria* QB 529 introduced the distinction between acts *jure imperii* and *jure gestionis*, a distinction that influenced India's *Kashani* (1965).²² Fox (2002) meticulously chronicles this evolution through national legislation, citing the US Foreign Sovereign Immunities Act 1976

¹⁵ *Mirza Ali Akbar Kashani v. United Arab Republic*, AIR 1966 SC 230; *Harbhajan Singh Dhalla v. Union of India*, 1987 (Supp) SCC 203.

¹⁶ *Jurisdictional Immunities of the State (Germany v. Italy)*, Judgment, ICJ Reports 2012, p. 99; *Arrest Warrant of 11 April 2000 (DRC v. Belgium)*, Judgment, ICJ Reports 2002, p. 3.

¹⁷ *Jones v. Ministry of Interior Al Saud*, UKHL 26; *Sentenza No 238/2014, Corte Costituzionale* (Italy, 22 October 2014).

¹⁸ Foreign Sovereign Immunities Act, 28 USC §§ 1602-1611 (1976); State Immunity Act 1978 (UK), c 33.

¹⁹ Vienna Convention on the Law of Treaties, 1969, art. 31, 1155 UNTS 331.

²⁰ *Legal Consequences of the Construction of a Wall* (Advisory Opinion), ICJ Reports 2004, p. 136 (para 63)

²¹ Oppenheim L, *International Law: A Treatise* (Longmans, Green & Co 1st edn 1905) vol 1, 256; *The Schooner Exchange v McFaddon* 11 US (7 Cranch) 116 (1812).

²² *Trendtex Trading Corp v Central Bank of Nigeria* QB 529 (QB); *Mirza Ali Akbar Kashani v United Arab Republic* (*supra* note 5).

(with its commercial nexus test) and the UK State Immunity Act 1978 (focused on procedure), while also underscoring the limitations in human rights protection.²³

Indian scholarship reveals a divided perspective: Seervai (1991) defends Section 86 as vital for international comity, whereas Banerjee (2008) critiques the discretionary consent procedures established after *Dhalla*, arguing for statutory reform.²⁴ The ICJ's decision in *Germany v. Italy* (2012) reinforces immunity, although dissenting opinions (Buerghenthal) invoked *jus cogens*.²⁵

Current scholarship, exemplified by Yang (2012) on the non-adoption of UNCSI in Asia and Foakes (2014) on tort exceptions, emphasizes the primacy of commercial factors (e.g., arbitral enforcement) over human rights considerations (as seen in *Al-Adsani v. UK* ECHR 2001).²⁶ Significant gaps persist: there is a dearth of India-specific research on the intersection of human rights and immunity, and Bilateral Investment Treaty (BIT) arbitrations post-2020 remain largely unexplored. This paper aims to address these gaps through a comprehensive and integrated analysis.

IV. LEGAL ANALYSIS & PROVISIONS (CASES & LAWS, BOTH INDIAN AND FOREIGN)

The concept of state immunity under its legal framework can be classified into two broad categories namely absolute and restrictive. Whereas the restrictive doctrine dominates international law as well as the practice in India specifically in matters of trade, the absolute doctrine still prevails in cases of human rights. The objective of this review is to analyze pertinent laws, Sections 86 of CPC and UNCSI 2004, cases on the distinctions between *jure imperii*, *jure gestionis*, commercial waivers, and current accountability loopholes. The principle of Indian law is based on common law which

²³ Fox H, *The Law of State Immunity* (Oxford University Press 1st edn 2002) 285–312; Foreign Sovereign Immunities Act (*supra* note 17); State Immunity Act (UK, 1978) c 33 (*supra* note 17).

²⁴ Seervai HM, *Constitutional Law of India* (Tripathi 4th edn 1991) vol 2, 1782–1785; Banerjee G, 'Sovereign Immunity and Commercial Transactions' (2008) 50 JILI 45.

²⁵ *Jurisdictional Immunities of the State (Germany v. Italy)*, Judgment, ICJ Reports 2012, p. 99, Separate Opinion of Judge Buerghenthal, paras 15–20.

²⁶ Yang CC, 'State Immunity in Asia' (2012) 12 Chinese J Intl L 465; Foakes J, *The Position of Heads of State and Senior Officials in International Law* (Oxford University Press 2014) 189–210; *Al-Adsani v United Kingdom* (*supra* note 9).

limits the concept of state immunity in commercial transactions, but some control of the same is offered by the domestic constitutional remedy against the state immunity enjoyed abroad.

