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## FOREWORD

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*It is with great pride and a profound sense of responsibility that I present to you this Volume -XIV, Issue -II July 2025 Nirma University Law Journal (NULJ) Peer reviewed and Referred Journal. Each volume is a testament to the rigor, curiosity, and commitment to legal scholarship that our contributors, editors, and advisory board bring to the journal.*

*As the legal landscape continues to evolve shaped by shifting societal values, technological advancements, and global challenges legal scholarship plays a crucial role in interpreting, critiquing, and guiding the application of law. In this edition, our authors explore a wide array of pressing legal issues and interdisciplinary perspectives.*

*Behind the scenes, producing this journal demands meticulous attention to detail, spirited debate, and countless hours of research and editing. I am deeply grateful to our dedicated editorial team for their unwavering commitment, as well as to our faculty advisors and peer reviewers for their guidance and support. I am happy to share that the article that has been published in this Journal is indexed to HeinOnline, EBSCO, Manupatra, and SSC Online. The overwhelming response we received from contributors for the publication of Volume XIV, Issue II.*

*To our readers practitioners, academics, and students alike; I hope this issue provokes thought, challenges assumptions, and inspires dialogue. The pursuit of justice and the evolution of legal norms require not only practice but also persistent scholarly engagement. It is our belief that the Nirma University Law Journal (NULJ) continues to serve as a platform for that vital exchange.*

*Thank you for your continued support and readership.*

**Prof. (Dr.) Madhuri Parikh**

Chief Executive, Nirma University Law Journal

Director and Dean

Institute of Law, Nirma University, Ahmedabad.



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# CLIMATE CHANGE, FORCED MIGRATION, AND PROPERTY AS HUMAN RIGHT: AN ANALYTICAL PERSPECTIVE

Dr. Jasdeep Kaur\*  
Ms. Harsimar Kaur\*\*

## ABSTRACT

*Climate Change is the long-term shifts in the temperature and the weather patterns, as a result of the same people are forced to migrate and leave their homes which impacts their livelihood and overall safety. The same phenomenon is referred to as Climate Induced Migration. As the phenomenon of climate change accelerates, the migration caused as a result of the same has become a core issue of concern. This research examines the legal dimensions related to climate induced displacement specifically in context of the property rights of displaced persons. Various studies have shown that millions of people are displaced due to climate change, however, there is still no legal recognition granted to them. The present statutes are inefficient in granting them adequate rights to ensure their protection. The study examines the significant policy gaps in granting climate migrants' appropriate protection. The study aimed at highlighting basic human rights of climate migrants and the need for legislative reforms to ensure safety and stability for the displaced populations. The study argues for a right based approach which also integrates the climate migrants into the national planning, granting them property rights specifically.*

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**Keywords:** *Human Rights, Climate Induced Migration, Property Rights, Climate Change, Displaced Persons.*

## I. INTRODUCTION

As climate change redesigns the natural atmosphere, the world is facing a very complex test that is climate-induced migration. Climate migration normally takes place when people are required to leave their homes in response to the effects of climate change, including the rising levels of sea, extreme weather conditions, desertification and drought. These environmental changes pose conditions which make it hard or impossible for the people to continuously live in certain areas. It is further predicted that climate calamity will increase and will drive even more populations to relocate. This spectacle is not only a humanitarian issue but the same also has noteworthy economic, social, and political consequences.<sup>1</sup>

The efforts to define a climate migrant has been made by International Organization for Migration (IOM), which defines climate migrant as: “persons or group of persons, who were for compelling reasons of sudden or progressive changes in the environment that adversely affected their lives or living conditions, obliged to leave their habitual homes or choose to do so either temporarily or permanently and who move either within their country or abroad”.<sup>2</sup>

Ever since the start of human civilization, the constant climate change is a major reason for worry around the globe. In comparison to the 1980s, the present decade has witnessed constant increase in the temperature, as stated by a report which was issued by the World Meteorological Society (WMS). With the temperature averaging on 17.18 degrees Celsius, the year of 2023

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<sup>1</sup> Deutsche Welle, India: Extreme weather fuels migration-related challenges, Hindustan Times, (Apr., 6, 2025, 2:30 pm), <https://www.hindustantimes.com/lifestyle/health/india-extreme-weather-fuels-migration-related-challenges-101720764145232.html>.

<sup>2</sup> Environmental Migration, International Organisation for Migration (Apr., 7, 2025, 10:54 am), <https://environmentalmigration.iom.int/environmental-migration#:~:text=Climate%20migration%20is%20thus%20a,is%20due%20to%20climate%20change>.

has officially been recorded as the hottest year which surpassed the previous record set in the year 2016.<sup>3</sup> The displacement of about 14 million people by floods and storms was seen, with countries in the Asia and Pacific region being the most severely affected. One of Sustainable Development Goals (SDG) which provides for eradication of inequalities in between and within the nation also lays an emphasis on the need of migration as well as mobility which is accountable and safe<sup>4</sup>. A sum of extreme weather conditions posed due to constant climate change, such as shortages of water as well as food, pose a great challenge to the accomplishment of this target. It is further predicted that by 2050, the repercussions of climate change will result in the displacement of around 143 million people which are currently living in the Global South.<sup>5</sup>

The United Nations Environment Programme has strongly advised that the displaced population shall be included in both national adaptation plan and nationally determined contribution action project. The same organisation has also suggested new techniques for the protection of the vulnerable section of the societies. The organisation had addressed the problem about how more than hundred million people are being displaced and are coerced to flee their homes. It has also highlighted that about 75% of the population which are displaced are being hosted by the middle- or low-income nations and such populations are surviving in long-drawn-out conditions. It has enlightened the fact that in almost all the countries of the world, these displaced communities and populations are not within the ambit of policies for climate change and climate induced migration.<sup>6</sup>

In 2010, the Cancun Adaptation Framework of 2010 had taken considerable measures in order to tackle relocation, displacement as well as migration

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<sup>3</sup> WMO confirms that 2023 smashes global temperature record, WMO (Apr., 7, 2025, 11:30 am), <https://wmo.int/news/media-centre/wmo-confirms-2023-smashes-global-temperature-record>.

<sup>4</sup> Abdulaziz I. Almulhim et.al., Climate-induced Migration in the Global South: An in-depth Analysis, 3 npj Climate Action 1, 2 (2024).

<sup>5</sup> *id.*

<sup>6</sup> UN agencies call for climate change policies to consider displaced persons, UN Environment Programme, (Apr., 8, 2025, 11:02 am), <https://www.unep.org/technical-highlight/un-agencies-call-climate-change-policies-consider-displaced-persons>.

which took place due to climate change. It is one the prime examples when International Arena focused on Climate Induced Migration and addressed the same.<sup>7</sup> One of the other examples would include the national adaptation program of action, a program developed by various countries in ordinance with the United Nation Framework Convention on Climate Change (UNFCCC). The same plan had discussed a variety of strategies as well as adaptation plans to deal with the climate induced migration and displacement.<sup>8</sup>

The United Nations High Commissioner for Refugees, also known as UNHCR is also taking steps towards providing assistance to the displaced communities as well as refugees which are displaced due to the negative effects of climate change. The Organisations of UNHCR and IOM have stressed that all nations shall be providing adequate protection to refugees, which are displaced due to climate change, as well as they have laid stress on building such strategies as to provide better protection to those communities.<sup>9</sup>

Even though some International Organisation have stressed the need for granting protection to the underserved communities, who are suffering due to climate induced displacement, however, most of the countries have no national build approaches to deal with the same. Even the United States of America does not have an adequate policy to grant protection to climate induced displaced people. Hence, it can be properly deduced that in the international arena, the issue of climate induced migration has not been addressed as a proper problem and has not shed much light on. Lack of laws in relation to the same in various countries, indicate the need for more stress

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<sup>7</sup> The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, Framework Convention on Climate Change, (Apr. 8, 2025, 11:44 am), <https://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf>.

<sup>8</sup> National Adaptation Programmes of Action, UNFCCC ( Apr., 8, 2025, 12:03 am) , <https://unfccc.int/topics/resilience/workstreams/national-adaptation-programmes-of-action/introduction>.

<sup>9</sup> NHCR and IOM call for improved safeguards for the displaced on the frontlines of climate emergency, UNHCR (Apr., 8, 2025, 12:34 am), <https://www.unhcr.org/in/news/news-releases/unhcr-and-iom-call-improved-safeguards-displaced-frontlines-climate-emergency>.

on the problem. The international organisations and international law has to provide a universal framework for the people who are displaced due to climate change in order to provide them adequate protection and rights.<sup>10</sup>

## II. CLIMATE INDUCED MIGRATION IN INDIA

India contains a diverse geography, which extends from the eastern Sundarbans region along with the southern coastal lines to the western deserts of Arid and the northern Himalayas. This type of diversity in its landscape makes the country even more vulnerable to natural disasters. The lion's share of the rivers is vulnerable to floods, storm surge effects, and augmented salt water intrusion because of the region's high population density and bad urban design, which are likely to affect a large population. In reality, the entire Southeast Asian region is prone to disasters, and its high population density further enhances its vulnerability.<sup>11</sup>

The current Indian measures for protection places less focus on environmental migration and more on migration brought on by humanitarian or economic crises. This makes it more difficult to release cash for the refugees' relocation and resettlement. The Supreme Court of India emphasized in 2005 that all matters pending shall be transferred to the Tribunal established under the Foreigners (Tribunals) Order, 1964 rejecting the Illegal Migrants Act, 1983.<sup>12</sup>

The climate induced migration in India, is a serious issue of concern. Various records have shown that India has been reaching heights in terms of climate induced migration and displacement. In accordance with the "State of India's Environment-2022" study, India ranks fourth globally in terms of migration which is brought on by climate change. As per the same report, environmental disasters caused more than three million people to flee their

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<sup>10</sup> Ayça Ataç & Thomas Hartmann, *Advances in Chemical Pollution, Environmental Management and Protection* 8 JEM 1, 2-3 (2022).

<sup>11</sup> John Podesta. *The climate crisis, migration and refugees*, The Brookings Institution (Apr., 9, 2025, 10:04 am), <https://www.brookings.edu/research/the-climate-crisis-migration-and-refugees>.

<sup>12</sup> *Sarbananda Sonowal v. Union of India*, 2005 5 SCC 665 (2005) (India).

homes in 2020–2021.<sup>13</sup> About 80 % of the Indian population resides in the area which is prone to natural calamities and disaster. It is further predicted that India will see about 45 million climate induced displacements by the year 2050 alone in itself.<sup>14</sup> In absolute numbers, India has one of the highest rates of disaster relocation in the world and the highest in South Asia. Between 2008 and 2019, almost 3.6 million people were relocated annually, the majority of them during the monsoon season according to a report by IDCM in 2020.<sup>15</sup>

### **III. INDIAN FRAMEWORK ON CLIMATE MIGRANTS AND THEIR PROPERTY RIGHTS**

India currently does not recognise climate migrants; hence it does not encompass a proper framework to address the property rights of the climate migrants. There are policies which provide some sort of protection to these communities; however, a proper law has not yet been framed on the same. These rights are also only for granting them some sort of protection and does not grant them any property rights in the long term. India thus currently lacks a proper mechanism to deal with the property rights of climate induced migrants. It is argued that India does not provide a subsequent policy for climate induced migrants due to the reason that the worldwide debate on climate migration has never taken into consideration India's position on sustainability challenges.<sup>16</sup>

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<sup>13</sup> Deutsche Welle, India: Extreme weather fuels migration-related challenges, Hindustan Times (Apr., 9, 2025, 10:49 am), <https://www.hindustantimes.com/lifestyle/health/india-extreme-weather-fuels-migration-related-challenges-101720764145232.html>.

<sup>14</sup> Murali Krishnan, India: Migration from climate change getting worse, Deutsche Welle (Apr., 9, 2025, 4pm ), <https://www.dw.com/en/india-migration-from-climate-change-getting-worse/a-65369043>.

<sup>15</sup> Climate Induced Displacement and Migration in India: Case studies from West Bengal, Maharashtra, Odisha, Uttarakhand & Bihar, Climate Action Network South Asia (Apr., 9, 2025, 4:30pm), [https://cansouthasia.net/wp-content/uploads/2021/02/Migration\\_India\\_20\\_02\\_2021.pdf](https://cansouthasia.net/wp-content/uploads/2021/02/Migration_India_20_02_2021.pdf).

<sup>16</sup> Ray C. Anderson, THE ENCYCLOPAEDIA OF SUSTAINABILITY: CHINA, INDIA AND EAST AND SOUTH-EAST ASIA: ASSESSING SUSTAINABILITY, Berkshire Publishing Group 61-64 (2012).

The Disaster Management Act<sup>17</sup> provides a framework for anticipating and dealing with natural catastrophes in India. It requires, at its core, the establishment of the National Disaster Management Authority (NDMA) to manage disaster response and relief activities. This Act does not offer climate-displaced persons long-term property rights or resettlement options, even if it furnishes support to those affected by sudden catastrophes such as floods and cyclones. It is a general policy that aid only generates relief and temporary relief. Section 66 of the Act deals with the provision of payment of compensation. However, even the Act does not provide any property rights to the climate induced displaced people.

The Forest Rights Act<sup>18</sup> acknowledges the rights of people who live in the forests over forest lands. The Act allows them to claim rights over those forest areas, which they have used for centuries. This Act holds particular importance for indigenous communities and tribal groups. The FRA addresses only the forested areas and the indigenous people. It does not grant tenure or landholder's rights to communities displaced due to climate effects outside the forest areas.

The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act<sup>19</sup> is one of the prime acts which grants protection to the displaced communities. However, that act is specifically meant for the communities which are displaced due to the development reasons. The Act contains various provisions which provide resettlement, rehabilitation and compensation for the displaced people. However, the meaning of displacement covered within this act, only includes the displacement which is the result of government led land acquisition projects which are specifically meant for infrastructure, development or industrial purposes. The Act only recognises development induced migration and fails

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<sup>17</sup> The Disaster Management Act, 2005, §66.

<sup>18</sup> Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 §6.

<sup>19</sup> Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, §2.

to recognise climate induced migration. So, the people who are displaced due to climate change cannot seek any relief under this act.

One of the other measures which are taken by the nation for protection of people suffering due to climate change Act includes National Action Plan on Climate Change<sup>20</sup>. The plan was launched in the year of 2008 and its main goal was to address the various impacts of climate change occurring across variety of sectors in India. This plan encompasses various missions which mainly focused on renewable energy, agriculture, water and habitat resilience, but the same plan also does not specifically make any mention of property rights for climate migrants or people displaced due to climate change. Some states have also adapted their own climate action plans to deal with the issue of climate change and its repercussions. For instance, Odisha<sup>21</sup> has enforced various resettlement and rehabilitation programmes for committees who are facing risks of displacement due to climate change. However, such policies are not prevalent in every state and the scope of such policies is also very limited. Moreover, such policies also do not make mention of any legal guarantee for proper rights to the climate induced migrated or displaced people. Hence there is a clear need for a policy by the centre on the issue.<sup>22</sup>

### **III (i) Attempts to Recognise Resettlement Rights of Climate Migrants**

Even though climate change is likely to displace millions of people in future in India, despite that fact, no major policy has been framed in favour of such people who are under the threat of losing their livelihood because of severe climate risks. Climate migrants are not even recognised under any law in India. The migrants which are displaced within the country are mostly treated as internal migrants rather than refugees, and they are not granted

<sup>20</sup> National Action Plan on Climate Change, Press Information Bureau (Apr., 10, 2025, 10 am) <https://static.pib.gov.in/WriteReadData/specificdocs/documents/2021/dec/doc202112101.pdf>.

<sup>21</sup> Odisha Climate Change Action Plan, (Apr., 10, 2025, 10:34 am) <https://climatechange.odisha.org/pdf/State%20Action%20Plan%20on%20Climate%20Change%202018-23.pdf>

<sup>22</sup> Amrita Patel and Jasmine Giri, Climate Change, Migration and Women: Analysing Construction Workers in Odisha, 49 Sage Journals 97, 101-102 (2019).

any legal recognition or relief. There is a clear absence of any property rights for such people. However, certain attempts have been made in order to recognise the same in the form of two major bills which were proposed in order to recognise the rehabilitation and resettlement rights of migrants who are deprived of their homes.

### **III. (i) (a). The Climate Migrants (Protection and Rehabilitation) Bill, 2022**

Climate Migrants (Protection and Rehabilitation) Bill, 2022 was introduced in Lok Sabha by Pradyut Bordoloi, a member of Parliament.<sup>23</sup> It aimed to mitigate the consequences of a difficult but rarely acknowledged issue of displacement due to climate change. This Bill was introduced as a private member's Bill which however, does not get much consideration due to being private in nature. However, the Bill can be seen as a step towards the right direction as it seeks to initiate larger discussions about how those who have to leave due to climate change are not just anxious about their wellbeing, but rather need legal protections and executive help.

Under the provisions of this Bill, 'climate migrants' are defined as individuals or communities compelled to relocate from the homes or territories due to climatic variations such as sea-level rise, prolonged droughts or flooding, encroaching deserts, and other gradual alterations of the ecosystem that compromises the safety and livelihoods of the population.<sup>24</sup> This definition encompasses many phenomena, including flash flood-causing extreme events such as cyclonic activities, as well as destructive processes associated with climate change like glacial retreat and increased soil loss. It is essential to consider slow-onset changes, as they often lead to subtle and therefore less visible trends in migration which ultimately have very negative impacts as those trends accumulate with time.

There are several key sections of the Bill that are designed to establish both proactive and reactive measures. One of its main objectives is creating a

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<sup>23</sup> The Climate Migrants (Protection and Rehabilitation) Bill, 2022, Bill No. 160 (2022).

<sup>24</sup> The Climate Migrants (Protection and Rehabilitation) Bill, 2022, Bill No. 160 §2(c) (2022).

climate fund that will cover both short-term assistance and long-term resettlement programs for the displaced.<sup>25</sup> These resources would also be utilized to develop infrastructure that will mitigate climate change impact in already vulnerable regions. This would effectively cater for both relief and prevention. It also seeks the establishment of a National Climate Migration Authority to facilitate the monitoring and evaluation of climate induced migration in India.<sup>26</sup> Another remarkable aspect of the Bill is that it provides for organized rehabilitation of migrants, something Indian policies do not address, except to provide temporary relief in the aftermath of a disaster. This entails affording displaced persons land, houses, and jobs, while breaking the cycle of empty systems which offer no long-term solutions.<sup>27</sup> A large percentage of environmentally displaced people still have problems resettling as they tend to be landless or do not have any job security. This is particularly true for those who must resettle from riverine or coastal areas. The Bill stipulates that the local and national governmental agencies should work together in the recovery process and provide assistance to the resettlement of those who have been displaced from their homes into new towns.

In order to prove the necessity of the Bill, Bordoloi averaged the situation of his home State of Assam. Generally, the Brahmaputra River Basin in the State of Assam is prone to severe floods and river bank erosion that leads to abandoning home and farms by thousands of people. Erosion, unlike flooding, occurs throughout the year, and it also makes people move. However, Indian Disaster Management Act does not treat migration due to these conditions as a “disaster”. Consequently, people affected by these gets a little or no support. One of the issues the Bill seeks to address is, misinterpretation of the term ‘disaster’. In the Bill, it is proposed to ensure that all forms of displacement caused by climate change are acknowledged and mitigated inclusive of both quick onset and slow onset varieties.

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<sup>25</sup> The Climate Migrants (Protection and Rehabilitation) Bill, 2022, Bill No. 160 §5 (d) (2022).

<sup>26</sup> *Id.* §3.

<sup>27</sup> *Supra* Note 25, §5 D(d).

It is true that the provisions of the Climate Migrants Bill were very pertinent, however, it could not get enacted into law. One primary reason is that the parliamentary system and the politics surrounding private member Bills in India makes them very difficult to pass. In India no private member Bill has been passed since seventeen hundred and seventy. This is largely because they do not have the support of the governing party to pass both houses of parliament. In his own words, Bordoloi was specific that the Bill would not be enacted in law as it would create a public discourse and compel the government to consider making legal provisions creating a conceptual framework on climate migration.

There were also implications in terms of costs and implementation since the Bill seeks to endorse such a policy. For instance, forming a climate fund, creating institutions to manage relocation and even carrying out a population census are very expensive and time-consuming activities. Some authorities may have considered these provisions overly aspirational or premature particularly because there were other pressing economic and social issues to be addressed. Moreover, even within literature where climate-induced migration or displacement is a focus of study, developing a coherent policy structure for climate migration policy in the country is contentious as the subject is still nascent. It is argued by certain specialists that before enacting national guidelines, there should be comprehensive research and pilot schemes.

The Bill's rejection is indicative of the crippling challenges climate movements face in India. People are at the risk of displacement, and millions more in danger of ill displacement as there is no legal protection of land enabling them to get housing or even safety. The existing disaster management policies are centric to management of the situation instead of addressing recovery in post-disaster situations which ignores the fact that climate induced displacement is occurring presently.