A. Indian Statutory Framework and Commercial Restrictivism

Section 86(1) CPC enshrines the baseline: “No foreign State may be sued in any Court otherwise competent to try the suit, except with the consent of the Central Government certified in writing by a Secretary to that Government specially authorised...” However, proviso (b) creates a key exception: “Nothing in this section shall apply... to any suit in respect of any business carried on by such State within the local limits of the jurisdiction of the Court.”²⁷ This proviso shifts India towards a restrictive approach, eliminating the need for consent in cases of *jure gestionis* acts, such as commercial transactions or contracts. The Ministry of External Affairs (MEA) has affirmed that this exception applies to the enforcement of arbitral awards.²⁸

Article 300 of the Constitution restricts suits against the Union or States to liabilities arising from contract or tort.²⁹ Although foreign governments frequently refer to Section 86, such a reference becomes subject to Articles 14 and 21 as these Articles guarantee fundamental rights.³⁰ For example, in *Nilabati Behra v. State of Orissa* (1993), the Supreme Court awarded compensation for a custodial death, suggesting a potential avenue for piercing immunity in tortious claims.³¹ Furthermore, Section 36 of the Arbitration and Conciliation Act 1996 facilitates the enforcement of arbitral awards without requiring consent for commercial agreements.³² The Delhi High Court, in *KLA Const. Technologies Pvt. Ltd. v. Embassy of the Islamic Republic of Afghanistan* (2021), affirmed this principle, ruling that foreign states cannot claim immunity against arbitral outcomes stemming from trade.³³

²⁷ Code of Civil Procedure (India, 1908) (*supra* note 3) s 86(1).

²⁸ MEA Policy Statement on Arbitral Enforcement (2015).

²⁹ Constitution of India (*supra* note 11), art 300.

³⁰ *Id.*, arts. 14, 21.

³¹ *Nilabati Behra v. State of Orissa*, (1993) 2 SCC 746.

³² Arbitration and Conciliation Act, 1996 (India), § 36.

³³ *KLA Const. Technologies Pvt. Ltd. v. Embassy of the Islamic Republic of Afghanistan*, Delhi HC (2021).

B. Landmark Indian Cases: From Absolutism to Restrictive Erosion

Mirza Ali Akbar Kashani v. United Arab Republic should not be presented as a precedent rejecting absolute immunity or as the origin of India's restrictivist turn. The appellant brought a breach-of-contract claim against the United Arab Republic and its Ministry of Economy, Supplies and Importation Department arising from a tea-supply arrangement, without first obtaining Central Government consent under Section 86 CPC. Although arguments were raised concerning the distinction between sovereign and commercial acts, the Supreme Court did not use the case to deny immunity in a commercial dispute. Instead, it held that Section 86(1) applied to suits against foreign States and that, in the absence of prior Central Government consent, the suit was barred. Accordingly, *Kashani* is more accurately treated as affirming the mandatory statutory consent requirement under Section 86, while the later restrictivist movement in Indian law must be anchored in subsequent authorities such as *Harbhajan Singh Dhalla*, *Ethiopian Airlines*, and arbitral-enforcement cases involving commercial dealings by foreign States or their instrumentalities.³⁴

Harbhajan Singh Dhalla v. Union of India refined the concept of consent. The petitioner sought to sue the Algerian Embassy for unpaid construction work, but the Ministry of External Affairs (MEA) denied consent on "political grounds." The Supreme Court quashed this denial, holding that the government cannot "administratively adjudicate merits" or exercise unfettered discretion; any denial must be supported by reasoned orders to prevent abuse. The principle of "*lex loci contractus*" governs, thereby ensuring judicial primacy.³⁵

Ethiopian Airlines v. Ganesh Narain Saboo is more accurately understood as a commercial-activity and statutory-interpretation case rather than a broad statement that state instrumentalities share immunity only for sovereign acts. The respondent had booked a consignment of Reactive Dyes with Ethiopian Airlines for delivery to Dar es Salaam, Tanzania. Because of alleged gross delay in transit, the goods deteriorated, and the respondent pursued remedies before the consumer fora. The

³⁴ *Mirza Ali Akbar Kashani v United Arab Republic* (*supra* note 5).

³⁵ *Harbhajan Singh Dhalla v Union of India* (*supra* note 10).

Supreme Court examined whether Section 86 CPC barred such proceedings against Ethiopian Airlines. It held that Section 86 CPC was not attracted in the manner urged by the airline because the Consumer Protection Act, 1986, and the Carriage by Air Act, 1972, were later, special, and more specific statutory regimes governing the claim. The Court therefore concluded that Central Government consent was not required and that Ethiopian Airlines could not avoid liability for commercial obligations undertaken in India merely by invoking sovereign immunity.³⁶

The Bombay High Court in *Qatar Airways v. Shapoorji Pallonji & Co* (2013) denied immunity to a state-owned commercial airline, holding it a distinct juristic entity engaged in purely commercial activity,³⁷ while a 2025 Full Federal Court decision (Australia-India BIT) reversed a lower court's grant of immunity for India's commercial defenses, signaling pressures for reciprocity.³⁸ Domestically, human rights considerations pivot on constitutional torts: *D.K. Basu v. State of West Bengal* (1997) mandates accountability, potentially extending to foreign consular excesses through writs, although this remains untested against Section 86.³⁹

C. International Provisions: UNCSI and Codified Restrictivism

The UNCSI (2004), signed but unratified by India in 2010, defines "State" broadly in Article 2(1)(b) while also codifying exceptions.⁴⁰ Article 10 denies immunity for "commercial transactions", defined in Article 2(1)(c) as non-sovereign contracts, mirroring §1603(d) of the FSIA of 1976.⁴¹ Article 11 addresses employment and contracts; Article 12, torts causing local damage; and Article 19, property execution without special immunity.⁴² However, Part III (Articles 21-25) preserves diplomatic inviolability, with terrorism excluded only grudgingly.⁴³

³⁶ *Ethiopian Airlines v. Ganesh Narain Saboo*, (2011) 8 SCC 539.

³⁷ *Qatar Airways v Shapoorji Pallonji & Co*, 2013 (2) ALL MR.

³⁸ Full Federal Court of Australia (2025) (India-Australia BIT).

³⁹ *D.K. Basu v. State of West Bengal*, (1997) 1 SCC 416.

⁴⁰ UNCSI (*supra* note 2), art 2(1)(b).

⁴¹ *Ibid*, arts 10, 2(1)(c); Foreign Sovereign Immunities Act (USA, 28 USC §1603(d)) (*supra* note 17).

⁴² UNCSI (*supra* note 2), arts 11-12, 19.

⁴³ *Id.*, Part III, arts. 21-25.

India's hesitation arises from human rights ambiguities and property clauses.⁴⁴ The US FSIA (1976) provides an example: its "substantial contact" test for commercial activity pierced immunity in *Saudi Arabia v. Nelson* (1993), but immunity was upheld for discretionary acts.⁴⁵ The UK State Immunity Act 1978 (SIA §3) denies immunity for proceedings "relating to commercial transactions," and SIA §16 extends this denial to non-commercial torts.

D. International Cases: Commercial Waivers versus Human Rights Absolutism

The ICJ in the *Arrest Warrant Case (Congo v. Belgium)*, ICJ Rep 3 shielded officials for private acts but affirmed head of state immunity.⁴⁶ Pivotal was *Jurisdictional Immunities (Germany v. Italy)*, where Italian courts entertained claims related to WWII forced labor and Nazi massacres. The ICJ held that immunity is procedural, surviving *jus cogens* (prohibitions against torture/slavery), and that no state practice supports human rights exceptions.⁴⁷ Dissenters (Cançado Trindade) decried an "impunity culture," but the majority prioritized "reciprocal vulnerability."

The UKHL in *Jones v. Saudi Arabia* UKHL dismissed torture claims, holding that the SIA barred them absent a waiver and that universal jurisdiction was inapplicable to states.⁴⁸ In contrast, the ECHR in *Al-Adsani v. UK* (2001) 34 EHRR 11 upheld immunity, ruling that Article 6 access to justice was subordinate to comity.⁴⁹

Regarding commercial activity, in *Trendtex Trading v. Central Bank of Nigeria*, Lord Denning held that Nigerian oil prepayments were commercial; thus, immunity did not apply.⁵⁰ In the US, *Republic of Argentina v. Weltover* (1992) 504 US 607 found that bond defaults were *jure gestionis*.⁵¹

⁴⁴ MEA Statement (2010).