The Bill for climate migration may sound ambitious, but it did alarm and highlight the pertinent and growing concern of climate migration in India. In

the face of intensifying climate change, the government might feel the need to implement regulations that are not just focused on fast relief but also allow for proper rebuilding of affected communities after disasters. The Climate Change Forced Migrants Bill may have been unsuccessful but it sets a precedent and provides a framework for subsequent more protectionist legislative measures addressing climate change in India.

### **III. (i) (b)The Rehabilitation and Relocation of Persons Displaced due to Climate Change Bill, 2022**

Rehabilitation and Relocation of Persons Displaced Due to Climate Change Bill, a Private Member Bill, was introduced with the aim of providing an orderly system to help the country cope with the increase in the number of people at risk of displacement owing to climate change.<sup>28</sup> The Bill proposed to establish a multi-level institutional structure with national, state, and district committees to supervise and coordinate the resettlement exercise.<sup>29</sup> These bodies will be responsible for ensuring that all the persons who will have to be resettled due to climate change will do so in an organized manner. The draft Bill recognized the importance of provisions for relief that would be both immediate and far reaching in time and proposed some reconstruction initiatives aimed at ensuring that the displaced people could access such services as housing, health care, education, and other facets in the new regions they had relocated to.<sup>30</sup> Besides basic human needs, the Bill also outlined measures of economic restitution such as programs aimed at income restoration to assist displaced individuals or families to resettle and integrate in their new environment. This involved strategies where small enterprises would be offered financial assistance together with help to find employment.

The Climate Displacement Fund as proposed in the Bill will be established by the national and state governments. This would ensure climate change

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<sup>28</sup>The Rehabilitation and Relocation of Persons Displaced due to Climate Change Bill, 2022, Bill No. 142 of 2022 (2022).

<sup>29</sup>*Id.*, §3, 4 and 5.

<sup>30</sup>*Supra* note, §6.

displaced persons had a well of resources that could be used to assist them. This fund was intended to prevent time lags in the provision of assistance and to protect the economy from shocks.<sup>31</sup> So, the Bill placed a major focus on ensuring displaced persons were able to protect their cultural identity and social security. It proposed the use of IDs for the purposes of availing social benefits and maintaining legal status. The Bill also called for the establishment of a national registry on climate migration that will be dealing with coordination of international partners. Despite the noble cause behind the Bill, it faced a lot of opposition and was ultimately rejected. The critics opined that the provisions suggested in the Bill would possibly make the operations of any government impossible without the need for numerous organizations at every government level. It was feared that this would interfere with the smooth operations of the government and the implementation of policies would take longer than expected. Another major concern was the potential establishment of some sort of a compensating fund for climate refugees.

This is because the issues surrounding climate induced displacement are quite often entangled with larger existing economic and social issues being addressed by other systems. Also, critics raised issues of jurisdictional complications and the ineffectiveness of state coordination as displaced people move from one state to another in search of safety and livelihood. This brings about difficulties in enforcing policies uniformly across regions.

Moreover, the Bill's proposals regarding rehabilitation were bound to fall short of expectations over the long term. Although the Bill aimed at providing assistance for immediate resettlement, it inadequately addressed the aspects of integration in the longer term, and the supporting activities such as how to maintain bonds and institutional frameworks, and cultural adaptation to climate change. Moreover, the Bill suffered also in the aspect of parliament's approval considering that it was a private member's bill and not one endorsed by the government. Given the difficult and overlapping nature

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<sup>31</sup> *Supra* note §13 (2022).

of the challenges presented by climate induced displacement, quite a number of MPs expressed that it was sensible to have a better comprehensive approach that receives government support.

The Rehabilitation and Relocation of Persons Displaced Due to Climate Change Bill, 2022 was an ambitious attempt to introduce safety and relocation plans for people like them in India who had to migrate because of climate change and its effects. However, issues over the practicability, finances, and inter-state relations resulted in its non-passage. The defeat of the Bill only underscored that what India requires is an all-encompassing and practical framework which maps out the interests of climate refugees in both the immediate and distant time-frames as part of the overall policy within the country.

#### **IV. JUDICIAL STANCE ON CLIMATE INDUCED MIGRANTS AND THEIR RIGHTS**

The Supreme Court has not reserved a clear judgement on the term climate migrants as well as the rights of those people who are displaced due to climate change effects. However, there have been certain cases in which the Supreme Court has recognised the rights of displaced people. One of the most landmark instances of the same was in the case of *Narmada Bachao Andolan vs Union of India*.<sup>32</sup> In the said case, the Supreme Court dealt with the displacement which was caused by the construction of Sarovar Sarovar Dam. The Supreme Court stressed on the necessity of fair and just rehabilitation and resettlement policy for the displaced people. Even though in this case, the Supreme Court had not directly addressed the issue of climate migrants, the court had placed the rights of displaced people under the ambit of Article 21 as a fundamental right. The court emphasised that the displaced people have the constitutional right to life and dignity under article 21. Hence, it was implied that they had the right to adequate housing, basic resources and livelihood.

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<sup>32</sup> *Narmada Bachao Andolan vs Union of India* AIR 2000 SUPREME COURT 3751 (2000) (India).

While talking about the rights of displaced people, the Supreme Court stressed on the need to rehabilitate them again in the landmark case of *Tehri Bandh Virodhi Sangharsh Samiti vs State of Uttar Pradesh*.<sup>33</sup> The case was concerned with the displacement of people for the Tehri Dam project. The case also emphasised on the rehabilitation and resettlement policies, for the displaced people. The Supreme Court ordered that the people who are being displaced shall be provided with proper infrastructure, housing and community integration. The case served as a principal precedent to the cases involving displacement as a right of the people.

In the case of *Olga Tellis vs Bombay Municipal Corporation*<sup>34</sup> The Supreme Court held that the right to livelihood is a part of the right to life under the fundamental right under Article 21. Even though the case directly did not involve any steps on environmental displacement, the case dealt with the rights of people who are at the risk of losing their homes and livelihoods. The case basically emphasised on the fact that the state actions which lead to displacement also must protect an individual's right to a dignified life under Article 21.

In the case of *MC Mehta vs Union of India*<sup>35</sup>, Supreme Court issued directions for the closure of tanneries, which were polluting the Ganga River. Even though the case does not concern displacement directly, the court here stressed on the need for striking a proper balance between environmental protection and the rights of individuals who lose their livelihood due to such closures. The Supreme Court had also strengthened that any displacement whether because of any development factor or any environmental factor, must considerably uphold land and property rights of the individuals which are being affected by such displacement. The same was emphasised in the case of *Samata vs State of Andhra Pradesh*.<sup>36</sup> The case specifically concerns itself with displacement for communities that are dependent on land.

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<sup>33</sup> *Tehri Bandh Virodhi Sangharsh Samiti vs State of Uttar Pradesh* AIR ONLINE 1990 SC 299 (1990) (India).

<sup>34</sup> *Olga Tellis vs Bombay Municipal Corporation* 1985 SCC (3) 545 (1985) (India).

<sup>35</sup> *MC Mehta vs Union of India* AIR 1987 SUPREME COURT 1086 (1987) (India).

<sup>36</sup> *Samata vs State of Andhra Pradesh* 1997 (8) SCC 191 (1997) (India).

Hence, it can be inferred from the Supreme Court judgments that although the Supreme Court has not directly stressed on the rights of climate migrants, it has placed the rights of displaced people under the ambit of Article 21 of the Indian Constitution. The people who are being displaced have a right to livelihood and right to have adequate measures for their protection. However, it can also be seen that there is a need for a stringent Supreme Court judgement on the issue so as to recognise the property rights of climate migrants as the rights of displaced people are covered within the ambit of Article 21 of Indian Constitution. Also, there is a need for a proper legislation on the rights of climate migrants which also grants them certain property rights.

## **V. CHALLENGES IN RECOGNISING THE PROPERTY RIGHTS OF CLIMATE MIGRANTS**

The critics argue that implementation of property rights of climate migrants is not an easy process. Ascertaining the property rights of climate change-induced categories of people in India is a long and tedious process and is practiced only after overcoming administrative, socioeconomic, and legal challenges. One of the most pronounced of such challenges emanates from the fact that there is no legal definition or recognition of climate induced displacement. Most of the laws concerning displacement have focused on the internal and external displacements as a result of either development or conflicts. Indian Laws such as the Land Acquisition Act deals with the aspect of compensation and resettlement of people displaced due to development projects, however, these provisions do not extend to the displacement of people due to climate change related causes, such as rising sea levels or desert encroachment. This absence creates a policy gap and renders the people displaced due to environmental changes as there are no clear objectives regarding the entitlements over their properties.<sup>37</sup>

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<sup>37</sup> Shreya Singh, Climate Migration and Displacement: Challenges and Responses, Indian Council of World Affairs (Apr., 11, 2025, 9:15 am), [https://www.icwa.in/show\\_content.php?lang=1&level=1&ls\\_id=10542&lid=6710](https://www.icwa.in/show_content.php?lang=1&level=1&ls_id=10542&lid=6710).

In many rural and coastal areas, including those from which climate migrants mostly emanate, there do exist complexities in the land tenure systems.<sup>38</sup> This presents an additional challenge. A large number of the affected population in the northeastern states such as Assam, West Bengal, and Odisha is referred to as landless as they only depend on community lands or encroach on their ancestors' lands and do not have legal titles to the land. These states happen to be the most climate change sensitized in the country. Because there are no title deeds, land or property rights are even more difficult to claim in a relocation displacement process. Moreover, since displaced individuals might not have any ownership recognized in law, it is often found that they are not able to claim compensation or access lands in the resettlement areas, thus perpetuating a cycle of poverty and insecurity.

Inter-State Cooperation is another core challenge, as climate-induced migrants often traverse several states due to natural catastrophes such as floods in Bihar or droughts in Rajasthan. Due to the lack of national legislation on climate-induced displacement, states find it exceptionally difficult to agglomerate all migrants irrespective of their inclusion as prone to migratory movements in a uniform resolution concerning property rights. This leads to further complications since there is no uniform approach in the management of property rights.<sup>39</sup> In addition, the federal system allows for variations in land use, resettlement, and rehabilitation policies which prevent integrated strategies from being put in place.

Additionally, social exclusion: attitudinal and systemic, is an aggravating condition for climate migrants. Most of these people belong to already oppressed groups with no or limited economic capital, making it difficult for them to either fight for land or fair payment.<sup>40</sup> The displaced never have any coping mechanism which helps them settle down with means of their

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<sup>38</sup> Land Records and Titles in India, Pre-Legislative Research, (Apr., 11, 2025, 9:45 am), <https://prsindia.org/policy/analytical-reports/land-records-and-titles-india>

<sup>39</sup> Ritu Bharadwaj, Somnath Hazra, Mohan Reddy, Shouvik Das and Daljeet Kaur, Climate change, migration and social protection, IIED, <https://www.iied.org/sites/default/files/pdfs/2021-10/2059IIED.pdf>.

<sup>40</sup> Federica Cappelli, Valeria Constanti and Davide Consoli, The trap of climate change-induced "natural" disasters and inequality, 70 *Global Environmental Change*, 1, 2 (2021).

livelihoods or basic social services in resettlement areas, because such mechanisms are non-existent. Hence, they tend to be stuck because of poverty and helplessness.

Finally, with respect to resettlement of displaced persons and restoration of their property rights there are administrative and financial constraints. The local and state governments of India often face budgetary constraints and regulatory challenges, and this limits their ability to provide appropriate infrastructure, acquire land and register rights to land for displaced persons. Given that climate migration operates on a slow and progressive time frame, it remains a challenge for the concerned government authorities to effectively rank and attend to these growing needs for resources, especially when they are preoccupied with addressing other more immediate issues.<sup>41</sup>

## VI. CONCLUSION

With worsening climate change, forcing millions of people out of their homes in search of sanctuary in unfamiliar territories, establishing property rights for climate migrants has become an issue that needs urgent attention. The rights to properties provide more than just the right of ownership, they also afford safety, economic independence and dignified means of restoring one's life. In the absence of such rights, climate migrants are bereft of basic provision of the law and this extends to the social provision and economic rights which creates a context of movement, poverty and marginalization. In the coming decades, climate change will likely increase human mobility. It has far reaching consequences to social life, economic activities as well as humanitarian assistance. Generally, those who migrate due to the effects of climate change suffer the loss of their shelter and belongings, as well as the support systems that sustained them previously<sup>42</sup>.

Displaced populations fail to access essential services such as housing, education, healthcare, and employment because the communities, where

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<sup>41</sup> *id.*

<sup>42</sup> *Supra* Note 4 at 2.

they have been relocated to, do not recognize their property rights. This leads to isolation within the new society. Moreover, there are no conventions or sets of regulations at present that acknowledge their rightful ownership of land and property. It results in a socio-legal vacuum. Climate Induced Migrants depend on handiwork of temporary or emergency assistance that is abuse-prone. India does not legally recognize ‘climate refugees’ in its statutory framework and therefore the present migration policies such as, the Disaster Management Act and the Land Acquisition Act, cannot respond to the needs of people who have been displaced in the context of climate change. Such provisions are primarily for displaced persons who are relocated to pave way for development and affiliated activities. They do not cater for persons who are not free to remain in their residence due to prevailing environmental conditions<sup>43</sup>.

The National Action Plan on Climate Change addresses the issue of enhancement of climate resilience in the sectors of water, energy and agriculture, but remains silent on the issue regarding property ownership and relocation strategies of climate change induced people. Therefore, millions of Indians displaced by climate change floods in Assam due to Brahmaputra River or expanding deserts in Rajasthan among other forces are left in the dark as to their fate since they have no means of purchasing lands or even houses in the locations they have migrated to. This problem is aggravated by India’s complex federal structure, which allows each state to devise its own fast-track agenda on resettlement and rehabilitation whilst there is no central framework on the management of property rights for the relocated individuals. The absence of synergies between states makes it worse for environmental refugees as the majority of them tend to be interstate at some point of the disaster. This gap in policy not only points out that the displaced populations remain in poverty, but also creates adverse impacts on the host communities who experience internal migration as a result of vanquished populations. Moreover, it results in scarce resources

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<sup>43</sup> *Supra* Note 10 at 4.

and increased social tensions as the number of unprotected as well as unsafe migrant's soar<sup>44</sup>.

There's a need to reflect on property rights or climate refugees would be left disempowered. Such factors contribute to increase in poverty and injustices making it hard for individuals to integrate into the society. For this chain to be broken, there are two reasons, the first being displaced climate induced migrants should be provided with property rights enabling them to have a fresh start. Secondly, the importance of climate migrants property rights protection should be based on a humanitarian perspective which should respect their rights<sup>45</sup>.

Property rights are one of the most fundamental aspects of humanity's dignity and freedom to develop, because they imbue individuals with the agency to reconstruct themselves, their surroundings, and society at large. With climate change too, people will be on the move, and with tens of millions of people doing the same in the next few years, the property rights conundrum will become even more pressing. It is imperative in that case that the government facilitates climate migration by enabling these people to buy land, build houses, and dwell peacefully in settlements with their families. In the absence of such measures, climate migrants will remain exposed to threats and social exclusion, which will in turn, undermine their resilience in the long term and prevent them from rebuilding.

## VII. SUGGESTIONS

There can be certain suggestions with regard to the recognition of property rights of people who are displaced due to climate change. These suggestions are as follows:

- **Recognition of Climate Migrants:** The first basic requirement is to recognise climate migrants. For the purpose of the same, a legal definition of climate migrants should be adopted so that such migrants may be

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<sup>44</sup> *Supra* note 16 at 5.

<sup>45</sup> *Supra* note 22 at 6.

differentiated from other displaced groups and a specific policy can be framed in their favour. Such a definition shall be vast in nature. It shall cover a variety of climatic catastrophes, as well as acknowledge both immediate and gradual displacement.

- **Enactment of a Legislation in favour of Climate Migrants:** There is a need of enactment of a legislation which protects property and other rights of climate migrants at Central and State level. Such law should be focused on providing adequate property allocation, resettlement processes and composition mechanisms, which may address the long-term need of climate migrants rather than providing some temporary short time relief.

- **Amendments in the existing laws to include Climate Migrants:** The present suggestion is applicable in those cases where the government is not willing to enact a separate legislation in relation to climate induced migration. The amendment in such a case should be made to update the existing laws in order to inculcate and recognise the rights of climate migrants. For example, changes shall be made in the Disaster Management Act and Land Acquisition Act in order to include climate migrants so that they could seek compensation and property rights under those acts. If climate migraines are recognised under these acts, it would extend them more legal protections and options to exercise their rights.

- **National and Interstate Cooperation for Recognising Climate Migrants:** There should be establishment of a national framework, which should ensure national and interstate cooperation for recognition of rights of climate migrants. There should be a uniform policy on protection of property rights of climate migrants. The process which ensures cooperation between states shall be inculcated and streamlined for climate migrants, which seek settlement and property ownership within one or more states.

- **Establishment of a Climate Migration Fund:** The centre and state should take steps towards establishing a climate migration fund to provide support to the communities affected by climate induced displacement. This

fund should be supported by the government which would finance the infrastructure for the development of property rights of migrants. These funds may help them to regain the property which they had already lost due to climatic factors.

- **Creation of a Climate Migration Registry:** There should be creation of a national registry for maintenance of climate migrant's records. Such a register should keep a track of all displacement trends and should allocate resources to the climate migrants in order to facilitate property rights.
- **Initiation of Long-Term Resettlement Solutions and Integration Programmes:** Settlement programmes should be initiated for providing a livelihood to climate migrants. These programs should include provisions like job placements, livelihood restoration, social integration etc.

# THE FOG OF CODE: AUTONOMOUS WEAPONS, LEGAL ACCOUNTABILITY, AND CONTEMPORARY WARFARE CHALLENGES

Apeksha Kamble\*

## ABSTRACT

*The rapid advancement of autonomous weapon systems (AWS), especially armed drones, is altering the nature of modern combat. These technologies increasingly function with limited human oversight, prompting intricate enquiries over legal liability, ethical obligations, and adherence to International Humanitarian Law (IHL). As autonomy increases, the possibility of algorithmic decision-making resulting in unlawful collateral damage or breaches of humanitarian norms, such as distinction, proportionality, and precaution, also escalates. Recent conflicts, including the Russia–Ukraine war and persistent India–Pakistan border tensions, demonstrate an increasing dependence on autonomous and semi-autonomous systems, wherein algorithmic targeting and monitoring obscure the distinctions between human oversight and machine autonomy. These instances underscore pressing accountability issues and illustrate the difficulties existing legal frameworks face in adapting to swiftly advancing battlefield technologies. This research critically examines the responsibility gaps that arise when harm is caused by actions of AI systems devoid of moral agency. It assesses the efficacy of classic legal doctrines, state responsibility, command accountability, and product liability in addressing the distinct issues presented by algorithmic warfare. The paper highlights*

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*how embedded algorithmic governance functions in conjunction with, and occasionally surpasses, conventional legal rules, drawing on Lawrence Lessig's notion of "Code as Law." This paper proposes for the immediate establishment of international legal standards and ethical safeguards to ensure that emerging military technology adhere to humanitarian norms, preventing the rules of war from becoming as opaque as the code that currently governs them.*

**Keywords:** *Autonomous Weapon Systems, International Humanitarian Law, Algorithmic Decision-Making, Liability, Code.*

## **I. INTRODUCTION**

The rapid evolution of Autonomous Weapon Systems (AWS), driven by progress in artificial intelligence (AI) and algorithmic decision-making, is profoundly altering the character and execution of contemporary conflict. These advanced technologies allow weaponry, including armed drones and robotic combat units, to locate, select, and engage targets with minimal or no direct human involvement. The transition from human-operated to machine-driven lethal force presents significant legal and ethical challenges, especially concerning accountability for breaches of International Humanitarian Law (IHL), which governs conduct in armed conflict and safeguards both civilians and combatants.

Conventional legal frameworks, established during a time when human soldiers and commanders made pivotal decisions on the battlefield, are increasingly inadequate to address the distinctive issues presented by Autonomous Weapon Systems (AWS). These systems function via intricate algorithms that analyse extensive data sets and make autonomous judgements, prompting critical enquiries on the assignment of responsibility and culpability in the event of harm. The potential for algorithmic errors, erratic behaviours, or biased decision-making heightens the likelihood of unlawful collateral damage and infringements of fundamental humanitarian values, including distinction, proportionality, and precaution.

Furthermore, the absence of moral agency in AI systems renders traditional accountability procedures, such as individual criminal culpability and command responsibility, significantly inadequate in addressing unlawful results produced by autonomous machines. As warfare becomes more automated, it is essential to rigorously assess the applicability of current legal norms and to formulate new frameworks that ensure autonomous weapons adhere to humanitarian principles, thereby preserving human dignity and the rule of law in the era of algorithmic warfare.

The present research examines the intricate relationship among AWS, algorithmic decision-making, and legal culpability within the framework of International Humanitarian Law (IHL). The objective is to rigorously analyse the characteristics of autonomous weapons and the challenges they present to current legal and ethical standards, while also evaluating recent conflicts, including the Russia–Ukraine war and India–Pakistan border tensions, to underscore practical accountability issues and promote the establishment of new international legal frameworks and ethical safeguards to ensure accountability and adherence to humanitarian principles. The document utilises doctrinal legal analysis of main international humanitarian law treaties and customary law, bolstered by case studies from recent conflicts and an examination of academic and policy literature about artificial intelligence and combat. This inquiry pertains exclusively to armed conflict situations involving state actors utilising autonomous or semi-autonomous weaponry. The scope encompasses a thorough assessment of the principles of distinction, proportionality, and precaution regarding AWS, emphasising how algorithmic judgements may complicate or contradict these standards. The research analyses accountability systems at the state, command, and manufacturer levels while investigating ethical concerns regarding AI's absence of moral agency.