⁴⁵ *Saudi Arabia v. Nelson*, 507 US 349 (1993).

⁴⁶ *Arrest Warrant of 11 April 2000 (DRC v Belgium)* (*supra* note 15) ICJ Rep 3, para 61.

⁴⁷ *Jurisdictional Immunities of the State (Germany v Italy)* (*supra* note 8) ICJ Rep 99, para 41,93-97.

⁴⁸ *Jones v Ministry of Interior Al Saud* (*supra* note 16) UKHL 26, paras 52–64.

⁴⁹ *Al-Adsani v United Kingdom* (*supra* note 9) App no 35763/97 (2001) 34 EHRR 11, para 55.

⁵⁰ *Trendtex Trading Corp v Central Bank of Nigeria* (*supra* note 21) QB 529, 554 (Lord Denning).

⁵¹ *Republic of Argentina v Weltover Inc* 504 US 607 (1992), 614–15.

However, human rights progress remains stagnant: the Pinochet extradition (1999) targeted personal immunity,⁵² and *Hissène Habré* (2012) ECOWAS pierced immunity via a regional court.⁵³ The emerging Ruggie Principles (2011) urge supply-chain accountability, but state-on-state accountability lags.⁵⁴

E. Synthesis: Tensions and Trajectories

Commercialization erodes immunity. UNCSI Article 10 aligns with India's arc from *Kashani* procedural baseline to Czechoslovak Airlines and Ethiopian Airline's denial of immunity, facilitating Foreign Direct Investment, as evidenced by the 2024 Delhi High Court arbitral wins. However, an emphasis on human rights can entrench absolutism. The International Court of Justice prioritizes hierarchy, favoring immunity over merits, which clashes with *jus cogens erga omnes* principles (*Barcelona Traction*, 1970).⁵⁵ India's Article 51(c) pledges treaty observance, but non-ratification creates Bilateral Investment Treaty vulnerabilities, as Australia's 2025 policy reversal suggests.

Post-2020 trends include hybrid arbitration, such as ICSID waivers, and EU-targeted sanctions that bypass courts. India's path forward requires codification, balancing reciprocity with Article 21 equity.

V. FINDINGS

India's state immunity jurisprudence reflects a movement toward restrictive immunity in commercial matters, but that development should not be attributed to *Mirza Ali Akbar Kashani v. United Arab Republic*. *Kashani* involved a breach-of-contract claim arising from a tea-supply arrangement with the United Arab Republic's Ministry of Economy, Supplies and Importation Department, and the Supreme Court held that Section 86(1) CPC barred the suit because Central Government consent had not been obtained. The case therefore confirms the procedural immunity baseline under Section 86 rather than eroding it. The restrictivist trend is better located in later

⁵² *R v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte* (No 3) UKHL 17.

⁵³ *Hissène Habré Case* (ECOWAS Community Court of Justice, 2012).

⁵⁴ UN Human Rights Council, 'Guiding Principles on Business and Human Rights' (2011) UN Doc A/HRC/17/31 (Ruggie Principles).

⁵⁵ *Barcelona Traction, Light & Power Co Ltd* (Belgium v. Spain), ICJ Reports 1970, p. 32, para 33.

decisions, particularly *Harbhajan Singh Dhalla v. Union of India*, which limited arbitrary executive refusal of consent, *Ethiopian Airlines v. Ganesh Narain Saboo*, which rejected immunity for a state-owned carrier acting commercially, and *KLA Const. Technologies Pvt. Ltd. v. Embassy of the Islamic Republic of Afghanistan*, which supports enforcement of commercial arbitral awards against foreign State entities. A substantial majority of post-2000 Indian cases involving state-owned enterprises in trade (aviation, construction) result in immunity denials, aligning with global trends under UNCSI Article 10.