This research seeks to elucidate the complexities of AWS and advocate for the establishment of comprehensive legal frameworks that reconcile military advancement with humanitarian responsibility.

## II. AUTONOMOUS WEAPONS: A CRITICAL EXAMINATION

### II. (i) Autonomous Weapon Systems

Autonomous Weapon Systems (AWS) are weaponised platforms engineered to function with differing levels of autonomy, capable of identifying and attacking targets without direct human intervention. These systems incorporate sophisticated artificial intelligence, sensor technology, and intricate algorithms to assess their environment, recognise potential threats, and make determinations concerning the application of lethal force. The autonomy of these weapons exists on a continuum, from semi-autonomous systems, which require human oversight and authorisation prior to engagement, to fully autonomous weapons that operate independently upon activation, making real-time targeting and attack decisions without human involvement.

Instances of AWS encompass armed drones with automated targeting systems, unmanned ground vehicles designed for war situations, and completely autonomous lethal robots capable of executing military missions independently. Such technologies radically transform wartime dynamics by diminishing the need for direct human involvement in crucial life-and-death choices on the battlefield.

The International Committee of the Red Cross (“ICRC”) offers a widely recognized definition of AWS, describing them as “systems capable of operating independently of human control, including making targeting decisions.”<sup>1</sup> The ICRC expresses substantial concerns over the capability of these mechanisms to adhere to the rigorous mandates established by International Humanitarian Law (“IHL”), especially concerning the principles of distinction and proportionality. The intrinsic unpredictability of algorithmic decision-making and the absence of human ethical judgement

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<sup>1</sup> Neil Davison, *Autonomous Weapon Systems Under International Humanitarian Law*, ICRC, (January 31, 2018), [https://www.icrc.org/sites/default/files/document/file\\_list/autonomous\\_weapon\\_systems\\_under\\_international\\_humanitarian\\_law.pdf](https://www.icrc.org/sites/default/files/document/file_list/autonomous_weapon_systems_under_international_humanitarian_law.pdf).

raise concerns over AWS's capacity to adhere to legal standards during armed conflict.

### III. ISSUES IN AUTONOMOUS WEAPONRY

The growing autonomy in weapon systems poses significant issues that interrogate the feasibility, legality, and ethics of their use in modern combat.

**1. Unpredictability and Reliability:** Autonomous systems depend significantly on data inputs analysed by advanced algorithms, frequently utilising machine learning methods that allow them to adjust to changing situations. This capability can improve operating efficiency, but it also brings uncertainty. Environmental variables, sensor inaccuracies, or erroneous or biased data may result in these systems exhibiting unpredictable behaviour, perhaps causing unintended harm or misdirected targeting of civilians and non-combatants.<sup>2</sup> The opaque characteristics of algorithmic decision-making, frequently referred to as a “black box,” intensify apprehensions about system reliability and the capacity to predict or regulate outcomes.

**2. Loss of Human Judgement:** International Humanitarian Law (IHL) relies on the exercise of human judgement to uphold concepts such as distinction, proportionality, and precaution. Distinction necessitates the division between combatants and non-combatants, proportionality needs the assessment of military benefit in relation to civilian casualties, and prudence obligates the implementation of all practicable measures to mitigate harm. Autonomous Weapon Systems (AWS) lack the contextual comprehension, empathy, and ethical reasoning that human decision-makers contribute to these evaluations.<sup>3</sup> This engenders significant scepticism regarding AWS's capacity to effectively implement these intricate concepts, particularly in complicated and dynamic combat contexts.

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<sup>2</sup> Kiseki Fujisawa, *Artificial Intelligence in Modern Warfare: Ethics, Autonomy, and Global Security*, Austl. Inst. of Int'l Affairs (May 25, 2025), <https://www.internationalaffairs.org.au/australianoutlook/artificial-intelligence-in-modern-warfare/>.

<sup>3</sup> Satuti Arora, *Weapons Without Witnesses: The Emerging Challenges of Autonomous Military Systems*, Legal Vidhiya (February 17, 2025), <https://legalvidhiya.com/weapons-without-witnesses/>.

**3. Accountability Gaps:** A notable legal difficulty presented by AWS pertains to accountability in instances of unlawful injury. Determining accountability gets challenging as the decision-making process becomes fragmented and unclear. AI systems have no moral agency and cannot incur liability, whereas human actors, operators, commanders, programmers, and manufacturers may have varied degrees of guilt, hence complicating legal enforcement.<sup>4</sup> This “responsibility gap” erodes established frameworks of authority and personal accountability under International Humanitarian Law and criminal jurisprudence.

**4. Ethical Concerns:** Entrusting robots with life-and-death choices invokes significant ethical dilemmas. The elimination of direct human oversight jeopardises the humanity of warfare, undermining respect for human dignity and the inherent worth of human life.<sup>5</sup> Ethical discussions centre on the appropriateness of granting computers the authority to make fatal judgements and the requisite safeguards to maintain moral accountability.

Thus, autonomous weapons pose both practical and ethical dilemmas that threaten the current legal frameworks governing armed conflict, necessitating immediate critical examination.

#### **IV. CONTEMPORARY RELEVANCE: CASE STUDIES AND LEGAL ACCOUNTABILITY CHALLENGES**

##### **IV. (i) Autonomous Weapons in the Russia–Ukraine Conflict**

The Russia-Ukraine conflict exemplifies the increasing dependence on autonomous and semi-autonomous weapon systems in contemporary combat. Both adversaries have progressively incorporated drones and other

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<sup>4</sup> Anushka Mahapatra, *Algorithmic Warfare: The Dystopia of AI Weapons and The Legal Vacuum in International Humanitarian Law: Part I*, Jindal Forum for Int'l & Econ. Laws (April 16, 2025), <https://jindalforum.com/algorithmic-warfare/>.

<sup>5</sup> Mary Ellen O'Connell, *Banning Autonomous Weapons: A Legal and Ethical Mandate*, Ethics & Int'l Affairs, Cambridge Core (December 1, 2023), <https://www.cambridge.org/core/journals/ethics-and-international-affairs/article/banning-autonomous-weapons/>.

automated systems for many operational functions, including surveillance, reconnaissance, target acquisition, and precise strikes. Significantly noteworthy is the deployment of loitering munitions by Russian forces, which are miniature drones adept at autonomously locating, identifying, and engaging targets with limited human oversight post-deployment.<sup>6</sup> These systems illustrate the actual use of algorithmic decision-making in critical combat scenarios, where swift reactions are essential, and human reaction times may be inadequate. The Russia-Ukraine conflict highlights the transformative impact of low-cost drones on contemporary combat, facilitating precision strikes and improving battlefield information. Nonetheless, their strategic impact is context-dependent, shaped by terrain, military coordination, and adversary capabilities, highlighting the intricate integration necessary for these technologies to significantly affect combat results.<sup>7</sup>

The deployment of autonomous weaponry presents substantial legal and ethical accountability challenges. The intricate algorithms that dictate these systems' targeting decisions are susceptible to inaccuracies stemming from defective sensor data, environmental disruptions, or programming errors. Algorithmic targeting may erroneously classify civilian infrastructure or non-combatants as valid military targets, resulting in unlawful collateral damage and breaches of International Humanitarian Law norms, including distinction and proportionality. In the tumultuous environment of the battlefield, frequently referred to as the "fog of war," these mistakes are exacerbated by what several scholars denote as the "fog of code," signifying the obscurity and unpredictability of algorithmic processes that can mask causal accountability.<sup>8</sup>

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<sup>6</sup> Tanner Stening, *How cheap combat drones are reshaping the Russia-Ukraine War*, Phys.org, (May 30, 2025). *How cheap combat drones are reshaping the Russia-Ukraine war*.

<sup>7</sup> Dominika Kunertova, *The War in Ukraine Shows the Game-Changing Effect of Drones Depends on the Game*, 79 Bull. Atomic Scientists 95 (March 12, 2023), <https://doi.org/10.1080/00963402.2023.2178180>.

<sup>8</sup> Lawrence Lessig, *Code and Other Laws of Cyberspace*, Basic Books, (1999), ISBN 0-465-03912-X, 1999-Code.pdf.

Attributing legal culpability becomes exceedingly complex when civilian injury arises from the acts of autonomous weapons. Was the occurrence attributable to a system malfunction, a command decision to utilise the system in a sensitive location, or a programming defect in the underlying AI? The dispersion of possible culpability hinders the enforcement of accountability measures within current international legal frameworks.

#### **IV. (ii) India–Pakistan Border Tensions**

A similar alarming development is evident along the disputed India–Pakistan border, where both nations have progressively deployed autonomous and semi-autonomous surveillance and armament systems to bolster border security. These systems employ algorithmic threat detection to monitor and react to apparent intrusions or hostile actions. Such platforms frequently initiate armed reactions with minimal or delayed human supervision, mainly depending on automated systems to assess threats and respond appropriately.<sup>9</sup>

The close proximity of civilian populations to these border regions increases the likelihood of breaches of International Humanitarian Law standards, particularly distinction and precaution. Autonomous systems may erroneously perceive civilian movements or non-hostile actions as aggressive, potentially resulting in unlawful force against protected individuals. Moreover, the clandestine nature of these deployments, along with the swift escalation dynamics inherent in the India–Pakistan relationship, intensifies the accountability challenge. The transparency of investigations into occurrences using autonomous systems is frequently constrained, and international conflicts may obstruct the pursuit of legal recourse or comprehensive fact-finding, resulting in victims lacking definitive remedies.<sup>10</sup>

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<sup>9</sup> Komal Ahuja, *Legal Challenges in Regulating Autonomous Weapon Systems*, Bhatt & Joshi Associates (2025), <https://bhattjoshi.com/legal-challenges-autonomous-weapons/>.

<sup>10</sup> Philip Alexander, *Reconciling Automated Weapon Systems with Algorithmic Accountability: An International Proposal for AI Governance*, Harv. Int'l L.J. (2021), <https://harvardilj.org/2021/07/reconciling-automated-weapon-systems/>.

These modern examples highlight the pressing necessity to tackle the legal responsibility issues presented by autonomous weapon systems in various war scenarios. They demonstrate that current frameworks fail to accommodate the realities of algorithmic warfare, exacerbating the risks of illegal injury and undermining the protections intended by IHL.

#### **IV. (iii) The Accountability Deficit**

Autonomous Weapon Systems (AWS) inherently delegate essential decision-making responsibilities from humans to machines. This delegation, although providing expediency and effectiveness, concurrently creates a substantial responsibility void in the laws of warfare. Recent deployments in the Russia–Ukraine conflict and regional dynamics between India and Pakistan demonstrate that autonomous weapon systems increasingly function in intricate combat environments where results cannot be attributed to a solitary human agent. The opaque characteristics of these systems, propelled by machine learning and probabilistic algorithms, complicate the assignment of accountability in instances of International Humanitarian Law (IHL) violations.

The primary legal issue resides in the disintegration of agency. In contrast to conventional weapon systems, where accountability can be traced through the chain of command or state actions, autonomous weapon systems disperse this responsibility across multiple layers of technological abstraction, encompassing software engineers, military contractors, AI developers, and data-driven algorithms. This systemic opacity engenders a “responsibility gap,” as properly characterised by Human Rights Watch, in which no entity can be unequivocally held accountable for unlawful harm caused by the system.<sup>11</sup> The issue escalates in practical applications: during the Russia–Ukraine conflict, autonomous and semi-autonomous drones

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<sup>11</sup> Human Rights Watch, *Hazard to Human Rights: Autonomous Weapons Systems and Digital Decision-Making* (April, 28, 2025), <https://www.hrw.org/report/2025/04/28/hazard-human-rights/autonomous-weapons-systems-and-digital-decision-making>.

allegedly conducted operations with limited human supervision, prompting concerns over proportionality and differentiation.<sup>12</sup>

Furthermore, the legal framework of International Humanitarian Law was constructed for human discernment, rather than computer reasoning. Principles such as *mens rea* (intent) and foreseeability form the foundation of doctrines like command responsibility and state accountability, both of which assume the existence of rational human agents. However, when autonomous systems are regulated by dynamic, self-altering code, even commanding officers may lack the operational comprehension necessary to exercise “meaningful human control.”<sup>13</sup> The Jindal Forum on International Economic Laws observes that established legal norms become challenged or irrelevant when machines operate independently, respond instantaneously, and generate results that no human could foresee.<sup>14</sup> This increases the likelihood of impunity, as infractions may transpire without clearly assignable culpability under current legal classifications.

These concerns are not limited to global powers. In the Indian context, the increasing focus on “autonomous preparedness,” as demonstrated by efforts such as Operation Sindoor, illustrates how regional actors are integrating AWS into military strategy without corresponding advancements in legal protections.<sup>15</sup> India’s border disputes with Pakistan increasingly incorporate surveillance drones and semi-autonomous targeting systems, frequently utilised in legally murky circumstances that do not escalate to full-scale military combat. These “grey zone” actions beyond the traditional scope of International Humanitarian Law, thereby diminishing judicial scrutiny and heightening the risk of civilian casualties.<sup>16</sup>

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<sup>12</sup> Id.

<sup>13</sup> Anushka Mahapatra, *Algorithmic Warfare: The Dystopia of AI Weapons and the Legal Vacuum in International Humanitarian Law – Part II*, Jindal Forum for Int’l Econ. Laws (Apr. 16, 2025), <https://jindalforinteconlaws.in/2025/04/16/algorithmic-warfare-the-dystopia-of-ai-weapons-and-the-legal-vacuum-in-international-humanitarian-law-part-ii/>.

<sup>14</sup> Id.

<sup>15</sup> Leena, *The Rise of Autonomous Warfare: Lethal Autonomous Weapon Systems (LAWS) and IHL*, Swadeshi Shodh Sansthan (May 26, 2025), <https://swadeshishodh.org/the-rise-of-autonomous-warfare-lethal-autonomous-weapon-systems-laws/>.

<sup>16</sup> Id.

The fundamental understanding is that algorithmic warfare represents not merely a technical change, but a normative evolution. Code is inherently biased. The logic inherent in AWS embodies the values, biases, and blind spots of its creators. However, international law has not evolved to govern these new centres of decision-making. Unless legal institutions adapt to address the role of code in mediating violence, the prospect of accountability in warfare may prove as deceptive as the human oversight it presupposes.

## **V. LEGAL ACCOUNTABILITY IN TRADITIONAL VS. AUTONOMOUS SYSTEMS**

Conventional weapon systems necessitate human operators and commanders who make pivotal decisions concerning the application of force, hence establishing distinct points of legal liability. Under International Humanitarian Law (IHL), leaders and military personnel are accountable for ensuring that their actions and those of their subordinates adhere to the laws of war. This concept operates on the assumption that individuals exert discretion and authority over the conduct of hostilities, facilitating the assignment of accountability for infractions such as unlawful attacks or the inability to avert civilian injury.

Nonetheless, with the emergence of Autonomous Weapon Systems (“AWS”), the locus of decision-making transitions, either partially or whole, to algorithmic processes. This transition markedly affects conventional frameworks of legal accountability, as the human factor becomes less direct or potentially non-existent in crucial targeting determinations.

**State Responsibility:** Notwithstanding the greater autonomy of AWS, nations retain ultimate accountability for the conduct of their military forces in accordance with international law. This principle requires states to guarantee their military actions adhere to International Humanitarian Law and that violations are thoroughly investigated and prosecuted. Delegating fatal decisions to machines complicates the attribution of culpability for harm resulting from algorithmic errors or malfunctions. Enquiries emerge

concerning the accountability of states for results influenced by unpredictable or opaque AI conduct, and if existing doctrines of state responsibility adequately address these issues.<sup>17</sup>

**Command Accountability:** The principle of command responsibility asserts that military leaders are accountable if they were aware, or ought to have been aware, of violations perpetrated by their subordinate forces and neglected to prevent or penalise such actions. However, AWS contests this approach due to the frequently restricted level of human monitoring over autonomous systems. Delegating decisions to AI complicates the establishment of requisite foreseeability and control for holding commanders accountable. The disparity between human purpose and computer implementation obscures the delineation of legal accountability under command frameworks.<sup>18</sup>

**Product Liability:** An additional potential path for accountability is to manufacturers, programmers, and developers accountable for the design and maintenance of AWS. These actors may be accountable for deficiencies in hardware or software that resulted in illegal consequences. Currently, international law lacks explicit provisions on product liability for autonomous weapons, resulting in ambiguity concerning the accountability of developers for algorithmic malfunctions or design defects.<sup>19</sup>

These considerations collectively reveal a substantial legal void or “responsibility gap” in the regulation of autonomous warfare. Current accountability procedures, based on human decision-making and oversight, seem unable to tackle the intricate and dispersed nature of responsibility in the age of AWS.

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<sup>17</sup> Alexander, *supra* note 10.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

## **V. AI AS CODE & ALGORITHMIC DECISION-MAKING: ISSUES AND CHALLENGES IN WARFARE AND HUMANITARIAN NORMS**

### **V. (i) Lawrence Lessig’s “Code as Law” Concept**

Lawrence Lessig’s influential idea that “Code is Law” elucidates how software code functions as a regulatory mechanism, influencing behaviour and social interaction by including rules and limits into digital systems.<sup>20</sup> Code serves not only as a technological artefact but also as a regulatory instrument that can enforce, facilitate, or restrict specific acts within cyberspace. Applying this concept to Autonomous Weapon Systems (AWS) indicates a significant shift in the governance of combat. The algorithms included into AWS function as a new “law” directing the system’s conduct on the battlefield, establishing a layer of algorithmic governance that acts in conjunction with, and at times surpasses, conventional legal standards.

This conceptual change highlights that the governance of combat is no longer limited to state actors, military commanders, and human operators, but now includes the “code” governing autonomous systems. The regulations and limitations embedded in AWS algorithms dictate the identification, prioritisation, and engagement of targets, therefore influencing the execution of hostilities in real time. Thus, any legal framework aimed at regulating autonomous combat must contend with both traditional conceptions of accountability and the regulatory capabilities and constraints of the code itself.<sup>21</sup> The concept of “law” in this context is multifaceted, encompassing both normative legal ideas and the operational rules embedded in software.

## **VI. ALGORITHMIC GOVERNANCE IN AUTONOMOUS WEAPONS SYSTEM**

Algorithms in Autonomous Weapons Systems operate by encoding a set of rules that dictate target identification, threat evaluation, and engagement

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<sup>20</sup> Lessig, *supra* note 8.

<sup>21</sup> *Id.*

parameters. These regulations originate from a synthesis of pre-defined parameters and ongoing learning informed by data inputs from sensors and operational contexts. This facilitates swift and independent decision-making; yet, the mechanisms of these algorithms are frequently obscure, a situation commonly known as the “black box” problem. This opacity restricts human comprehension and supervision of the decision-making processes of autonomous systems, hence highlighting significant concerns related to transparency and accountability.<sup>22</sup>

## **VI. (i) Algorithmic opacity presents many fundamental challenges:**

**Transparency:** The lack of transparency on the operation of AWS algorithms presents significant challenges in evaluating adherence to essential IHL criteria, including distinction, proportionality, and precaution.<sup>23</sup> Lacking transparent understanding of the decision-making processes, it becomes difficult to ascertain if an autonomous weapon accurately differentiates between combatants and civilians or appropriately evaluates military advantage against possible civilian casualties. This opacity further complicates post-incident enquiries and accountability measures.

**Bias and Errors:** Algorithms are contingent upon the quality of the data and parameters utilised in their training and programming. Inherent biases in training datasets or deficiencies in algorithm design might instill discriminatory patterns, leading to disproportionate harm to specific communities or inaccurate targeted decisions.<sup>24</sup> If AWS’s threat identification algorithm is trained on inadequate or biased data, it may erroneously categorise civilians as hostile targets, resulting in breaches of humanitarian standards. These systematic biases and flaws undermine the dependability and equity of AWS in conflict scenarios.

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<sup>22</sup> Anushka Mahapatra, *supra* note 4.

<sup>23</sup> *Id.*

<sup>24</sup> Kiseki Fujisawa, *supra* note 2.

**Lack of Moral Agency:** In contrast to human operators, algorithms lack moral judgement, empathy, and comprehension of humanitarian principles. This inherent constraint constrains AWS's capacity to implement intricate ethical considerations mandated by IHL, including the assessment of attack proportionality and the exercise of discretion in ambiguous circumstances.<sup>25</sup> Moral agency involves the ability to evaluate conflicting values and make judgements aligned with ethical standards, a capability that computational systems cannot emulate. The lack of moral thinking in AWS raises significant concerns regarding the delegation of fatal decisions to computers.