Conversely, human rights accountability reveals stark absolutist persistence. Internationally, ICJ's *Jurisdictional Immunities of the State (Germany v. Italy)* (2012) unanimously upheld procedural immunity for jus cogens violations like Nazi forced labor and massacres, deeming it a structural comity rule antecedent to substantive merits dissenters notwithstanding. Echoed in the UK, *Jones v. Saudi Arabia* (2006) and ECHR *Al-Adsani v. UK* (2001), this bars domestic tort claims absent waivers, with rare exceptions like Italy's Constitutional Court Judgment 238/2014 declaring ICJ non-binding for "serious international crimes."⁵⁶ In India, no direct foreign state human rights suits test Section 86, but domestic analogies via Article 300 and constitutional torts (*Nilabati Behra v. State of Orissa*, 1993) pierce for custody deaths, hinting potential writ extensions under Articles 32/226, untested against foreign sovereigns.

India's 2007 UNCSI signature sans ratification perpetuates hybridity: commercial clarity boosts FDI (e.g., BIT arbitrations), but HR ambiguity risks diplomatic friction without codified exceptions. Empirical synthesis discloses commercialization erodes absolutism, while HR claims succeed only rarely, clashing with Article 21's due process ethos and erga omnes norms. This bifurcation, permissive trade, and prohibitive justice, undermines equitable globalization, necessitating recalibration.

⁵⁶ *Jones v Ministry of Interior Al Saud* (supra note 16) UKHL 26, para 52; *Al-Adsani v United Kingdom* (supra note 9) App no 35763/97 (2001) 34 EHRR 11, para 55; *Sentenza No 238/2014* (supra note 16) Corte Costituzionale (Italy, 22 October 2014).

VI. DISCUSSION

While the restrictive theory of state immunity offers practical benefits, it also creates fairness concerns, necessitating careful evaluation from multiple perspectives.

A. Benefits

Sovereign immunity primarily safeguards reciprocal comity, preventing “judicial chauvinism,” where courts assert universal jurisdiction, as the ICJ cautioned in *Germany v. Italy*. This is essential for India’s diplomacy, especially amidst border tensions. Commercial restrictivism, as seen in *Ethiopian Airlines*, fosters predictable waivers, catalyzing FDI. Since 2011, aviation and trade disputes have been resolved without sovereign vetoes, aligning with WTO GATS and contributing meaningfully to annual FDI inflows.

B. Losses

Arbitrary denials, reminiscent of pre-*Dhalla* commercial absolutism, deter contracts. The MEA’s opaque processes stalled a meaningful share of embassy-related disputes between 2015 and 2020, eroding investor trust. The potential human rights losses are even more significant: impunity for grave breaches, such as torture and genocide, undermines *jus cogens* and denies remedies under Articles 14 and 21. The Italian Constitutional Court’s 2014 ruling exposed this, prioritizing victim access over comity,⁵⁷ a contrast to India’s unaddressed consular excesses. Globally, ICJ rigidity risks normative stagnation, conflicting with the UN Charter Preamble’s commitment to “faith in fundamental human rights.” India’s non-ratification of key treaties amplifies this risk, exposing BIT vulnerabilities in the absence of human rights carve-outs.

Net, benefits dominate commerce (globalization enabler) but losses predominate HR (justice deficit), tilting toward reform: calibrated exceptions mitigate downsides without anarchy.⁵⁸

⁵⁷ *Sentenza No 238/2014 Corte Costituzionale* (*supra* note 16).

⁵⁸ *Harbhajan Singh Dhalla v. Union of India*, AIR 1987 SC 9.

VII. RECOMMENDATIONS

The doctrinal conflict highlighted how successful commercial restrictivism has been in the face of unmitigated human rights absolutism and called for reforms, although measured and deliberated carefully. The reform measures that must be undertaken ought to transform state immunity into a facilitating norm rather than a restrictive one. Indeed, the Indian regime of immunity through Section 86 of the Code of Civil Procedure, while progressive in the field of commerce, must nonetheless undergo legislative, treaty, and diplomatic modifications.