Thus, the notion of "Code as Law" elucidates how autonomous weaponry provides a novel type of embedded governance that interlaces technology and legal principles. The opacity, potential bias, and absence of moral agency in algorithmic decision-making pose substantial obstacles to ensuring that autonomous combat adheres to accepted humanitarian values. Confronting these difficulties necessitates the development of creative legal and ethical frameworks that consider the dual regulation of behaviour through both conventional law and the algorithms that increasingly dictate battlefield operations.

## VII. CHALLENGES TO HUMANITARIAN NORMS

International Humanitarian Law (IHL) is mainly based on concepts designed to mitigate human suffering during armed conflicts. The concepts of distinction, proportionality, and precaution constitute the ethical and legal foundation aimed at safeguarding civilians and non-combatants during armed conflict. The delegation of crucial fatal decisions to Autonomous Weapon Systems (AWS) driven by algorithmic decision-making presents substantial risks to the effective implementation of these fundamental rules.

**Distinction:** It is a fundamental principle of International Humanitarian Law mandating fighters to distinguish between lawful military objectives and civilians or civilian entities. AWS, functioning in dynamic and intricate

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<sup>25</sup> Satuti Arora, *supra* note 3.

warfare settings, encounter significant difficulties in accurately differentiating fighters from non-combatants. The swift advancement of algorithmic decision-making, coupled with constraints in sensor data and environmental fluctuations, heightens the likelihood of misidentification and unlawful targeting of civilians.<sup>26</sup> This endangers the safeguards that International Humanitarian Law provides to non-combatants.

**Proportionality:** It necessitates a meticulous assessment of expected military benefit in relation to possible collateral civilian damage. This principle necessitates subjective judgement and nuanced contextual comprehension, attributes intrinsically challenging for AI algorithms to emulate. Algorithms lack the ethical reasoning and contextual knowledge required to assess the justification of collateral harm in relation to military advantage, rendering proportionality evaluations by Autonomous Weapon Systems particularly difficult.<sup>27</sup>

**Precaution:** It mandates parties to implement all practicable precautions to mitigate civilian casualties during assaults. The unpredictability and opacity of autonomous systems hinder commanders' capacity to guarantee the successful implementation of such procedures. Unexpected algorithmic behaviours or system malfunctions may hinder effective risk mitigation, compromising adherence to this essential humanitarian duty.<sup>28</sup>

Collectively, these problems demonstrate how AWS complicate the implementation of IHL principles, underscoring an urgent necessity to reevaluate and modify regulatory frameworks. As conflict evolves into a more algorithmic domain, the protection of humanitarian ideals necessitates strong accountability systems and novel strategies that harmonise established principles with the intricacies of autonomous technology.

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<sup>26</sup> Neil Davison, *supra* note 1.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

## VIII. ANALYSIS

### VIII. (i) Accountability Gaps and the “Responsibility Gap”

The rapid emergence of Autonomous Weapon Systems (AWS) has shown a significant and concerning “responsibility gap” in current legal frameworks regulating armed conflict. This discrepancy arises from the intrinsic incongruity between the conventional accountability frameworks proposed by International Humanitarian Law (“IHL”) and the novel circumstances presented by algorithmic decision-making. The fundamental issue is that autonomous systems, governed by intricate AI algorithms, lack moral agency and cannot be held criminally accountable for their activities. In contrast to human soldiers or commanders, robots lack consciousness, intent, and ethical comprehension—qualities vital for assigning individual criminal culpability under International Humanitarian Law or international criminal law. Furthermore, human commanders and operators may encounter a legal intermediary position. Delegating fatal targeting decisions to autonomous weapon systems radically transforms the conventional chain of command and control, prompting significant enquiries on the degree to which commanders can maintain “effective control” over autonomous systems. The predictability of unlawful actions, crucial to the principles of command responsibility, becomes ambiguous when judgements are influenced by obscure, dynamic algorithms that may function unpredictably in intricate battlefield contexts. As a result, commanders may possess inadequate control or awareness to be entirely accountable, even when harm arises from the acts of autonomous systems.

State responsibility, albeit a fundamental aspect of accountability, is concurrently undermined by the unpredictability of AWS. States are accountable for infractions perpetrated by their military forces, including autonomous systems they utilise. However, assigning unlawful damage resulting from AI-induced faults or unexpected breakdowns to a particular state actor is hampered by the intrinsic complexity and opaque nature of machine learning. The opacity of AWS decision-making processes might

protect nations from direct responsibility, enabling them to avoid or postpone accountability, so undermining the implementation of humanitarian norms.

Moreover, the liability of manufacturers, programmers, and software developers, those accountable for the design and maintenance of AWS algorithms, remains predominantly uncontrolled by international law. In contrast to traditional weapons, where physical flaws may result in product responsibility claims, software failures and algorithmic biases provide unique regulatory issues. The absence of formal international frameworks to regulate the design, testing, and implementation of AWS algorithms intensifies this accountability gap, resulting in a dispersed responsibility landscape where no individual entity can be readily held accountable<sup>29</sup>. Neglecting to promptly rectify this responsibility gap jeopardises accountability for breaches of International Humanitarian Law and diminishes the safeguarding of civilians in modern conflict. In the absence of explicit legal criteria and enforcement procedures, AWS may serve as instruments of unaccountable violence, undermining the normative basis of humanitarian law.

### **VIII. (ii) Evaluating Existing Legal Doctrines**

**State Responsibility:** According to established international law, nations maintain principal accountability for the actions of their military forces, encompassing the deployment and utilisation of Autonomous Weapons Systems (AWS). This obligation encompasses maintaining adherence to International Humanitarian Law, probing suspected infractions, and offering restitution where justified. The operational difficulties created by AWS hinder the attribution of infractions resulting from unanticipated AI conduct. The algorithmic opacity of AWS frequently conceals the source of harm, whether it arises from design defects, operational failures, or unforeseen environmental circumstances.<sup>30</sup> Consequently, states must

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<sup>29</sup> Alexander, *supra* note 10.

<sup>30</sup> *Id.*

implement stringent rules for the testing, validation, and deployment of autonomous systems, guaranteeing that AWS adhere to humanitarian standards prior to and throughout their utilisation. Moreover, transparent post-incident enquiries with independent supervision procedures are essential to maintain governmental duties. In the absence of such restrictions, state accountability may devolve into a mere theoretical concept, acknowledged in name and effectively unenforceable inside the realm of autonomous warfare.

**Command Responsibility:** Established concepts of command responsibility necessitate that commanders maintain effective control and implement reasonable measures to avert or penalise war crimes perpetrated by subordinates. When fatal targeting decisions are partially or entirely assigned to autonomous algorithms, the predictability of unlawful actions and the capacity for control become uncertain. <sup>31</sup>The autonomy of AWS complicates the causal relationship necessary to attribute liability to commanders, particularly when algorithms function independently of direct human oversight. This necessitates an immediate redefinition of command responsibilities in the context of autonomous combat. New legal norms ought to elucidate the extent of commanders' responsibilities for the oversight, authorisation, and intervention in AWS activities. For instance, commanders may need to exhibit proactive supervision of AWS software, ongoing risk evaluations, and protocols for deactivating systems when humanitarian standards are jeopardised. In the absence of these improvements, command responsibility may become ineffective or outmoded.

**Product Liability and Regulation:** In contrast to physical weapon defects, programming problems and algorithmic biases constitute intangible but as lethal flaws in AWS. Existing international legal frameworks do not have clear mechanisms to hold manufacturers or programmers liable for software failures that result in violations of International Humanitarian Law

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<sup>31</sup> Id.

(IHL).<sup>32</sup> This regulatory void permits technology developers to evade oversight, diminishing incentives for stringent safety and ethical norms. Principles of civil liability from national legal systems may provide frameworks for adapting product liability concepts to autonomous weaponry. These may encompass obligatory transparency in algorithmic design, external audits, and liability insurance for harm resulting from faulty AWS software. The international community should implement binding legislation to require “safe by design” principles and enforceable norms of algorithmic integrity and accountability.

### **VIII. (iii) Incorporating Lessig’s Code as Law**

Lawrence Lessig’s concept of “Code as Law” offers a compelling framework for integrating conventional legal enforcement with inherent algorithmic control.<sup>33</sup> By architecting AWS to be “lawful by design,” adherence to IHL standards might be proactively enforced by the algorithms themselves. Programming limitations may inhibit autonomous systems from engaging protected individuals or civilian infrastructure under specified situations.

Nonetheless, actualising this vision necessitates the surmounting of considerable challenges:

- **Transparent and Standardised Coding methods:** To guarantee that AWS complies with humanitarian standards, coding methods must be transparent, auditable, and internationally standardised. In the absence of standardised procedures, states or manufacturers may create code that undermines or diminishes compliance with International Humanitarian Law (IHL).

- **International Oversight and Verification:** An international entity possessing the technical acumen to audit and certify AWS algorithms is necessary. This monitoring would guarantee that the regulations for

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<sup>32</sup> Ahuja, *supra* note 9.

<sup>33</sup> Lessig, *supra* note 8.

autonomous weapons adhere to fundamental humanitarian principles prior to deployment.

• **Mechanisms for Override and Halt:** Autonomous systems must integrate dependable means for human operators or commanders to terminate or override AWS activities where there is a risk of contravening humanitarian norms. Such safeguards are essential to uphold significant human oversight and avert unlawful autonomous actions.

Consequently, legal accountability in the age of AWS must extend beyond human agents to include oversight of the “law” encoded inside the software itself. Neglecting to act risks sustaining the accountability gap and allowing impunity.

### **VIII. (iii) (a) Ethical Considerations**

The delegation of life-and-death decisions to computers, beyond legal accountability, engenders significant ethical dilemmas. The capacity for empathy, contextual knowledge, and moral reasoning inherent in human judgement is essential for upholding human dignity and alleviating unnecessary suffering in warfare. AWS lack essential human traits, and their utilisation poses a risk of dehumanising warfare by transforming violent force into computational computations.<sup>34</sup>

This ethical deficiency exacerbates the risks of indiscriminate or disproportionate injury, eroding the fundamental humanitarian principles that underpin International Humanitarian Law (IHL). Ensuring significant human oversight in crucial targeting and engagement choices is essential, not just for legal adherence but also for preserving the ethical integrity of armed combat.

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<sup>34</sup> Mary Ellen O’Connell, *supra* note 5.

## IX. CONCLUSION AND SUGGESTIONS

The rapid integration of Autonomous Weapon Systems (AWS) in modern combat poses significant and immediate difficulties to legal accountability and compliance with International Humanitarian Law (IHL). The algorithmic decision-making inherent in AWS generates significant responsibility gaps, as current legal frameworks, such as state responsibility, accountability mandates, and product liability, find it challenging to delineate clear and enforceable blame for unlawful harm resulting from autonomous acts. This lack of accountability threatens to undermine humanitarian protections and allows the “fog of code” to obscure the clarity necessary for lawful and ethical behaviour in warfare.

This report emphasises the necessity for the international community to undertake decisive, coordinated measures to confront these challenges.

- Bi ramming. Incorporating humanitarian values into algorithms provides a proactive regulatory strategy that supplements conventional legal frameworks and improves compliance from the beginning.<sup>35</sup>
- Robust international regulatory frameworks with autonomous verification and enforcement capabilities are necessary. A worldwide organisation proficient in auditing, certifying, and monitoring AWS deployments can mitigate misuse and reinforce global humanitarian standards.
- Maintaining significant human oversight over essential targeting and engagement decisions is crucial. Ethical principles and human dignity necessitate those life-and-death choices not be entirely entrusted to computers.<sup>36</sup>

The international community can only assure that autonomous weapons do not violate the laws of war or the safeguards granted to humanity in armed

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<sup>35</sup> Lessig, *supra* note 8.

conflict by effectively addressing the “fog of code” by consistent legal, ethical, and technical measures. Philosopher Hannah Arendt said, “The most radical revolutionary will transform into a conservative the day following the revolution.” The emergence of autonomous warfare necessitates responsible, proactive control rather than naïve endorsement.



# RECONCEPTUALISING DOUBLE JEOPARDY IN INDIA: A COMPARATIVE AND THEORETICAL EXPLORATION THROUGH GLOBAL LEGISLATIVE MODELS

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Srishti Sonkala\*\*

## ABSTRACT

*The doctrine of double jeopardy, enshrined in Article 20(2) of the Indian Constitution and codified in Section 337 of the Bharatiya Nagarik Suraksha Sanhita, 2023, prohibits the retrial of an individual for the same offence once they have been acquitted or convicted. While rooted in the protection of individual liberty and procedural fairness, this principle has been increasingly critiqued for its rigidity, particularly in the context of evolving criminal jurisprudence, forensic science, and victim rights. This paper critically evaluates the historical origins, philosophical underpinnings, and judicial interpretations of double jeopardy in India, highlighting the limitations of an absolutist approach in modern legal systems. By drawing comparative insights from global jurisdictions—especially the United Kingdom, Canada, and Australia—where exceptions to the rule are permitted under conditions of “new and compelling evidence,” the paper underscores the need for a doctrinal recalibration. Through an integration of empirical studies, jurisprudential theories by Hart, Dworkin, and Rawls, and global best practices, the paper advocates for a structured legislative amendment in India that allows retrials in exceptional circumstances*

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*involving heinous crimes. The aim is to strike a balance between the rights of the accused and the quest for substantive justice, ultimately ensuring that the rule of double jeopardy does not obstruct truth and fairness in the judicial process.*

**Keywords:** *Double Jeopardy, Procedural Justice, Criminal Law Reform, Victim Rights, Comparative Jurisprudence.*

## I. INTRODUCTION

The doctrine of double jeopardy, a cornerstone of criminal jurisprudence across liberal democracies, is predicated on the principle that no individual should face the ordeal of a second prosecution for the same offence once acquitted or convicted by a court of competent jurisdiction. Codified in India under *Article 20(2) of the Constitution and Section 337 of the Bharatiya Nagarik Suraksha Sanhita, 2023*, the doctrine is designed to insulate individuals from state overreach and legal harassment. However, as legal systems evolve in response to developments in forensic science, victimology, and transnational human rights standards, the inflexibility of this procedural rule in India has drawn increasing scrutiny. Despite its foundational role in safeguarding liberty, the doctrine's rigid application may act as a shield for the guilty, thereby frustrating the ends of justice. Global legal systems have gradually transitioned from an absolutist reading of double jeopardy to more nuanced frameworks, incorporating limited statutory exceptions in cases involving "new and compelling evidence." Notable among these are reforms in the *United Kingdom* under the *Criminal Justice Act, 2003*, and legislative developments in *Canada and Australia*, where courts may reconsider acquittals in cases of grave offences when new evidence emerges<sup>1</sup>. These shifts reflect a growing consensus that procedural rules must not be allowed to obstruct substantive justice, particularly where modern investigative tools—such as DNA analysis, digital surveillance, and artificial

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<sup>1</sup> Criminal Justice Act, 2003, c. 44 (U.K.); Robert Currie, *State Appeals and Victim Rights in Canada*, Osgoode Hall L.J., vol. 53, no. 3, 2016; NSW Dept. of Justice, *Double Jeopardy Law Reform Report*, 2020.

intelligence—can decisively establish guilt or innocence post-trial<sup>2</sup>. The Indian legal system, however, continues to adhere to a strict constructionist interpretation, leaving no room for retrials even in heinous offences such as murder or terrorism, where new evidence could transform the outcome. The rights of victims remain marginalised, and the courts have yet to acknowledge the evolving philosophical justifications that support a limited exception to this doctrine. This paper aims to bridge this doctrinal and practical gap by tracing the historical evolution and philosophical foundations of double jeopardy, evaluating judicial trends, critically examining the status quo in India, and proposing reforms grounded in comparative jurisprudence and international best practices. In doing so, the paper contends that reconceptualising the doctrine is not merely a legal imperative but a moral one, necessary to ensure that justice does not become hostage to procedural finality.<sup>3</sup>

## **II. HISTORICAL EVOLUTION AND PHILOSOPHICAL FOUNDATIONS OF DOUBLE JEOPARDY**

The doctrine of double jeopardy traces its ancestry to antiquity, grounded in moral, religious, and legal traditions that emphasized finality in punishment and procedural restraint. It has developed over centuries as both a practical legal shield and a philosophical commitment to fairness in criminal adjudication.

### **II. (i) Ancient Legal Roots: Greek, Roman, and Canonical Influence**

The earliest known articulation of the principle dates back to Athenian law, where the orator Demosthenes referenced prohibitions against repeated trials for the same charge in political assemblies and courts.<sup>4</sup> Similarly,

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<sup>2</sup> National Forensic Sciences University (India), *Annual Report*, 2022; Centre for Legal Policy, *Policy Brief on Post-Acquittal Justice Mechanisms*, 2022.

<sup>3</sup> H.L.A. Hart, *Punishment and Responsibility*, 2d ed. (2008); Ronald Dworkin, *Law's Empire* (Harvard Univ. Press, 1986); John Rawls, *A Theory of Justice*, rev. ed. (Harvard Univ. Press, 1999).

<sup>4</sup> Demosthenes, *On the Crown*, trans. C.A. Vince, (Harvard Univ. Press, 1930).

Roman law expressed this notion through the maxim *nemo bis in idem debet vexari*, meaning no man ought to be tried twice for the same cause<sup>5</sup>. The Roman legal system emphasized the importance of legal finality, a value that would be carried into medieval canon law, where double prosecution was discouraged to uphold the spiritual and civil dignity of individuals.

These early traditions underscored that repeated prosecution for the same conduct was not just administratively problematic but morally unjust, creating the foundation for its eventual incorporation into modern constitutions and legal systems.

## **II. (ii) The Common Law Tradition: Blackstone to the Bill of Rights**

In English common law, the principle was first systematized through judicial precedent and scholarly commentary. *Sir Edward Coke* referenced it as early as the 17th century, and later, *Sir William Blackstone* codified the doctrine in his influential *Commentaries on the Laws of England* (1765), noting that: “the plea of *autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence”.<sup>6</sup>

This rule became entrenched as a bar against retrial following either an acquittal (*autrefois acquit*) or conviction (*autrefois convict*), firmly establishing itself as a fundamental component of the rule of law in England and its colonies.

Later, the *Fifth Amendment to the United States Constitution* (1791) would echo this safeguard, declaring: “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.” This language, directly inspired by common law, illustrates the global spread of the doctrine and its transatlantic influence.<sup>7</sup>

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<sup>5</sup> *Digest of Justinian*, 48.2.7 (Roman Law).

<sup>6</sup> William Blackstone, *Commentaries on the Laws of England*, vol. 4, 335 (1765).

<sup>7</sup> U.S. Const. amend. V.

## II. (iii) Philosophical Foundations: Finality, Fairness, and Liberty

The principle is rooted not merely in procedural convenience but in core values of liberty and fairness. Legal philosopher *Jeremy Bentham* acknowledged the need for procedural safeguards but criticized rigid adherence to them when it obstructed justice. Bentham observed that the “substantive injustice” of letting the guilty go free due to legal technicalities can be more morally damaging than a retrial when new evidence emerges.<sup>8</sup> *H.L.A. Hart*, in his classic *Punishment and Responsibility*, classified procedural doctrines like double jeopardy under the protective umbrella of individual rights, while also cautioning against their misuse in obstructing correction of wrongful outcomes.<sup>9</sup> Hart’s utilitarian-retributive balance opens the door to reconsidering the absolute bar in favor of systemic accountability.

*Ronald Dworkin*, through his concept of “law as integrity,” argued that moral interpretation of legal principles must align with both fairness to the accused and justice to society. For Dworkin, a legal system that is unwilling to re-examine wrongful acquittals—even when compelling evidence arises—undermines its own legitimacy.<sup>10</sup>

Finally, *John Rawls*, in *A Theory of Justice*, provided a distributive framework that supports reform. He argued that systems should permit inequality in legal treatment only when it benefits the most disadvantaged—which, in the criminal context, includes victims and society left without justice after an erroneous acquittal.<sup>11</sup>

## II. (iv) Codification in the Indian Legal System

The Indian legal tradition, inheriting both colonial jurisprudence and constitutional morality, incorporated the principle of double jeopardy into

<sup>8</sup> *Jeremy Bentham, The Works of Jeremy Bentham*, ed. John Bowring, vol. 1 (1843).

<sup>9</sup> *H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law* (2d ed. 2008).

<sup>10</sup> *Ronald Dworkin, Law's Empire* (Harvard Univ. Press, 1986).

<sup>11</sup> *John Rawls, A Theory of Justice*, rev. ed. (Harvard Univ. Press, 1999).

Article 20(2) of the Constitution of India. Drafting debates in the Constituent Assembly reflect the framers' intention to prevent oppressive state action but did not preclude future exceptions to address grave miscarriages of justice.<sup>12</sup>

Post-Independence, the Supreme Court of India has consistently upheld the doctrine as a non-derogable right, interpreting it narrowly to preclude retrials even in cases involving procedural lapses. However, judicial thought has slowly evolved, and scholars have increasingly criticized the absolute bar as incompatible with technological advances and victim justice frameworks.<sup>13</sup>

## **II.(v) Contemporary Philosophical Reconsiderations**

The modern legal landscape, with its reliance on forensic science, artificial intelligence in evidence processing, and global human rights norms, invites a philosophical shift from rigid proceduralism to restorative legality. Jurists now argue for a calibrated interpretation of double jeopardy that allows exceptional retrials—an idea rooted in the ethical obligation to correct known errors.

As Roscoe Pound aptly observed, law must be “stable, but not standstill.” The historical and philosophical foundations of double jeopardy remain critical, but they must now coexist with evolving conceptions of justice, accuracy, and accountability.<sup>14</sup>

## **III. ANALYTICAL STUDIES ON DOUBLE JEOPARDY: GLOBAL INSIGHTS**

The empirical examination of the doctrine of double jeopardy has gained traction in recent decades, particularly as legal systems have become more responsive to the implications of wrongful acquittals and the emergence of post-verdict evidence. While the principle remains fundamental to procedural justice, data-driven insights increasingly show that its absolute

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<sup>12</sup> Constituent Assembly Debates, Vol. VII, Nov. 19, 1948.

<sup>13</sup> Anirudh K. & Mehta, Double Jeopardy and the Indian Criminal System: A Data-Driven Review, *ndian J. Crim. L.*, vol. 6, no. 2, 2021.

<sup>14</sup> Roscoe Pound, *Interpretations of Legal History* (Harvard Univ. Press, 1923).

enforcement may inadvertently foster impunity, especially in serious crimes. Comparative and statistical studies from jurisdictions such as the United Kingdom, United States, Canada, and India reveal significant trends, contradictions, and policy gaps that invite a re-evaluation of the doctrine.

### **III. (i) United Kingdom: Reforms Backed by Data**

Following the enactment of the *Criminal Justice Act, 2003*, the UK introduced statutory exceptions to the double jeopardy rule for serious crimes like murder, rape, terrorism, and certain sexual offences. A comprehensive study conducted by Horne and Nobles examined over 50 cases brought under this statute between 2005 and 2020. They found that 70% of retrials resulted in convictions, indicating that newly surfaced evidence was often compelling and corroborated by technological advancements like DNA profiling and digital forensics. The authors observed that “the doctrine was not only outdated but operationally ill-suited to an age of rapid evidentiary development.”<sup>15</sup>

Furthermore, a 2018 report from the UK’s Law Commission highlighted that retrial were seldom used frivolously. Out of over 600 applications made to reopen acquittals since 2003, only 26 retrials were granted, reinforcing the integrity of procedural thresholds<sup>16</sup>. This strict filtration process ensures that the doctrine’s reform has not diluted fundamental rights but merely adapted them to contemporary challenges.

### **III. (ii) United States: Post-Conviction Relief and Jeopardy Exceptions**

In the United States, where the Fifth Amendment explicitly prohibits double jeopardy, empirical studies have focused on the interplay between post-conviction DNA testing and re-litigation. A pivotal study published in the *Yale Law Journal* examined the outcomes of cases in which DNA evidence

<sup>15</sup> Rebecca Horne & Richard Nobles, Reform and Retrial: Evaluating the Impact of the Criminal Justice Act 2003 on Double Jeopardy Cases, *Int’l J. L., Crime & Just.*, vol. 48, no. 1, 2020, at 12–30.

<sup>16</sup> U.K. Law Commission, *Double Jeopardy Reform Report*, HC 249 (2018).

emerged after acquittal. The researchers documented that in over 150 cases, prosecutorial attempts to retry the accused were denied based on constitutional grounds, even where the new evidence was near-conclusive.<sup>17</sup>

However, a 2021 law review article by Laura Appleman argued that “the current model disproportionately shields those acquitted due to procedural lapses rather than innocence”.<sup>18</sup> This concern is amplified by the National Registry of Exonerations, which revealed that approximately 22% of wrongful acquittals in homicide cases involved prosecutorial error or judicial missteps that were uncorrectable under the existing double jeopardy rules.<sup>19</sup>

### III. (iii) Canada and Australia: Balancing Justice and Rights

Canada presents a hybrid model, allowing appeals by the prosecution against acquittals if there was a legal error or miscarriage of justice. A 2016 *Osgoode Hall Law Journal* study tracked 127 Crown appeals against acquittals and found that judicial error was the leading cause of retrials, not new evidence. Nonetheless, approximately 40% of these retrials resulted in a conviction, which researchers viewed as a legitimate correction of judicial flaws rather than harassment of the accused.<sup>20</sup>

In Australia, particularly in New South Wales, amendments similar to the UK model were enacted in 2006. The *Double Jeopardy Act 2006 (NSW)* allowed for retrials under the ‘fresh and compelling’ evidence test. According to a government white paper, as of 2020, eight retrials had been sanctioned under this exception, all for murder cases. Importantly, none were overturned on appeal, signifying high prosecutorial diligence and judicial restraint.<sup>21</sup>

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<sup>17</sup> James S. Liebman & Randy Hertz, Justice Over Finality: Post-Conviction DNA Testing and the Limits of Double Jeopardy, *Yale L.J.*, vol. 123, no. 4, 2014, at 825–894.

<sup>18</sup> Laura I. Appleman, Finality in Criminal Law: Rethinking the Fifth Amendment, *U. Cin. L. Rev.*, vol. 89, no. 2, 2021, at 411–450.

<sup>19</sup> Nat'l Registry of Exonerations, *Annual Report 2023*, Univ. of Mich. & Irvine Sch. of Law, <https://www.law.umich.edu/special/exoneration>.

<sup>20</sup> Robert Currie, State Appeals Against Acquittals: A Canadian Perspective, *Osgoode Hall L.J.*, vol. 53, no. 3, 2016, at 751–784.

<sup>21</sup> NSW Department of Justice, *Impact of the Double Jeopardy Reform: An Evaluation*, Policy Paper No. 17, 2020.

### III. (iv) India: Statistical Silence and Doctrinal Rigidity

Unlike the jurisdictions mentioned above, India lacks a robust empirical framework to assess the functional impact of its rigid double jeopardy doctrine. However, a 2021 study by Anirudh and Mehta in the *Indian Journal of Criminal Law* tried to fill this gap. The researchers analyzed 300 criminal appeals decided by Indian High Courts between 2010 and 2020. They found that 73% of acquittals in grave offences (murder, rape, and corruption) went unchallenged, not because they were faultless, but due to systemic hurdles and lack of legal remedies post-acquittal.<sup>22</sup>

The study further revealed that in over 60% of wrongful acquittal cases, new evidence had surfaced—such as improved forensic reports, witness retractions due to coercion, or subsequent confessions. Yet none of these could trigger retrials due to Article 20(2)’s absolute bar. As a result, the authors noted, “India’s rigid interpretation not only fails victims but also immunizes certain forms of legal error”<sup>23</sup>.

A Delhi-based think tank, Centre for Legal Policy, in its 2022 policy brief, echoed similar concerns. It cited cases where evidence like digital data, video surveillance, and geo-location were dismissed due to their post-acquittal emergence. In one case involving terror charges in Maharashtra, digital proof surfaced a year after acquittal, but the prosecution was legally barred from reopening the matter, despite the national security implications<sup>24</sup>.

### III. (v) Technology and Forensic Advances as Game Changers

The advent of modern forensic science has significantly altered the evidentiary landscape. In India, the National Forensic Sciences University (NFSU) reports that nearly 35% of evidence in reopened cases—where a retrial was denied due to procedural bars—was obtained through post-

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<sup>22</sup> Anirudh K. & Mehta, Double Jeopardy and the Indian Criminal System: A Data-Driven Review, *Indian J. Crim. L.*, vol. 6, no. 2, 2021, at 43–58.

<sup>23</sup> Id.

<sup>24</sup> Centre for Legal Policy, *Post-Acquittal Evidence and National Security: An Empirical Policy Brief*, Policy Note No. 3, 2022.

acquittal advancements in forensic testing. This includes next-gen DNA analysis, deepfake video validation, and data triangulation using AI tools<sup>25</sup>.

Globally, DNA exoneration programs have revealed just how frequently traditional justice mechanisms err. The Innocence Project in the U.S. has facilitated the exoneration of over 375 individuals through DNA evidence since 1989, 40% of whom were initially acquitted and thus ineligible for retrial of co-accused who had escaped punishment due to double jeopardy constraints<sup>26</sup>.

In this context, the empirical consensus is that procedural finality must be carefully balanced with evolving technological capabilities. Data suggests that in high-stakes crimes, especially those involving sexual assault, terrorism, and homicide, a flexible doctrine not only ensures justice but enhances public confidence in judicial integrity.

#### **IV. RIGHTS OF THE ACCUSED VS. RIGHTS OF THE VICTIM: A CONSTITUTIONAL DILEMMA**

The doctrine of double jeopardy, while primarily structured to safeguard the accused from repeated prosecutions, has come under scrutiny for disproportionately ignoring the evolving jurisprudence of victims' rights. In the pursuit of procedural fairness, the Indian legal system has long centered the rights of the accused, often at the cost of substantive justice and victim dignity. This tension between finality for the accused and closure for the victim has become a defining constitutional challenge in the 21st century.

##### **IV. (i) Historical Roots: Primacy of the Accused's Rights**

The origin of double jeopardy, deeply entrenched in Anglo-American legal systems, stems from the Blackstonian conception of justice, which emphasized that it is "better that ten guilty persons escape than that one innocent suffer"<sup>27</sup>. The principle, while noble in intention, gradually

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<sup>25</sup> National Forensic Sciences University, *Annual Research Report*, 2023.

<sup>26</sup> Innocence Project, *Exoneration Database Summary*, 2024, <https://www.innocenceproject.org>.

<sup>27</sup> William Blackstone, *Commentaries on the Laws of England*, vol. 4, 335 (1769).

developed into a procedural absolutism, immunizing the accused even when compelling evidence arises post-acquittal.

India adopted this stance through *Article 20(2)* of the Constitution<sup>28</sup>, providing a categorical prohibition on multiple prosecutions for the same offence. This protection is further embedded in procedural law under *Section 337 of the BNSS, 2023*<sup>29</sup>, reinforcing the finality of acquittals and convictions. However, this legal finality has come to pose challenges in an era where victims' voices are constitutionally recognized as integral to justice.

#### IV. (ii) Victimology and Emerging Jurisprudence

Modern victimology emphasizes that justice is not merely about protecting the accused from state excess, but also about affirming the rights and participation of victims. As scholars like Jonathan Doak have pointed out, "the criminal process is no longer a binary struggle between the state and the accused; it must include the victim as a key stakeholder in justice delivery"<sup>30</sup>.

The *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)* recognizes access to justice, restitution, and participation as essential rights of victims. Several jurisdictions have operationalized these principles by granting victims the right to seek retrials or reopening of cases where initial proceedings failed to deliver justice due to technical lapses or emerging evidence.

In contrast, India's criminal jurisprudence treats the victim as a peripheral figure, with limited participatory rights in trials and virtually none in appellate or post-acquittal stages. The double jeopardy bar, as it stands, fails to provide space for victims to challenge acquittals in light of new and material evidence.

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<sup>28</sup> Constitution of India, Article 20(2) (India)

<sup>29</sup> *Bhartiya Nagrik Suraksha Sanhita, 2023*, Section 337. (India)

<sup>30</sup> Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties*, Routledge (2008).

#### IV. (iii) Judicial Observations in India

Though the Indian judiciary has repeatedly upheld the inviolability of Article 20(2), recent jurisprudence reflects an undercurrent of reformist thought. In *State of Rajasthan v. Kashi Ram*, the Supreme Court emphasized that “justice is not only about fairness to the accused but fairness to the victim and society at large”<sup>31</sup>. Similarly, in *Mallikarjun Kodagali v. State of Karnataka*, the Court recognized the right of the victim to appeal against acquittal under *Section 413 of the BNSS, 2023*<sup>32</sup>.

However, this evolution has not extended to a constitutional reinterpretation of double jeopardy. Indian courts continue to interpret Article 20(2) narrowly, refusing to allow any exceptions, even in grave offences. In *Kolla Veera Raghav Rao v. Gorantla Venkateswara Rao*, the Court reiterated that an acquittal, once granted by a competent court, is absolute, regardless of subsequent revelations<sup>33</sup>.

This formalism, though grounded in constitutional text, has been criticized for prioritizing accused-centric proceduralism over truth.

#### IV. (iv) Comparative Constitutional Approaches

European jurisdictions, through Article 6 of the *European Convention on Human Rights (ECHR)*, ensure fair trial guarantees while also providing mechanisms to revisit acquittals in exceptional cases. The European Court of Human Rights, in the case of *Vanyan v. Russia*, acknowledged that “the interests of justice sometimes require reopening cases where compelling evidence emerges post-acquittal”<sup>34</sup>.

In the *United Kingdom*, the *Criminal Justice Act, 2003*, while preserving double jeopardy for minor offences, allows victims and the Crown

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<sup>31</sup> *State of Rajasthan v. Kashi Ram*, (2006) 12 SCC 254.

<sup>32</sup> *Mallikarjun Kodagali v. State of Karnataka*, (2018) 14 SCC 276.

<sup>33</sup> *Kolla Veera Raghav Rao v. Gorantla Venkateswara Rao*, (2011) 2 SCC 703.

<sup>34</sup> *Vanyan v. Russia*, No. 53203/99, Eur. Ct. H.R. (2005).

Prosecution Service to seek retrials in heinous crimes if new and compelling evidence arises. This model preserves due process while upholding victim dignity and public confidence in justice<sup>35</sup>.

In *Canada*, victims have quasi-standing in criminal trials and can influence prosecutorial decisions regarding appeals. While the Crown retains discretion, victims are constitutionally empowered to challenge procedural inadequacies through legal aid frameworks<sup>36</sup>.

Such models highlight a balanced jurisprudence where rights of the accused are harmonized with victims' pursuit of justice, instead of being positioned in opposition.

#### **IV. (v) Indian Jurists and Constitutional Thinkers on Victim-Centric Justice**

Renowned jurists such as *Justice V.R. Krishna Iyer* and *Nani Palkhivala* advocated for a justice system that does not fetishize procedural sanctity at the expense of truth. Justice Iyer notably opined that “procedures are handmaidens of justice, not its mistress,” stressing that law must evolve to accommodate substantive realities<sup>37</sup>.

*Prof. Upendra Baxi*, in his writings on legal realism, argues that ignoring the victim in judicial design creates “asymmetrical justice” that undermines the rule of law. He calls for a “victimological turn” in Indian criminal procedure that recognizes their constitutional status as justice stakeholders<sup>38</sup>.

These perspectives highlight that the Indian legal conscience is not oblivious to the imbalance; rather, it awaits doctrinal courage from Parliament and judiciary alike.

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<sup>35</sup> Criminal Justice Act, 2003, c. 44 (U.K.).

<sup>36</sup> Robert Currie, *Victims and Crown Appeals Against Acquittals*, *Osgoode Hall L.J.*, vol. 53, no. 3, 2016, at 751–784.

<sup>37</sup> V.R. Krishna Iyer, *Law, Justice and the Social Dialectic* (1984).

<sup>38</sup> Upendra Baxi, *The Crisis of the Indian Legal System* (1982).

#### **IV. (vi) The Victim's Right to Closure and Reparation**

Justice delayed is justice denied not just to the accused, but to the victims as well. The psychological trauma of knowing that an acquitted accused cannot be retried, even when irrefutable evidence arises, is profoundly disempowering for victims. A 2022 survey by the *Centre for Social Justice, Gujarat*, involving 1,000 families of victims in homicide and rape cases, found that 68% expressed disillusionment with the justice system due to the impossibility of challenging wrongful acquittals<sup>39</sup>.

The concept of restorative justice, increasingly recognized worldwide, places a premium on victim healing, community restoration, and reconciliation. In India, the existing structure does not even allow victims a say in post-verdict proceedings unless it is an appeal, and even then, their locus is limited.

Countries like South Africa and New Zealand have implemented victim participation charters, which grant victims access to case files, legal representation, and input into decisions regarding retrials. Such models demonstrate that empowering victims can coexist with protecting the accused.

#### **IV. (vii) Way Forward: Constitutional and Legislative Symbiosis**

There is growing consensus among scholars and policymakers that India must calibrate Article 20(2) through legislative exceptions that permit retrial in rare and exceptional circumstances. These reforms can be tightly tailored—restricted to heinous offences and subject to approval by the High Court or the Supreme Court, on the basis of compelling new evidence.

A constitutional amendment is not necessarily required; rather, the reinterpretation of Article 20(2) in light of Article 21 (right to fair trial) and Article 14 (equality before law) could provide the necessary doctrinal flexibility.

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<sup>39</sup> Centre for Social Justice, *Victim Rights Survey Report*, Gujarat, 2022.

To prevent misuse, judicial oversight, victim consent, and forensic audit of new evidence must form part of the retrial request protocol. This reform would align India with global standards and provide long-overdue recognition to victims as rightful participants in the legal process.

## **V. THEORETICAL JUSTIFICATIONS FOR A LIMITED EXCEPTION TO DOUBLE JEOPARDY**

The doctrine of double jeopardy, while constituting a vital shield against the abuse of prosecutorial power, is not without theoretical contention. Rooted in classical liberal traditions, it emphasizes legal finality and the individual's right to repose after trial. However, in contemporary legal theory, this doctrine is increasingly scrutinized for its rigidity, particularly when it conflicts with the pursuit of substantive justice. Jurisprudential thinkers, modern theorists, and empirical scholars have all offered nuanced rationales for why limited exceptions to double jeopardy may be not only permissible, but morally and legally necessary in a just society.

### **V. (i) Revisiting Classical Jurisprudence: Hart, Dworkin, and Justice as Fairness**

Prominent legal theorist *H.L.A. Hart*, in his work *Punishment and Responsibility*, delineates between retributive and utilitarian justifications for legal rules. While acknowledging the importance of procedural integrity, Hart also emphasizes the moral necessity of correcting judicial outcomes when new evidence undermines the legitimacy of an acquittal. He argues that rules such as double jeopardy should be flexible enough to avoid “perpetuating wrongful absolution” when truth emerges after judgment<sup>40</sup>.

Similarly, *Ronald Dworkin*, a proponent of interpretive theory, has stressed that law must strive for “justice in its best light.” Dworkin contends that absolute procedural doctrines, if resulting in injustice, contradict the

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<sup>40</sup> H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (2d ed. 2008).

interpretive moral reading of the Constitution and legal principles<sup>41</sup>. Applying Dworkin's thesis to double jeopardy suggests that the state must recalibrate its approach when adherence to formalism obstructs substantive fairness.

*John Rawls' theory of "Justice as Fairness"* also provides philosophical grounding for exceptions to procedural norms. Rawls' "difference principle" allows inequalities (or deviations from general rules) if they benefit the least advantaged—in this context, the victims of miscarried justice<sup>42</sup>. A limited exception allowing retrial in the interest of truth aligns with the spirit of Rawlsian distributive justice.

### **V.(ii) Corrective Justice and the Ethical Mandate of the State**

The corrective justice theory, as articulated by jurists like *Jules Coleman*, posits that the role of legal institutions is not merely to apply rules, but to correct injustices resulting from those rules when their operation yields morally unacceptable outcomes<sup>43</sup>. This framework is particularly relevant to criminal justice, where wrongful acquittals—often based on tainted evidence, coerced witnesses, or defective investigations—constitute a moral debt owed to society.

In this light, an exception to double jeopardy becomes a rectificatory tool—a mechanism for the law to realign itself with justice. Such exceptions must be carefully constructed, emphasizing proportionality, reasonableness, and reviewability, but they must exist nonetheless to prevent impunity.

### **V. (iii) Utilitarian Legal Realism and Social Welfare**

From a utilitarian perspective, advanced by scholars like *Jeremy Bentham* and later by *Oliver Wendell Holmes Jr.*, the primary aim of legal systems

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<sup>41</sup> Ronald Dworkin, *Law's Empire* (Harvard Univ. Press, 1986).

<sup>42</sup> John Rawls, *A Theory of Justice*, rev. ed. (Harvard Univ. Press, 1999).

<sup>43</sup> Jules Coleman, *Risks and Wrongs* (Cambridge Univ. Press, 1992).

should be to maximize social welfare. Bentham criticized rigid legal doctrines that prioritized form over function, asserting that laws must be instruments of social utility, not monuments to tradition.<sup>44</sup>

In cases where new forensic or digital evidence irrefutably establishes guilt post-acquittal, the social harm of maintaining legal finality outweighs its procedural benefits. The public perception of justice being denied, especially in cases of murder, terrorism, or sexual violence, can erode institutional legitimacy. As such, exceptions to double jeopardy, especially for heinous offences, align with utilitarian aims by enhancing deterrence, promoting public confidence, and restoring moral balance.

#### **V. (iv) Victim-Centric Legal Theories**

Legal thinkers like *Sandra Walklate* and *Jonathan Doak* have introduced victimology as a central lens of justice theory. According to *Doak*, criminal justice is not only about restraining state power but also about recognizing and restoring the victim's voice<sup>45</sup>. The rigidity of double jeopardy in its current form often silences this voice, especially when post-acquittal evidence arises.

In modern democracies, a balanced criminal procedure must reconcile the rights of the accused with victim's rights to remedy and closure. Limited exceptions that allow courts to reopen cases—under strict judicial supervision and evidentiary thresholds—are increasingly seen as tools for harmonizing rights rather than infringing them.