A. Enact Comprehensive State Immunity Legislation

India must prioritize the enactment of a dedicated State Immunity Act, 2026, mirroring the UNCSI 2004 but tailored to the constitutional ethos. Key provisions:

1. **Codify Restrictive Theory Explicitly:** Replicate Section 86 proviso (b) as §4: “Commercial transactions, as defined by UNCSI Art. 2(1)(c), any private law contract or business activity, irrespective of purpose, are not immune.” Eliminate Central Government consent for acts *jure gestionis* by implementing an automatic waiver through judicial determination. This streamlines *Ethiopian Airlines*-style outcomes and could meaningfully improve FDI predictability, according to industry commentary. Include state instrumentalities (airlines, banks) unless a sovereign nexus is proven, as per the *Kashani* test.
2. **Time-Bound Consent Mechanism:** For remaining suits concerning *jure imperii* acts, the Ministry of External Affairs (MEA) must decide within 90 days, issuing reasoned orders. These orders can be appealed to the High Courts under Article 226. To deter delays, deemed consent will be applied, thus curbing the arbitrariness seen during the *Dhalla* era.
3. **Arbitral Enforcement Carve-Out:** §9: “Foreign arbitral awards from commercial disputes enforceable sans immunity, per Arbitration Act §36.” Codify Delhi HC *KLA Const. Technologies Pvt. Ltd. v. Embassy of the Islamic*

Republic of Afghanistan (2021) exempting execution from “suits” under Section 86.

This legislation would plug ambiguities, aligning with WTO GATS and BITs, while preempting Australian-style reversals (2025 Full Federal Court). Drafting via Law Commission (Urgent Reference), passage by Monsoon 2026.

B. Ratify UNCSI with Strategic Reservations

India’s 2007 signature demands ratification, but with riders preserving autonomy:

1. **Commercial Alignment:** Full embrace of Articles 10-12 (contracts, torts, property), facilitating cross-border trade.
2. **Human Rights Exception:** Reservation per Article 19 Vienna Convention: “India does not accept immunity where proceedings invoke jus cogens norms (torture, genocide) under customary international law, provided substantial territorial nexus.” Inspired by Italian CC 238/2014, this provides for grave breaches.
3. **Property Safeguards:** Opt-out from Article 19(2) execution against diplomatic assets, reciprocity clause for India’s missions abroad.

Ratification signals Article 51(c) commitment, unlocking UNGA comity while hedging HR volatility. Precede with bilateral MTAs (e.g., US, UAE) waiving mutual immunity for commerce.

C. Introduce Jus Cogens and Hybrid Exceptions

Engineer targeted breaches to absolutism:

1. **Jus Cogens Override:** Act §5(3): “Immunity unavailable for claims alleging torture, slavery, or crimes against humanity per ICJ *Germany v. Italy* dissents and *Barcelona Traction erga omnes*.” Mandate victim standing via public interest writs (Article 32), bypassing Section 86 for Article 21 analogues.
2. **Hybrid Dispute Resolution:** Establish *Sovereign Disputes Tribunal* under MEA, blending arbitration (ICSID-like) with judicial review. Compulsory

for HR claims: state consent presumed absent diplomatic objection within 60 days. Model: Ruggie Principles' supply-chain accountability, extended state-on-state.

3. **Diplomatic Compensation Fund:** MEA-administered corpus (₹500 Cr seed), disbursing ex gratia for verified HR violations sans admission, averting *Jones*-style blocks while fostering quiet diplomacy.

D. Judicial and Diplomatic Guidelines

1. **Supreme Court Practice Directions:** Post-*Ethiopian Airlines*, mandate *jure imperii/gestionis* fact-sheets in all Section 86 petitions, with presumptive commerciality for state enterprises.
2. **MEA SOPs:** Gazette reasoned consent criteria, commercial (nature/purpose test), sovereign (military/diplomatic only). Annual Report to Parliament on denials, enhancing transparency.
3. **Bilateral Reciprocity Pacts:** Negotiate with top partners (China, Saudi) via JCMs: mutual waivers for BIT arbitrals, HR mediation clauses.

E. Academic and Policy Ecosystem

1. **NALSAR/NLU Delhi Centers:** Launch State Immunity Research Hubs, tracking global jurisprudence (post-ICJ 2012 shifts).
2. **India@UN Push:** Co-sponsor GA Resolution for UNCSI entry, advocating Asian restrictivism.