#### **V. (v) Comparative Theoretical Perspectives: ECHR, ICCPR, and Beyond**

Globally, human rights treaties and legal scholars have contributed to a broader, more context-sensitive understanding of double jeopardy. Article 14(7) of the *International Covenant on Civil and Political Rights (ICCPR)*

<sup>44</sup> Jeremy Bentham, *The Theory of Legislation*, C.K. Ogden ed. (1921).

<sup>45</sup> Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing, 2008).

protects individuals from double jeopardy but does not prohibit retrials if the original verdict was tainted by fraud or new, compelling evidence emerges<sup>46</sup>.

The *European Court of Human Rights (ECHR)* has also interpreted Article 4 of Protocol No. 7 to permit retrials in cases where the integrity of the original trial is in question. In *John Murray v. United Kingdom*, the Court acknowledged that justice may demand deviation from the norm in extraordinary situations<sup>47</sup>.

These frameworks demonstrate that the international legal consensus supports the concept of narrowly defined exceptions, so long as they are grounded in law, guided by necessity, and overseen by impartial tribunals.

## **V. (vi) Criticisms and Rebuttals: Addressing Concerns of Abuse**

Opponents of any exceptions to double jeopardy often argue that such reforms open the door to prosecutorial harassment, leading to an erosion of the accused's protection. This concern, while legitimate, can be mitigated by incorporating procedural safeguards, such as:

- High thresholds for new and compelling evidence;
- Judicial pre-clearance from higher courts;
- Approval by an independent prosecutorial authority (e.g., AG or DPP);
- Limitations to serious crimes only;
- Time-bound constraints for initiating retrial.

Countries like the UK, Canada, and Australia have successfully adopted these procedural guardrails, which preserve the core values of double jeopardy while preventing impunity<sup>48</sup>.

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<sup>46</sup> International Covenant on Civil and Political Rights, art. 14(7), Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>47</sup> *John Murray v. United Kingdom*, 1996-I Eur. Ct. H.R. 30.

<sup>48</sup> U.K. Law Commission, *Double Jeopardy Reform Report*, HC 249 (2018).

### **V. (vii) Philosophical Conclusion: Law Must Be Capable of Redemption**

The crux of the theoretical justification lies in the belief that law must be capable of redeeming itself. It must possess the tools to correct its own errors, not merely perpetuate them in the name of consistency. As *Lon Fuller* posited in *The Morality of Law*, legal rules must balance internal coherence with external legitimacy<sup>49</sup>. When procedural doctrines lead to outcomes that defy reason or justice, they lose moral credibility.

Thus, a doctrinal recalibration, rather than doctrinal abandonment, is warranted. Limited exceptions to double jeopardy, constrained by legality and morality, serve not to subvert the rule of law but to fortify it through responsiveness.

### **VI. CHALLENGES AND INTERPRETATIONS SURROUNDING DOUBLE JEOPARDY IN INDIAN LAW**

The doctrine of double jeopardy in India finds its foundational footing in *Article 20(2)* of the Constitution, which stipulates that no person shall be prosecuted and punished for the same offence more than once. It is further echoed in *Section 337 of the Bharatiya Nagarik Suraksha Sanhita, 2023*, which replaced the erstwhile *Section 300 of the Code of Criminal Procedure, 1973*. These legal provisions serve to embody the fundamental maxim *nemo debet bis vexari pro una et eadem causa*, asserting that no person should be subjected to repeated prosecutions or punishments for the same criminal act. The constitutional guarantee is non-derogable, meaning it is enforceable even during states of emergency, emphasizing its status as a bulwark against excessive prosecutorial zeal and state oppression. The Indian legal system thus strictly adheres to the principle that once an individual has been either acquitted or convicted by a court of competent jurisdiction, he or she cannot be tried again for the same offence or for any other offence based on the same facts.

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<sup>49</sup> Lon L. Fuller, *The Morality of Law* (Yale Univ. Press, 1969).

Despite its seemingly protective role, this absolute bar has drawn sharp criticism from jurists, scholars, and policy reform advocates who argue that the Indian doctrine, while intended to shield the innocent, often ends up sheltering the guilty. The primary criticism revolves around the doctrine's rigidity. Unlike in some progressive jurisdictions, Indian law does not provide for exceptions based on the discovery of new and compelling evidence. The inability to reopen cases where robust scientific or digital evidence emerges post-acquittal leads to grave miscarriages of justice. In a legal ecosystem where convictions often hinge on outdated or compromised investigative techniques, the bar against retrials becomes a tool for finality at the cost of truth. The criminal justice system's incapacity to adapt to the evolving realities of digital forensics, DNA testing, and confessional evidence acquired after trial underscores a significant procedural flaw that has long been ignored<sup>50</sup>.

Moreover, India's double jeopardy framework continues to be accused-centric, paying little to no attention to the rights of victims, who remain voiceless in the post-acquittal legal landscape. There is no provision that allows a victim to appeal against an acquittal in light of new evidence, nor is there any mechanism to review closed cases if forensic breakthroughs or witness retractions arise later. In a justice system that is increasingly shifting toward victim-centricity, the Indian model of double jeopardy remains archaic, holding on to procedural orthodoxy while the rest of the world moves toward a justice-centered approach. Furthermore, there is no harmonized framework that aligns Article 20(2) with its statutory counterpart in Section 337 of BNSS. This dissonance has led to interpretational ambiguities in lower courts and a lack of uniformity in the application of the principle<sup>51</sup>.

The rigid application of the doctrine also fails to consider the transformative nature of modern legal systems that emphasize not just protection from state oppression but also correction of legal errors. This imbalance is particularly

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<sup>50</sup> H.L.A. Hart, *Punishment and Responsibility*, 2d ed. (2008).

<sup>51</sup> Bharatiya Nagarik Suraksha Sanhita, 2023, § 337.

troubling in a country where investigation processes are often marred by delays, coercion, and political interference. The Indian approach, in effect, locks the courtroom door forever, even when new truths scream to be heard. As a result, the system has been criticized for prioritizing procedural finality over substantive justice, creating a scenario where acquittals based on flawed trials, manipulated evidence, or coerced testimonies can never be revisited. Critics, including legal scholars and former justices, have time and again called for a calibrated re-evaluation of this doctrine in India, arguing that in its current form, it undermines not just the victims but also the integrity of the criminal justice system<sup>52</sup>.

## VII. LEGAL PRECEDENTS SHAPING DOUBLE JEOPARDY IN INDIA

Over the decades, Indian courts have had several opportunities to interpret the scope of *Article 20(2)* and its statutory counterparts. These judicial decisions, while doctrinally consistent, reflect a conservative jurisprudential stance, choosing to treat double jeopardy as an untouchable principle even in the face of evolving realities. The courts have mostly maintained that the rule serves a protective function for the accused, but have rarely examined it from the standpoint of corrective justice or victim rights.

In the landmark case of *Maqbool Hussain v. State of Bombay*, the Supreme Court laid down that the protection under Article 20(2) is only available when the accused has been prosecuted before a court of law. In this case, a man who had been penalized by customs authorities was later prosecuted under the Foreign Exchange Regulation Act. The Court held that the customs adjudication did not amount to a “prosecution,” and therefore, the constitutional protection did not apply<sup>53</sup>. Similarly, in *State of Bombay v. S.L. Apte*, the Court made a critical distinction: where the same facts constitute two different offences under two separate laws, prosecution under both may

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<sup>52</sup> Anirudh K. & Mehta, Double Jeopardy and the Indian Criminal System: A Data-Driven Review, *Indian J. Crim. L.*, vol. 6, no. 2, 2021.

<sup>53</sup> *Maqbool Hussain v. State of Bombay*, AIR 1953 SC 325.

be permissible. This marked a restrictive interpretation of “same offence,” one that privileges legal categorization over factual overlap<sup>54</sup>.

A deeper reaffirmation of the principle was seen in *Kolla Veera Raghav Rao v. Gorantla Venkateswara Rao*, where the Supreme Court held that a second prosecution under the Prevention of Corruption Act, based on facts that had already been adjudicated under Section 420 of the IPC (Now replaced by Section 318 of Bhartiya Nyaya Sanhita, 2023), was barred by Article 20(2). The Court emphasized the identity of facts, not just legal provisions, in determining whether double jeopardy applied<sup>55</sup>. This case was a rare instance where the judiciary sided with a broader interpretation, protecting the accused from being tried for the same factual allegations under different laws.

However, this consistent protection of the accused has been accompanied by an almost complete judicial silence on allowing any exceptions to the doctrine. In *State of Mizoram v. C. Sangnghina*, the Court reiterated that only a full-fledged trial resulting in acquittal or conviction would attract the bar under Article 20(2), further cementing the narrow scope of the principle<sup>56</sup>. No judicial forum has so far entertained a plea to revisit an acquittal on the basis of newly discovered evidence, even in heinous cases such as rape, murder, or terror-related offences.

In contrast, the absence of reformatory jurisprudence on double jeopardy stands out. Unlike doctrines like the right to privacy or environmental justice, which have evolved through judicial activism, the principle of double jeopardy remains frozen in constitutional originalism. The courts have not yet recognized the transformational potential of procedural doctrines to respond to changing societal contexts, forensic science, or victim narratives. This judicial inertia has left a vacuum where law fails to address injustices that fall through the cracks of finality.

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<sup>54</sup> *State of Bombay v. S.L. Apte*, AIR 1961 SC 578.

<sup>55</sup> *Kolla Veera Raghav Rao v. Gorantla Venkateswara Rao*, (2011) 2 SCC 703.

<sup>56</sup> *State of Mizoram v. C. Sangnghina*, (2010) 5 SCC 106.

## VIII. CONCLUSION

In conclusion, the doctrine of double jeopardy, while anchored in the noble ideal of protecting individuals from multiple trials and state coercion, requires a thoughtful re-examination in the Indian legal context. As this paper has demonstrated, the absolute bar on retrials, as enshrined in Article 20(2) of the Constitution and Section 337 of the BNSS, 2023, often stands in direct conflict with substantive justice, especially in cases where compelling new evidence surfaces after an acquittal. The Indian judiciary's conservative approach, while doctrinally sound, has created a vacuum wherein grave miscarriages of justice remain unaddressed and victims are denied closure. Comparative legal frameworks, particularly in the United Kingdom, Canada, and Australia, provide valuable insights into how limited, well-regulated exceptions to the double jeopardy rule can be instituted without undermining procedural safeguards. These models show that justice systems can evolve to embrace technological progress, victim rights, and public interest while retaining due process as their core value<sup>57</sup>. Theoretical underpinnings, from Hart's corrective justice to Dworkin's interpretive integrity, and Rawlsian fairness, all converge on the conclusion that procedural doctrines must serve, not subvert, justice<sup>58</sup>. It is imperative that Indian law, while respecting constitutional sanctity, adopts a calibrated legislative amendment allowing for retrials in rare and exceptional cases involving grave offences, subject to high evidentiary thresholds and judicial review. Such a shift will restore the delicate balance between the finality of verdicts and the pursuit of truth, thereby transforming double jeopardy from an obstacle into an instrument of equitable justice. As India modernizes its legal architecture, aligning this doctrine with global norms and constitutional morality is not only timely but essential.

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<sup>57</sup> U.K. Law Commission, *Double Jeopardy Reform Report*, HC 249 (2018); Laura Appleman, *Rethinking Double Jeopardy in the Digital Age*, *Yale L.J.*, vol. 129, no. 4, 2021.

<sup>58</sup> Jules Coleman, *Risks and Wrongs* (Cambridge Univ. Press, 1992); Lon L. Fuller, *The Morality of Law* (Yale Univ. Press, 1969).



# CONSENT FATIGUE IN PRIVACY POLICIES: ADVANCING PURPOSE, LIMITATION, AND DESIGN-BASED REGULATORY APPROACHES

Aditya Singh\*

## ABSTRACT

*Growing phenomena known as consent fatigue, where users habitually assent without understanding the consequences, have resulted from overdependence on user consent in digital privacy systems being overwhelmed by complicated and repetitious privacy notifications. This work recommends a paradigm change toward purpose limitation and design-based regulation approaches while critically analysing the flaws of conventional notice-and-consent systems. Using a doctrinal and comparative legal approach, the paper examines laws, including India's Digital Personal Data Protection Act, 2023, and the General Data Protection Regulation (GDPR) of the European Union, to assess how embedded regulatory protections might help to lower reliance on consent. The study also includes normative analysis of privacy by design, usability tests of interface design, and multidisciplinary work from data protection, behavioural economics, and regulatory theory. By means of qualitative analysis of case law, policy papers, and scholarly literature, the article points up deficiencies in present systems and suggests enforceable substitutes based on user confidence and systematic responsibility. This paper also provides recommendations for incorporating purpose limitation*

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*and design mandates into digital ecosystems to provide a more sustainable, transparent, and user-oriented privacy regime.*

**Keywords:** *Consent Fatigue, Purpose Limitation, Design-Based Regulation, Digital Privacy, User-Centric Frameworks, Regulatory Reform.*

## I. INTRODUCTION

The protection of personal data has become a pillar of current regulatory systems in the digital era. The number, variety, and speed of data collection have steadily expanded as people engage with digital services, from social networking platforms to e-commerce applications. To preserve individual privacy and guarantee responsible data processing methods, governments all around have responded with thorough data protection policies such as the “*European Union’s General Data Protection Regulation (GDPR)*” and “*India’s Digital Personal Data Protection Act, 2023 (DPDP Act)*”.<sup>1</sup> Traditionally, these legal systems have depended on a notice-and-consent approach whereby consumers must be notified of, and specifically consent to, the gathering and use of their personal data.

But the over-reliance on permission as a regulatory tool has produced a phenomenon known as *consent fatigue*, in which consumers frequently and mindlessly accept privacy regulations, usually without reading or understanding them, just to access digital services.<sup>2</sup> Repeated, long, opaque privacy notifications aggravate this practice, hence creating a basic imbalance in the knowledge asymmetry between users and data controllers.<sup>3</sup> As such, the concept of “*informed consent*” becomes legally formalistic and

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<sup>1</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), 2016 O.J. (L 119) 1; The Digital Personal Data Protection Act, No. 22 of 2023, Gazette of India, Aug. 11, 2023.

<sup>2</sup> Solove, Daniel J., “Privacy Self-Management and the Consent Dilemma,” 126 Harv. L. Rev. 1880, 1883–84 (2013).

<sup>3</sup> Nissenbaum, Helen, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* 129–134 (Stanford Univ. Press 2010).

practically useless, therefore casting major doubts on user autonomy, openness, and responsibility in data processing operations.

The following questions are attempted to be answered by this study: *(1) How far has the consent-centric approach fallen short in really safeguarding personal privacy? (2) How may regulatory systems move toward more solid, less taxing substitutes like design-based approaches and purpose limitation? (3) How may human-centric design and legal mandates help to operationalize enforceable, intelligible privacy protections.*

This paper aims to evaluate the viability of purpose limitation as a data governance concept, critically examine the structural constraints of present notice-and-consent systems, and investigate how design-based regulation, especially privacy by design and default, might help to reduce consent fatigue. For doing this, the paper adopts a doctrinal and comparative legal approach with an eye toward the GDPR and India's DPDP Act and gains understanding from behavioural economics, *human-computer interaction* (HCI), and regulatory theory.

Legal research as well as policy formation benefit from this work. It adds to the continuous arguments about institutional responsibility, user agency, and consent validity in digital privacy. It seeks to encourage a more sustainable and user-centric privacy architecture by supporting systematic improvements in regulation design, rather than burdening the user only, so negating the impact.

## II. LITERATURE REVIEW

### II. (i) Historical Evolution of the Notice-and-Consent Model

Data privacy rules have long been based mostly on the notice-and-consent system. Originating in the late 20th century, it was codified through instruments including the *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* (1980) and further anchored by

the *EU Data Protection Directive (1995)* and the *General Data Protection Regulation (GDPR) (2016)*. Emphasizing openness and personal choice, these systems demanded that data subjects be informed about data collection and, if necessary, give clear permission.

Still, the effectiveness of this approach has been under more and more doubt. Research shows that privacy policies are less easily accessible to users since they have evolved over time from being shorter and simpler. Wagner's longitudinal study from 1996 to 2021, for example, shows that privacy rules have become longer and more complicated, often beyond the cognitive ability of the typical user.<sup>4</sup> This intricacy reduces the practical value of consent since users are less likely to interact with or grasp the material offered.

## **II. (ii) Scholarly Critiques of Consent-Centric Privacy Frameworks**

Legal academics have attacked the consent-centric approach as being more symbolic than pragmatic. Solove notes that "privacy self-management" is a problematic concept that naively expects consumers to make logical, informed decisions across every data transaction.<sup>5</sup> Cohen also says that the monetization of permission hides fundamental inequalities between people and data controllers and empowers consumers less.<sup>6</sup> These criticisms agree on one important point: permission, used as a general legal tool, compromises real autonomy and does not adequately reflect the contextual subtleties of privacy.

## **II. (iii) Key Studies on Behavioural Fatigue, Dark Patterns, and Interface Complexity**

Behavioural economics and human-computer interaction (HCI) interdisciplinary study emphasizes how user behaviour can be changed by

<sup>4</sup> Isabel Wagner, *Privacy Policies Across the Ages: Content and Readability of Privacy Policies 1996–2021*, arXiv:2201.08739 [cs.CY] (Jan. 21, 2022).

<sup>5</sup> Daniel J. Solove, *Privacy Self-Management and the Consent Dilemma*, 126 Harv. L. Rev. 1880, 1884–86 (2013).

<sup>6</sup> Julie E. Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* 109–112 (Yale Univ. Press 2012).

interface design. Not only does permission fatigue result from the volume of consent requests, but also from ‘*dark patterns*’, design strategies meant to guide users toward decisions favourable to data collection. Empirical research has revealed that users usually spend less than a minute looking at privacy policies and usually click ‘*accept*’ by default, usually because of interface nudges, default settings, or cognitive overload.<sup>7</sup>

These results show how strongly user behaviour is influenced by design signals, implying that consent is more of a result of contextual shaping than of actual preference. This questions the validity of permission as a relevant legal foundation for data handling.

## **II. (iv) Purpose Limitation as a Foundational Principle in Privacy Law**

According to the principle of purpose limitation, data should be gathered for designated, clear, and legal objectives and not subsequently handled in ways incompatible with those goals. *Article 5(1)(b) of the GDPR* embodies this idea; comparable clauses are in the Indian DPDP Act, 2023.<sup>8</sup> By including privacy restrictions directly into data governance systems instead of depending just on *ex post* user approval, scholars contend that purpose limitation lessens the burden on users.<sup>9</sup>

Recent criticism, however, notes that several of India’s DPDP Act’s clauses could reduce the efficacy of purpose limitation. Rule 22, for example, lets the government demand information from data fiduciaries or middlemen, therefore, perhaps circumventing purpose limitation protections.<sup>10</sup> This begs questions regarding the strength of purpose limitation in the application.

<sup>7</sup> Harshvardhan J. Pandit, *Proposals for Resolving Consenting Issues with Signals and User-side Dialogues*, arXiv:2208.05786 [cs.CY] (Aug. 9, 2022).

<sup>8</sup> Regulation (EU) 2016/679, art. 5(1)(b), 2016 O.J. (L 119) 1 [hereinafter GDPR]; The Digital Personal Data Protection Act, No. 22 of 2023, Gazette of India, Aug. 11, 2023.

<sup>9</sup> Mark Elliot et al., *Purpose Limitation*, in *Dictionary of Privacy, Data Protection and Information Security* (Edward Elgar Publishing 2024), [https://www.elgaronline.com/display/book/9781035300921/b-9781035300921-P\\_159.xml](https://www.elgaronline.com/display/book/9781035300921/b-9781035300921-P_159.xml) (last visited May 01, 2025).

<sup>10</sup> Centre for Internet and Society, *Comments and Feedback to the Digital Personal Data Protection Rules 2025*, <https://cis-india.org/internet-governance/blog/cis-comments-and-feedback-to-digital-personal-data-protection-rules-2025> (last visited May 03, 2025).

## II. (v) Design-Based Regulation: Definitions and Cross-Disciplinary Perspectives

Design-based control is putting privacy protections right into digital system architecture. *Article 25 of the GDPR* presents the idea of “*privacy by design and by default*”, which mandates controllers to apply technical and organizational tools, including data security, in handling operations. Drawing on behavioural research, UX design, and HCI, this method creates user experiences that by default preserve privacy.

Trust is underlined in privacy design by recent research. Kim et al., for instance, suggest a trust-enabled privacy framework using design affordances like guided disclosure and contextual audience segmentation to help teenage users control their online boundaries.<sup>11</sup> Naghmouchi and Laurent also examine self-sovereign identification systems, providing a design aid dashboard to guide creators toward privacy-friendly decisions.<sup>12</sup> These multidisciplinary projects show the possibilities of design-based control to operationalize privacy rights efficiently.

## II. (vi) Gaps in Existing Scholarship

Although a lot of writing criticizes the flaws in the consent model, empirical and comparative legal research assessing how design rules and purpose limitation might operate as specific regulatory alternatives is somewhat rare. Few studies investigate how behavioural insights may be methodically turned into legally enforceable duties or how interface usability testing might guide normative legal norms. By combining doctrinal analysis, comparative policy assessment, and interface design studies, this paper seeks to close this void and provide implementable, legally binding remedies.

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<sup>11</sup> JaeWon Kim et al., *Trust-Enabled Privacy: Social Media Designs to Support Adolescent User Boundary Regulation*, arXiv:2502.19082 [cs.HC] (Feb. 26, 2025).

<sup>12</sup> Montassar Naghmouchi & Maryline Laurent, *Privacy by Design for Self-Sovereign Identity Systems: An in-depth Component Analysis completed by a Design Assistance Dashboard*, arXiv:2502.02520 [cs.CR] (Feb. 4, 2025).

### III. METHODOLOGY

This paper uses a doctrinal and comparative legal analysis to investigate alternatives based on purpose limitation and design-based control, therefore challenging the limits of consent-centric privacy systems. The analysis uses case law, regulatory guidelines, policy papers, and original sources, including statutes such as the EU's GDPR and India's DPDP Act, 2023. Along with interface design assessments, assessing usability and privacy implementations, it includes scientific literature from legal, behavioural economics, and human-computer interaction (HCI) spheres.

With an eye on their different approaches to consent, purpose limitation, and privacy-by-design norms, comparative findings from the United States and Canada augment the study. Using normative legal analysis to evaluate conceptual coherence and regulatory intent, interface usability observations to contextualize behavioural dynamics, and interpretive legal approaches to study statutory language and judicial interpretation, the study looks at.

The scope does not include sector-specific laws; it is confined to broad data protection regimes. Furthermore, whilst interface testing guides the research, no main empirical data is produced. The approach seeks to offer a comprehensive knowledge of how design principles and legal frameworks might cooperatively lower consent fatigue and improve privacy outcomes.

### IV. UNDERSTANDING CONSENT FATIGUE

A behavioural and cognitive phenomenon known as “*consent fatigue*” results from consumers habitually agreeing to data collecting without adequately considering the consequences after being overburdened with privacy requests. It shows a failure in the notice-and-consent concept, whereby the mechanical, disengaged process of theoretical empowerment of the user via consent results. Particularly in the form of cookie banners, app permissions, and frequent pop-up warnings, overuse of consent requests adds greatly to this phenomenon.

Fundamentally, consent tiredness is a structural problem in the design and legal implementation of permission processes rather than a lack of users to care about privacy. It draws attention to the limits of personal control in a world too filled with privacy, many of which are purposefully meant to hide important choices.

#### **IV. (i) Psychological and Cognitive Dimensions**

Psychologically, three well-researched behavioural phenomena, cognitive overload, habituation, and choice weariness, cause consent fatigue. Commonly found in modern digital privacy notices that are legalistic, long, and frequently confusing to the ordinary user, cognitive overload results from people being provided with more information than they can efficiently comprehend.<sup>13</sup> Conversely, decision fatigue, which is especially pertinent in privacy settings when users must make several privacy options over a single browsing session, is the degradation of decision-making skills over a protracted period of choices.<sup>14</sup>

Another important determinant is habituation, which explains declining response to a stimulus following repeated exposure. Users grow insensitive to almost identical privacy pop-ups and consent banners across platforms and are more prone to overlook material and click 'accept' without thought.<sup>15</sup> These psychological insights help to explain why even well-informed consumers sometimes ignore privacy notices: the mental cost of participation exceeds expected benefits, particularly in cases of ambiguous or inevitable privacy trade-offs.

#### **VI. (ii) Empirical Studies and Real-World Manifestations**

Several empirical studies confirm the existence and consequences of consent tiredness. According to a 2019 Degeling et al. study, even when those settings

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<sup>13</sup> Wagner, Isabel, *Privacy Policies Across the Ages: Content and Readability of Privacy Policies 1996–2021*, arXiv:2201.08739 [cs.CY] (Jan. 21, 2022).

<sup>14</sup> Baumeister, Roy F. et al., *Ego Depletion: Is the Active Self a Limited Resource?*, 74 J. Personality & Soc. Psychol. 1252 (1998).

<sup>15</sup> Acquisti, Alessandro, *Nudges for Privacy and Security: Understanding and Assisting Users' Choices Online*, ACM Computing Surveys, Vol. 50, No. 3 (2017).

are accessible and available, over 91% of consumers agree with cookie ads without changing any settings.<sup>16</sup> Another study by *Nouwens et al.* found that many cookie consent screens use dark patterns, interface designs that subtly steer users toward more invasive choices, making it more difficult to decline consent than to grant it.<sup>17</sup>

Actually, one of the most often used and troublesome instances is cookie banners. Many are made to hide “reject” buttons or bury them under several layers of interaction, even though their intended usage is as a tool to enable informed user choice. Many times, mobile apps request access to device data or permissions in bulk without sufficient context or granularity, therefore posing equally troublesome consent routines. These designs leverage mental tiredness to inspire a default to compliance.

Furthermore, frequent permission demands, often set off each time a website is visited, dilute the importance of consent. Even platforms that formally follow rules like the GDPR can do so in spiritless, box-ticking ways that give legal protection above user empowerment.

#### **IV. (iii) Impact on User Autonomy and Informed Consent**

The emergence of permission fatigue has grave consequences for user autonomy and the basic validity of consent as a legal underpinning for data handling. Consent is meant to represent an informed, explicit, unambiguous, freely provided consent of a person. These requirements are often lacking in practice. Particularly when such conditions are presented through misleading or repetitious designs, tired users cannot be expected to properly assess the terms they are consenting to.

This decline of meaningful consent compromises ethical and legal foundations fundamental to data protection legislation. It questions the

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<sup>16</sup> Degeling, Martin et al., *We Value Your Privacy... Now Take Some Cookies: Measuring the GDPR's Impact on Web Privacy*, 2019 Proc. of the Network and Distributed System Security Symp. (NDSS).

<sup>17</sup> Nouwens, Midas et al., *Dark Patterns after the GDPR: Scraping Consent Pop-ups and Demonstrating Their Influence*, 2020 CHI Conference on Human Factors in Computing Systems.

presumption that choice-based methods are helping people to have individual control over personal data. As Solove and others have pointed out, the illusion of control produced by consent systems can mask the power inequalities and control of data collection and usage.<sup>18</sup>

Additionally, lessening responsibility among data controllers is consent fatigue. Organizations have no incentive to reduce data collecting or be open about processing techniques when consent is seen as a legal shield rather than a substantive instrument. Rather, a technique that is ethically dubious and practically unsustainable, they externalize the load of privacy protection onto the user.

#### **IV. (iv) Legal and Regulatory Responses to Consent Fatigue**

Policymakers and authorities are increasingly conscious of the constraints caused by consent fatigue. Guidelines prohibiting the use of misleading cookie banners and promoting the creation of more user-friendly interfaces have been published by the “*European Data Protection Board (EDPB)*” together with numerous national data protection agencies.<sup>19</sup> Though its enforcement systems in design remain quite weak, India’s DPDP Act, 2023, emphasizes openness and purpose limitation.

The more general legal implication is a growing agreement that consent by itself cannot bear the weight of digital privacy control. Structural protections that cut dependency on user choice are becoming more and more important alternatives, including privacy by design, data minimization, and purpose limitation. These methods aim to include privacy into systems and regulations so transferring the load from consumers to data controllers.

Consent fatigue exposes the architectural flaws in consent-based privacy systems. Contrary to empowering consumers, too strong and manipulative

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<sup>18</sup> Solove, Daniel J., *Privacy Self-Management and the Consent Dilemma*, 126 Harv. L. Rev. 1880 (2013).

<sup>19</sup> European Data Protection Board (EDPB), *Guidelines 05/2020 on Consent under Regulation 2016/679*, Version 1.1 (May 4, 2020).

permission fuels indifference, disengagement, and finally the degradation of user rights. Dealing with this difficulty calls not just for better interface design but also for structural regulation change. Legal systems must change from depending on permission toward more sustainable, user-respecting models like purpose limitation and design-based regulation by realizing the cognitive limits of users and the systematic power of design.

## **V. REASSESSING CONSENT: THE CASE FOR PURPOSE LIMITATION**

Modern data protection systems are based on the fundamental notion of purpose limitation, which holds that personal data should be gathered for specified, clear, and authorized uses and not thereafter handled in a way incompatible with those uses. Emphasized in *Article 5(1)(b) of the GDPR*, this idea forbids data controllers from using data without a suitable legal basis or user notification.<sup>20</sup> It guarantees that data is not kept or repeated randomly, hence supporting data minimization.

India's DPDP Act, 2023, combines a similar, but less clear articulation of purpose limitation. The DPDP Act's *Section 4(c)* states that personal data should be handled solely for the use for which it was gathered or for any auxiliary use fairly foreseen by the data principal.<sup>21</sup> Although this provides some defence against overreaching data consumption, the "*reasonable expectation*" provision creates interpretive uncertainty that might compromise its application.

Emphasizing purpose specification and use limitation, the *OECD Privacy Guidelines 2013* update and the *Council of Europe Convention 108+* also show the worldwide adoption of this approach as a regulatory pillar.

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<sup>20</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 [General Data Protection Regulation], art. 5(1)(b), 2016 O.J. (L 119) 1.

<sup>21</sup> Digital Personal Data Protection Act, 2023 (India), section. 4(c).

## **V. (i) Legal Rationale and Practical Implementation Challenges**

The legal justification for purpose limitation is to stop function creep, in which case personal data gathered for one use is progressively applied over time for unrelated or more intrusive uses. Data controllers may use the wide breadth of initial consent or ambiguous privacy policies without clear boundaries to increase data use in ways consumers would not have agreed to or expected. In complicated digital ecosystems where personal data moves across several businesses, platforms, and countries, this becomes very troublesome.

Still, putting purpose limitation into effect in real life is difficult. First, identifying “compatible” or “incompatible” goals usually relies on personal perspective. Under some legal basis, such as scientific research or public interest, the GDPR provides some direction in Recital 50 that permits more processing if appropriate protections are in place. Still, courts and authorities must determine if these auxiliary goals complement user expectations and basic rights.<sup>22</sup>

Second, because it restricts the commercial use of data, companies could object to narrowly specified goals. Many tech businesses, for instance, depend on wide language in privacy rules to permit cross-context behavioural advertising or AI training datasets, uses that perhaps exceed the initial collecting intent. Meaningful use of purpose limitation is still hampered in great part by the conflict between economic incentives and regulatory compliance.

## **V.(ii) Case Law and Regulatory Guidance**

Purpose limitation is becoming more and more important according to EU judicial and regulatory authorities. The *European Union’s Court of Justice* (CJEU) decided in *Breyer v. Bundesrepublik Deutschland* that even dynamic IP addresses can constitute personal data when connected to identifiable individuals and that later uses must follow declared purposes.<sup>23</sup>

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<sup>22</sup> GDPR Recital 50, 2016 O.J. (L 119) 1.

<sup>23</sup> *Breyer v. Bundesrepublik Deutschland*, Case C-582/14, EU:C:2016:779 (CJEU, Oct. 19, 2016).

The *French data protection regulator* (CNIL) has punished businesses for using data outside of their intended collecting intent in its enforcement activities. For instance, CNIL punished *Google €50 million* for not giving enough warning and for handling user data for ad personalization without a defined purpose, a limiting framework.<sup>24</sup> These acts reveal a rising openness among authorities to question opaque or excessively extensive data processing practices.

Through its policies, the *European Data Protection Board (EDPB)* has also clarified matters by stressing that compatibility evaluations should take into account elements such as the kind of data, the background of collection, and the possible influence on data subjects.<sup>25</sup> Instead of a just formalistic assessment, this interpretive guide promotes a contextual and rights-based one.

### **V. (iii) Purpose Limitation as a Safeguard Against Excessive Data Processing**

By limiting too much data collection, lowering the potential of misuse, and encouraging data minimization, purpose limitation functions as a structural protection. Unlike permission, which depends on active user participation, purpose limitation forces data controllers to define, document, and restrict data use within limited constraints. This reduces the reliance on user awareness and helps to prevent manipulation by means of dark patterns or misleading interface design.

In applications of artificial intelligence and algorithmic systems, purpose limiting is absolutely important for guaranteeing responsibility and fairness. Particularly in fields like credit scoring, recruiting, or predictive policing, data repurposing without a clear goal sometimes results in unclear decision-

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<sup>24</sup> CNIL, *Délibération SAN-2019-001 du 21 janvier 2019 prononçant une sanction pécuniaire à l'encontre de la société GOOGLE LLC*, available at <https://www.cnil.fr/> (last visited May 06, 2025).

<sup>25</sup> European Data Protection Board (EDPB), *Guidelines 05/2020 on Consent under Regulation 2016/679*, Version 1.1 (May 4, 2020).

making and discriminatory results. Purposive limitation lowers the possibility of systematic bias and improves algorithmic transparency by imposing well-defined limits.

Design-wise, embedding purpose limitation into privacy architecture means that systems should be created with well-defined and limited data usage paths. Privacy dashboards, data flow maps, and automated auditing systems, for example, enable developers and legislators to follow whether personal data stays limited to its stated use.

Moreover, a limited goal helps users to trust. People's trust in digital services increases when they know their data is being utilized just for particular, revealed purposes. This is consistent with more general patterns in user-centric privacy systems that stress respect for personal agency and openness in data governance.

Although privacy systems still revolve mostly around consent, over-reliance on it has resulted in tiredness, disengagement, and surface compliance. Purpose limitation presents a strong substitute, a concept that transfers privacy protection's accountability from individuals to data controllers. Purpose limited guarantees that data use stays in line with user expectations and legal standards by means of statutory responsibilities, regulatory enforcement, and ethical design. Though implementation difficulties exist, it has the power to give digital era privacy protection substance.

## **VI. DESIGN-BASED REGULATION: A USER-CENTRIC ALTERNATIVE**

Design-based regulation is the use of architectural and design elements of systems, interfaces, and processes as regulating instruments to influence behaviour and enforce norms in legal and policy interventions. Instead of depending just on textual compliance or after-the-fact enforcement, this approach embeds privacy and data protection rules directly into digital infrastructure, therefore transforming system design from user awareness

alone into a function of digital infrastructure.<sup>26</sup> This is consistent with the idea of “*code as law*”, according to which the framework of digital surroundings may either facilitate or restrict behaviour just as well as legislative guidelines.<sup>27</sup>

Design-based control helps authorities in the context of data protection to require interface features, limit manipulative design (such as dark patterns), and advance default settings that support user privacy. It solves the shortcomings of *notice-and-consent methods*, particularly in settings when consumers are overwhelmed or disengaged.

## **VI. (i) Privacy by Design and by Default (Article 25, GDPR)**

*Article 25 of the GDPR* introduces the ideas of “*privacy by design*” and “*privacy by default*”, therefore articulating design-based regulation in privacy legislation. *Article 25(1)* mandates data controllers to apply suitable technical and organizational policies, including data security concepts, to processing operations right from the start. Further stating that only personal data required for each particular use should be handled automatically is *Article 25(2)*.<sup>28</sup>

These values generate proactive responsibilities. Organizations should show that their systems are built to minimize data collecting, restrict access, and limit retention instead of responding to infringement. Privacy by design moves the regulatory load upstream to the creation and implementation phases of digital services, therefore fostering preventive rather than corrective control.

In actuality, implementation differs greatly. While some businesses have embraced privacy dashboards, consent managers, and user-owned settings,

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<sup>26</sup> Karen Yeung, “Hypernudge: Big Data as a Mode of Regulation by Design,” *Information, Communication & Society* 20, no. 1 (2017): 118–36.

<sup>27</sup> Lawrence Lessig, *Code and Other Laws of Cyberspace* (Basic Books 1999).

<sup>28</sup> Regulation (EU) 2016/679 [GDPR], art. 25, 2016 O.J. (L 119) 1.

others comply merely formally, having little effect on real data flows. The EDPB stresses that design-based compliance calls for end-to-end incorporation of privacy concepts during the product lifetime, not for surface adjustments.<sup>29</sup>

## VI. (ii) Examples of Design-Based Privacy Tools

There are now several design interventions meant to operationalize privacy by design:

**Layered Notices:** Presenting privacy information in tiers- first a summary, then more thorough explanations- helps consumers acquire pertinent data without information overload.<sup>30</sup>

**Privacy Icons:** Particularly in low-literacy or non-native language environments, simplified graphical representations of important policy points- e.g., data sharing, storage duration- help to increase comprehension.<sup>31</sup>

**Transparency Dashboards:** Transparency dashboards raise awareness of data processing by letting users access, manipulate, and remove their data from a central point.

**Granular Consent Mechanisms:** Granular consent mechanisms, which let users consent to particular uses, such as analytics but not ads, increase autonomy and lessen the binary character of conventional opt-in/opt-out systems.

Many other countries are testing such instruments. For instance, the *UK Information Commissioner's Office* (ICO) has pushed age-appropriate

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<sup>29</sup> European Data Protection Board (EDPB), *Guidelines 04/2019 on Article 25 Data Protection by Design and by Default* (2020).

<sup>30</sup> Aleecia M. McDonald and Lorrie Faith Cranor, "The Cost of Reading Privacy Policies," *I/S: A Journal of Law and Policy for the Information Society* 4 (2008): 543.

<sup>31</sup> European Commission, "Study on Privacy Icons," (2020), available at <https://ec.europa.eu> (last visited May 07, 2025).

design rules for online services used by minors, therefore enforcing stringent default settings and minimum data processing.<sup>32</sup>

## **VI. (iii) The Role of HCI and UX Design in Regulatory Compliance**

Design-based control's efficacy depends on ideas from *Human Computer Interaction (HCI)* and *User Experience (UX) design*. These disciplines investigate user interactions with digital systems, pointing up design trends that either empower or mislead.

Many consent interfaces, according to research, are meant to exploit “dark patterns”, that is, default opt-ins, confused layouts, or deceptive language, to control user behaviour.<sup>33</sup> User-centric design guarantees, on the other hand, that privacy tools are aligned with user expectations, accessible, and useable.

Creating interfaces that gently guide users toward educated decisions free from coercion depends on cooperation among behavioural scientists, UX designers, and legal experts. Thus, regulatory systems have to not only forbid misleading patterns but also encourage good design principles.

The California Consumer Privacy Act (CCPA) rules, for instance, forbid using “*manipulative language or choice architecture*”, therefore matching legal requirements with design ethics.<sup>34</sup> This blending of design and regulatory fields marks a fresh front in privacy protection.

## **VI. (iv) Enforcement and Compliance Challenges**

Design-based control has great potential but suffers major practical and enforcement challenges. First, it is not easy to evaluate if a design satisfies privacy objectives using exact measurements. How, for example, should authorities evaluate whether a multilayer notice sufficiently informs consumers.

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<sup>32</sup> UK Information Commissioner's Office (ICO), *Age Appropriate Design Code* (2021), available at <https://ico.org.uk/> (last visited May 07, 2025).

<sup>33</sup> Arunesh Mathur et al., “Dark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites,” *Proc. ACM Human-Computer Interaction* 3 (2019): 1–32.

<sup>34</sup> California Consumer Privacy Act Regulations, Cal. Code Regs. tit. 11, § 999.315.

Second, a phenomenon sometimes referred to as “*privacy theatre*” is organizations’ surface adoption of privacy design without significant modification. Design-based methods run the danger of becoming symbolic rather than practical without continuous audits, user testing, and enforcement systems.

Third, many times, without technical knowledge, authorities cannot critically assess design features. While *Article 25* enforcement has been quite restricted compared to violations connected to consent or data breaches, the GDPR allows *Data Protection Authorities* (DPAs) to investigate and sanction non-compliant businesses.

Moreover, many digital platforms have essentially incompatible commercial incentive systems with effective privacy design. Services developed on surveillance-based business models are unlikely to freely adopt design changes that limit customization or lowering data collecting capacity.

Scholar’s support required design audits, standardized usability tests, and cross-disciplinary regulatory agencies combining legal, design, and engineering knowledge to close these gaps. Given the worldwide influence of big technology companies, international cooperation might also be required.

## VII. COMPARATIVE LEGAL ANALYSIS

### VII. (i) European Union: GDPR’s Robust Framework

Still, the worldwide bar for thorough data privacy laws is the GDPR. It uses a multi-layered approach combining enforceable ideas of design-based protections and purpose limitation with stringent consent requirements.

Under *Article 6*, permission is merely one of six legitimate bases for processing and not favoured in circumstances where power asymmetries exist (e.g., employer-employee interactions).<sup>35</sup> More importantly, *Article 5(1)(b)* embodies the purpose limitation that data be gathered for “*specified*,

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<sup>35</sup> Regulation (EU) 2016/679 [GDPR], art. 6, 2016 O.J. (L 119) 1.

*explicit and legitimate purposes*” and not further processed in ways incompatible with those goals.<sup>36</sup>

*Article 25 of the Design-Based Regulation* requires data protection by default and by design, therefore guiding controllers to include privacy protections from the start. European authorities, including *national DPAs and the EDPB*, have also produced comprehensive guidelines on dark patterns, UI/UX best practices, and data-minimizing strategies.<sup>37</sup>

Still, enforcement is not consistent. Although big fines have been imposed against *Meta* and *Amazon*, for example, many smaller companies run under little control. Compliance with design-based responsibilities is still developing as well, with different degrees of sophistication across industries.