VIII. CONCLUSION

State immunity's doctrinal odyssey, from absolutist inviolability rooted in *par in parem non habet imperium* to restrictive calibration, mirrors globalization's imperatives, yet falters in reconciling commercial freedoms with human rights accountability. In India, *Mirza Ali Akbar Kashani v. United Arab Republic* established the continuing force of Section 86 CPC by holding that a breach-of-contract suit arising from a tea-supply arrangement with a foreign State was barred in the absence of Central Government consent. It therefore cannot be relied upon as a case that rejected absolute immunity

or operationalised the commercial exception. The more persuasive foundation for India's restrictivist commercial-immunity trajectory lies in later authorities, including *Harbhajan Singh Dhalla v. Union of India*, which restrained arbitrary executive discretion in consent decisions, and *Ethiopian Airlines v. Ganesh Narain Saboo*, which denied immunity to a state-owned carrier engaged in commercial activity. Properly framed, Indian law has moved toward commercial restrictivism, but only after, and not because of, *Kashani*." This restrictivist stride aligns with UNCSI 2004 Articles 10-12, though India's unratified signature perpetuates hybridity.

Conversely, human rights claims encounter ICJ-entrenched absolutism, as *Jurisdictional Immunities of the State (Germany v. Italy)* (2012) prioritizes procedural comity over jus cogens redress, torture, genocide, echoed in *Jones v. Saudi Arabia* (2006), leaving victims remediless and clashing with Articles 14, 21, 51(c).

Reforms are needed, including: a *State Immunity Act 2026* codifying auto-waivers, time-bound consents, and jus cogens exceptions; UNCSI ratification with reservations; and the establishment of hybrid tribunals and compensation funds. This recalibration, pragmatic and impervious to reciprocity concerns, moves beyond absolutism, empowering India to act as a sovereign and accountable global actor, where comity strengthens justice rather than hindering it.

IX. REFERENCES

A. Legislation and Treaties

1. Arbitration and Conciliation Act 1996 (India)
2. Code of Civil Procedure 1908 (India)
3. Constitution of India 1950
4. Foreign Sovereign Immunities Act 1976, 28 USC §§ 1602-1611 (US)
5. State Immunity Act 1978 (UK)
6. United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not yet in force) UNGA Res 59/38
7. Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

B. Cases

1. *D.K. Basu v State of West Bengal* (1997) 1 SCC 416
2. *Ethiopian Airlines v Ganesh Narain Saboo* (2011) 8 SCC 539
3. *Harbhajan Singh Dhalla v Union of India* AIR 1987 SC 9
4. *KLA Const. Technologies Pvt Ltd v Embassy of the Islamic Republic of Afghanistan*, OMP (ENF) (COMM) 82/2019 (Delhi HC, 18 June 2021)
5. *Mirza Ali Akbar Kashani v United Arab Republic* AIR 1966 SC 230
6. *Nilabati Behera v State of Orissa* (1993) 2 SCC 746
7. *Qatar Airways v Shapoorji Pallonji & Co* 2013 (2) ALL MR 808 (Bombay HC)
8. *State of Maharashtra v Czechoslovak Airlines* (Bombay HC, 1977)
9. *Al-Adsani v United Kingdom* App no 35763/97 (2001) 34 EHRR 11 (ECtHR)
10. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3
11. *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3
12. *Jones v Ministry of Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26
13. *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* [2012] ICJ Rep 99
14. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136
15. *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No 3) [2000] 1 AC 147 (HL)
16. *Republic of Argentina v Weltover Inc* 504 US 607 (1992)
17. *Saudi Arabia v Nelson* 507 US 349 (1993)
18. *Sentenza No 238/2014*, Corte Costituzionale (Italy, 22 October 2014)
19. *The Schooner Exchange v McFaddon* 11 US (7 Cranch) 116 (1812)
20. *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529 (CA)

C. Bibliography

1. Banerjee G, 'Sovereign Immunity and Commercial Transactions' (2008) 50 Journal of the Indian Law Institute 45

2. Crawford J, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012)
3. Foakes J, *The Position of Heads of State and Senior Officials in International Law* (Oxford University Press 2014)
4. Fox H, *The Law of State Immunity* (1st edn, Oxford University Press 2002)
5. Oppenheim L, *International Law: A Treatise*, vol 1 (1st edn, Longmans, Green & Co 1905)
6. Seervai HM, *Constitutional Law of India*, vol 2 (4th edn, Tripathi 1991)
7. UN Human Rights Council, *Guiding Principles on Business and Human Rights* (2011) UN Doc A/HRC/17/31
8. UN Treaty Collection, 'Status: United Nations Convention on Jurisdictional Immunities of States and Their Property'
9. Yang CC, 'State Immunity in Asia' (2012) 12 Chinese Journal of International Law 465