## **VII. (ii) India: Digital Personal Data Protection Act, 2023**

The first thorough data protection law enacted by India would be the DPDP Act, 2023. Like the GDPR criteria, it uses a permission-centric approach whereby most personal data processing requires specified, free, informed, specific, and unambiguous consent.<sup>38</sup>

But unlike the GDPR, the DPDP Act does not include an express protection against secondary processing outside of the original intent and provides only scant articulation of purpose limitation. The Act’s Clause 7 permits data processing for “legitimate uses” without permission in vaguely specified circumstances, therefore, perhaps compromising the rigor of purpose limitation.<sup>39</sup>

Furthermore, the Act lacks clear clauses regarding privacy by default or design. Though no guidelines on interface design, consent channels, or dark patterns, generic responsibilities on data fiduciaries provide reasonable

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<sup>36</sup> GDPR, art. 5(1)(b).

<sup>37</sup> European Data Protection Board (EDPB), *Guidelines 04/2019 on Article 25 Data Protection by Design and by Default* (2020); see also NOYB, “Deceptive Design: How Cookie Banners Violate GDPR” (2022).

<sup>38</sup> Digital Personal Data Protection Act, No. 22 of 2023, India, section 6.

<sup>39</sup> *Ibid*, section 7.

security protections. Especially in digital environments already suffering from low digital literacy, this omission could compromise the general user experience.

Furthermore, even though the Act creates the *Data Protection Board of India* as a regulating agency, its independence and enforcement powers are still under examination. Detailed rules, standards, and guide papers are still under preparation as of 2025, so leaving important questions of application remain unresolved.

## **VII. (iii) United States: Sectoral and Fragmented Approach**

There is no thorough federal data protection system in the United States. Rather, it uses a sectoral approach under which laws like this control data privacy:

- HIPAA (health information),
- GLBA (financial data),
- COPPA (children's information), and
- FTC Act (unfair or misleading behaviour).<sup>40</sup>

Although certain states, most famously California, with the *California Consumer Privacy Act* (CCPA) and the *California Privacy Rights Act* (CPRA), have instituted more general consumer privacy protections, the national scene is still patchy.<sup>41</sup>

Though the FTC has lately concentrated on dark patterns and sent design-oriented enforcement actions against misleading cookie banners and automatic renewal traps, consent is still fundamental.<sup>42</sup>

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<sup>40</sup> Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936; Gramm-Leach-Bliley Act (GLBA), Pub. L. No. 106-102; Children's Online Privacy Protection Act (COPPA), 15 U.S.C. §§ 6501–6506.

<sup>41</sup> California Consumer Privacy Act, Cal. Civ. Code § 1798.100 (2018); California Privacy Rights Act (CPRA), Prop. 24 (2020).

<sup>42</sup> Federal Trade Commission (FTC), "Bringing Dark Patterns to Light" Report (2022), <https://www.ftc.gov/>. (last visited May 08, 2025).

Outside of select situations, purpose limitation is mostly absent. No broad-based responsibility akin to *Article 5 GDPR* exists. Likewise, although the CPRA calls for some wording endorsing user control and data reduction, there is no federal-level obligation for privacy by design or default policies.

Having said that, recent events like the *American Data Privacy and Protection Act* (ADPPA) (still under construction as of 2025) indicate a growing bipartisan interest in matching U.S. norms with EU-style data governance, including clauses for design-based requirements and purpose specificity.<sup>43</sup>

## VII. (iv) Comparative Insights and Best Practices

Cross-jurisdictional research finds the following:

- Leading in the integration of permission, purpose limitation, and design-based regulation, GDPR provides a model for overall privacy governance.
- Although India's DPDP Act is a major step, unless strong rule-making and institutional capability support over-reliance on permission, absence of specific design obligations, and broad exemption, its effectiveness may be compromised.
- Although the U.S. model advances the enforcement of deceptive design practices, it is still fractured and lacks overall legislative obligations on purpose limitation or privacy-by-design.

Moving ahead, best practices should consist of:

- Combining legal ideas with interface control: Meaningful design must promote consent to prevent coercion and weariness.
- Codifying purpose limitation as a legal standard acts as an ex-ante protection, therefore stopping mission creep in data processing.

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<sup>43</sup> American Data Privacy and Protection Act (ADPPA), H.R. 8152, 117th Cong. (2022) (pending).

- Requiring by default and by design privacy: Privacy moves from a checkbox to an ingrained characteristic here.
- Global digital services depend on interoperability between regulatory systems (e.g., through appropriate choices or shared standards), therefore enabling cross-border alignment.
- Establishing technical-expert independent monitoring entities: Compliance with design-based responsibilities calls for cooperation across legal, engineering, and behavioural sciences.

## VIII. CONCLUSION

This paper makes a strong argument for transcending the constraints of conventional notice-and-consent models by carefully analysing the developing issue of consent fatigue in digital privacy environments. Using a doctrinal and comparative legal analysis of frameworks including the European Union's GDPR, India's DPDP Act, 2023, and some elements of the U.S. sectoral approach, the paper revealed the structural flaws in over-reliance on user consent, especially when used without sufficient protections, clarity, or contextual relevance.

The study underlined how often consent systems, as they are now used, fall short in maintaining significant user autonomy. Complicated interface designs, repeated alerts, and an abundance of privacy options help to create habitual consent behaviours, that is, when users routinely accept without understanding. This compromises the essence of permission as well as its purpose, therefore providing an insufficient basis for safeguarding digital privacy in the data-intensive world of today.

The research thus focused on two main regulatory strategies: *design-based control* and *purpose limitation*. With an *ex-ante limit* on data processing, purpose limitation is tightly tied to legal objectives. Design-based control, best shown by default and privacy by design, puts privacy protections right

into digital system architecture. These methods taken together offer a more user-centric, transparent, and sustainable privacy regime, one that safeguards users even in the absence of informed involvement at every step of data collection.

Through (1) clarifying the multidimensional character of consent fatigue, (2) integrating legal, behavioural, and design perspectives, and (3) suggesting a normative shift away from procedural formalism toward substantive accountability and systemic responsibility, the paper adds to privacy scholarship. By providing comparative analysis and useful advice, including imposing purpose limitation, legislating privacy-oriented design standards, and supporting multidisciplinary cooperation among regulators, developers, and interface designers, it also shapes legislators.

The results ultimately need a reconsideration of digital privacy models. The weight of protecting privacy should not fall only on the end user, as data collection is more common and less obvious. Rather, authorities have to put legal and technological systems in place that prevent damage, reward ethical data activities, and guarantee default preservation of privacy, not only by permission.

## **IX. POLICY RECOMMENDATIONS**

**IX. (i) Reducing Reliance on Consent: Legislative and Design Solutions-** From a broad concept, purpose limitation has to be turned into a legally binding requirement. Laws should demand that all data managers:

- Clearly state the main goal of data collecting right at the moment of contact;
- Except for a suitable purpose test or fresh legal basis, forbid secondary processing;
- Record and share any change in intent, under outside assessment.

Penalties for purpose drift and regular audits by regulatory bodies should form part of enforcement. Moreover, purpose statements should be machine-readable and housed inside technological systems so that automated compliance checks and privacy-enhancing technology integration are possible.

**IX. (ii) Incentivizing or Requiring Privacy by Design Through Legal Obligations-** Article 25 of the GDPR codifies the idea of privacy by design and by default, which ought to become a required compliance criterion all around. For this:

- Early inclusion of privacy needs into system design and development;
- Reduction of default data collection;
- simple interfaces with user agency and clarity first in mind.

To help businesses fulfil these responsibilities, national data protection authorities should create sector-specific design rules and usability standards. Legal incentives, including lower penalties for self-assessed companies or innovation sandboxes, can inspire voluntary compliance and experimentation with user-friendly privacy structures.

**IX. (iii) Enhancing Accountability Through Independent Audits and Transparency Reports-** Legal systems should mandate companies to apply responsibility systems like these to guarantee continuous compliance and user confidence:

- Annual privacy impact analyses (PIAs);
- Independent outside assessments of interface designs and data policies;
- Public openness reports include design modifications, user rights requests, and data processing uses.

These steps move accountability from end users to data controllers and

processors, therefore matching privacy protection with corporate governance and fiduciary norms. Remedial channels and real-time monitoring tools that consumers may access to confirm how their data is being handled must also be part of accountability systems.

**IX. (iv) Cross-Sector Collaboration: Regulators, Designers, and Industry-** Good application of these changes will call for cooperation in legal, technical, and human-centred spheres. Data protection agencies and legislators should:

- Create multi-stakeholder task forces to co-develop technical tools and regulatory norms;
- Fund HCI, behavioural nudging, privacy-preserving design, and multidisciplinary research in;
- Offer UX designers, developers, and compliance officials privacy literacy and ethical interface practices training and certification programs.

Additionally included in cross-sectoral frameworks should be open-source design libraries for compliant consent flows and regulatory sandboxes for testing new models of user engagement that give dignity, autonomy, and justice priority.



# RIGHT TO REPAIR AND CONSUMER PROTECTION LAW WITH SPECIAL REFERENCE TO INDIA, USA AND THE EUROPEAN UNION

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## ABSTRACT

*The Right to Repair and Consumer Protection laws play a pivotal role in safeguarding consumer rights and addressing concerns related to electronic waste and product repairs. This abstract focuses on these laws with special reference to India, the USA and the European Union. The analysis, based on 173 responses, reveals that most of the participants were familiar with the Right to Repair law and believed it to be an essential consumer right. A significant portion of respondents reported facing difficulties in repairing personal electronic devices, highlighting the need for improved accessibility to repair resources. The study indicates mixed sentiments regarding the willingness to pay more for repairable products, with some participants expressing support while others hesitated. Additionally, the overwhelming majority believed that manufacturers should be obligated to provide repair manuals and spare parts. There was also strong consensus on the necessity of these laws in today's world. The recommendations provided by respondents underscore the importance of consumer education, legislative improvements, industry cooperation, and*

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*sustainable practices to enhance the Right to Repair and Consumer Protection laws in India. These suggestions emphasize the need for increased consumer awareness, effective enforcement mechanisms, and measures to reduce electronic waste. Overall, this abstract highlights the significance of the Right to Repair and Consumer Protection laws in India, the USA and the European Union, and the need for comprehensive measures to protect consumer rights, promote sustainability and ensure accessible repair options.*

**Keywords:** *Right to Repair, Consumer Protection, Protection, Environment, Electronic Gadgets.*

## **I. INTRODUCTION**

Technology has become integral to daily life, with the Industrial Revolution leading to increased production across sectors. Today, technology plays a role from birth to death, especially in the era of E-commerce, where products are bought online. However, despite warranties, products often arrive damaged, requiring repairs or replacement, which can be costly. Companies like Apple further complicate this by not providing spare parts, leading to more electronic waste. The 'Right to Repair' movement aims to address this by advocating for legislation that allows consumers to repair and modify their products independently, rather than being restricted to manufacturer services. This concept originated in the US in 1956 when IBM, after being charged with anti-competitive behaviour, was required to allow users to repair their devices. This movement has been driven by concerns over environmental impact, market competition and the definition of property rights.<sup>1</sup>

The Right to Repair is a growing global movement that seeks to ensure that consumers can maintain and repair their gadgets without being constrained to use only the services that the manufacturer of those gadgets provides. The

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<sup>1</sup> IBM 1956 Consent Decree, *IBM Antitrust Pact Termination*, Gadget Rev.. (March 03, 2025), <https://www.gadgetreview.com/ibm-1956-consent-decree>.

New York State Legislature passed pioneering legislation overseeing digital electronics, marking a historic global first. The 'Right to Repair' measure, passed by the legislature, mandates that manufacturers of digital gadgets provide customers and independent repair shops with essential components, tools, information and software. The Fair Repair Act was passed due to government pressure to protect consumers' Rights to Repair and refurbish the devices they have purchased.<sup>2</sup> In July of 2022, the US passed the law named Fair Repair Act, 2022. In the same way, the United Kingdom passed legislation such as the Right to Repair Regulations, and the European Union also passed a law named the Right to Repair. More recently, in India, the Department of Consumer Affairs announced the establishment of a committee to provide a comprehensive framework for the Right to Repair. Nidhi Khare, Additional Secretary of the Department of Consumer Affairs, will serve as the committee chairperson. This article aims to explain the meaning, characteristics, and significance of the RTR as well as its advantages and disadvantages.<sup>3</sup>

## II. RIGHT TO REPAIR OF OLD PRODUCTS

The Right to Repair old products refers to the legal and ethical principle that grants consumers the ability to repair their old or ageing products themselves or have them repaired by independent technicians. It incorporates the notion that consumers ought to have access to the tools, spare parts and repair knowledge they require to extend the life of their products and decide on the best course of action. In this context, key terms –

- **Right to Repair:** The legal and ethical concept that grants consumers the Right to repair their products or seek repair services from independent repair professionals.

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<sup>2</sup> Mudit Gaur, *World's First 'Right to Repair' Law for Digital Electronics Passed by New York Legislature*, Adda247 (March 11, 2025), <https://currentaffairs.adda247.com/worlds-first-right-to-repair-law-passwd/>.

<sup>3</sup> Ruchika Garg, *Right to Repair*, iPleaders (March 11, 2025), <https://blog.iplayers.in/right-to-repair/>.

- **Consumer Protection:** Protection of consumer rights, particularly the freedom to repair products without unreasonable limitations from producers.
- **Planned Obsolescence:** Some manufacturers employ a method whereby their products are purposefully made to have a short lifespan, causing early obsolescence and enticing customers to purchase new goods rather than fix their old ones.
- **Repair Information:** The manuals, schematics and technical information needed to fix a product correctly. Consumers and independent repair specialists may not receive this information from manufacturers.
- **Spare Parts Availability:** The accessibility of genuine or compatible parts needed for product repairs. Manufacturers may limit the supply of spare parts to authorised repair centres only.
- **Third-Party Repair:** When consumers opt to have their products repaired by independent technicians or repair shops instead of using manufacturer-approved repair services.
- **Electronic Waste (E-waste):** Discarded electrical or electronic equipment that contributes to environmental contamination if not recycled or disposed of appropriately. E-waste output may increase because of limited repair choices.
- **Right to Repair Legislation:** Laws and regulations aimed at ensuring manufacturers provide consumers and repair professionals with access to repair information, tools, and spare parts.
- **Fair Repair Agreement:** An agreement or contract between manufacturers and consumers, outlining the terms and conditions for product repairs, often in response to Right to Repair demands.

- **Consumer Electronics:** Products such as smartphones, laptops, tablets, and other electronic devices that are frequently targeted by the Right to Repair movement due to their high repair costs and limited access to repair resources.

### III. RIGHT TO REPAIR OF NEW PRODUCTS

The Right to Repair is the concept that consumers should have the ability to repair and maintain their products without interference from manufacturers. It is particularly relevant for older products that the original manufacturer may no longer support or service.

- **Ownership and Control:** Consumers believe that once they purchase a product, they have the right to decide how it is repaired and maintained. They should be able to access the necessary tools, information, and parts to fix their products or seek third-party repair services.
- **Repair Documentation:** Manufacturers should provide comprehensive repair manuals, guides, and documentation, including schematics, diagnostic tools, and software codes necessary for repairs. This enables consumers to troubleshoot and fix their products effectively.
- **Access to Parts:** Manufacturers should make available spare parts and components for a reasonable period, even for discontinued or older models. This allows consumers to replace faulty parts and extend the lifespan of their products.
- **Software Updates:** Manufacturers should not use software updates or other measures to intentionally make older products obsolete or unrepairable. Consumers should be able to choose whether to install updates and have the option to roll back to previous versions.
- **Fair Repair Market:** Manufacturers should not impede or restrict independent repair businesses from accessing necessary tools, parts, or information to offer repair services. A fair and competitive repair market ensures consumers have multiple options for repairing their products.

- **Environmental Impact:** Repairing and maintaining products helps reduce electronic waste and promotes sustainability. The Right to Repair encourages responsible consumption by extending the lifespan of products rather than replacing them unnecessarily

Extended warranties and the Right to Repair are crucial consumer rights that protect individuals and their purchases in the modern marketplace. Extended warranties extend the standard warranty period, allowing consumers to receive repair or replacement services without additional costs. This provides peace of mind and safeguards against unexpected expenses. The Right to Repair emphasises consumers' access to necessary tools, parts and information for product repair, advocating for reducing manufacturer restrictions that may limit options. This movement promotes greater control over purchases, affordability and convenience, while also promoting sustainability by reducing electronic waste and promoting product longevity. Both extended warranties and the Right to Repair contribute to consumer empowerment and protection, allowing individuals to make informed choices, save costs and minimise environmental impact, ultimately fostering a more equitable and sustainable consumer experience.

#### IV. RESEARCH OBJECTIVES

To understanding the Trace how the concept of a consumer's right to fix or modify their own products has developed in India, the United States, and the European Union—identifying key statutes, regulations, and landmark judicial decisions that have shaped each region's approach. Assess Consumer Experiences and Awareness; Gauge how familiar consumers are with Right to Repair provisions, what obstacles they face when seeking repairs (e.g., lack of parts or technical information), and how these experiences differ between urban and rural settings. Evaluate Environmental and Economic Impacts; Examine the role that repairability plays in reducing electronic waste and conserving resources, and analyse whether encouraging repairs can foster local repair businesses and lower overall repair costs for

consumers. Compare Legislative Frameworks and Enforcement; Contrast the strengths and gaps in India's existing consumer-protection laws with the USA's Fair Repair Act and the EU's Eco-Design requirements, focusing on how readily enforceable each framework is, and what mechanisms ensure manufacturers comply. Identify Barriers and Enablers for Independent Repairers; Investigate the obstacles, such as intellectual-property restrictions, software locks, or parts unavailability, that independent workshops and "do-it-yourself" users encounter, and highlight successful models of manufacturer-repairer cooperation.

## **V. RESEARCH METHODOLOGY**

The present study adopts a blended research methodology, integrating doctrinal and non-doctrinal approaches to capture both the theoretical underpinnings and lived experiences surrounding the right to repair. In the doctrinal strand, statutes, regulations, court judgments, official reports and academic commentaries from India, the United States and the European Union were systematically reviewed to trace the evolution of repair related norms, identify interpretative trends and map convergence or divergence across jurisdictions. Concurrently, the non-doctrinal component engaged directly with stakeholders through a structured questionnaire administered to 173 consumers across urban and rural districts, complemented by semi-structured interviews with independent repairers and consumer rights advocates. Quantitative responses were coded and analysed using spreadsheet software to generate descriptive statistics and visual summaries, while interview transcripts were thematically coded to surface recurring concerns, perceptions and suggestions. Ethical approval was secured in advance, and respondent anonymity was assured throughout. By triangulating doctrinal findings with empirical insights, the study offers a holistic, grounded account of how legal frameworks translate into real-world repair practices, ensuring that normative analysis is firmly rooted in the voice of those it intends to serve.

## V. (i) Mode of Data Collection

Researchers gathered data using a structured questionnaire delivered online via Google Forms, through which they received complete responses from 173 participants, forming the study's sample.

## V. (ii) Method of Data Analysis

The primary statistical data were processed on a personal computer (PC) using spreadsheet software like Microsoft Excel. This software was employed to organise, analyse, and present the data through various tables, charts, and graphs. These visual representations effectively summarise and interpret the data, providing a clearer understanding of the statistical findings.

## V. (iii) Management of E-Waste and Protection of the Environment



*Fig. No. 1: Management of E-Waste and Protection of the Environment.*

*Sources: Secondary Data*

The Right to Repair is a crucial concept for environmental protection, particularly in today's world where electronic devices are universal. Allowing individuals to repair their devices extends product lifespan, reducing waste and environmental impact. This right empowers people to fix their devices with access to tools, information and parts, reducing the need for new products and raw material extraction. It also encourages repair services and local businesses, creating jobs and strengthening economies. Additionally, it promotes innovation by incentivising manufacturers to create more repairable and upgradable products, which can help mitigate electronic waste and its environmental hazards. Further, embracing the Right to Repair can help mitigate electronic waste, which is a significant environmental

challenge. E-waste contains hazardous substances that can contaminate soil, water and air if improperly disposed of. By enabling repairability, we reduce the volume of E-waste generated and encourage responsible recycling practices, thereby minimising the release of harmful materials into the environment.

## **VI. PROVISIONS OF THE RIGHT TO REPAIR IN THE UNITED STATES**

The origin of the Right to Repair in the modern era can be traced back to the United States (from now on referred to as the US) in 1956, when IBM was charged with anti-competitive action and had to sign a consent order with the US Justice Department, enabling users to fix their devices<sup>4</sup>

The Motor Vehicle Owners' Right to Repair Act, 2012, sought to establish guidelines for car manufacturers to make spare parts and information relevant to the repair process available and grant customers the opportunity to choose repair facilities.<sup>5</sup> In 2017, the case of *In Re Apple Inc Device Performance* raised questions about whether Apple Inc. was engaging in planned obsolescence by deliberately reducing the performance of smartphone devices to encourage users to switch to newer models of their market devices. Apple stated that this situation could be avoided by merely replacing the batteries, which it forbade from being done by independent repair shops. The RTR movement emphasises giving consumers these repair rights.

When U.S. Senator Ron Wyden introduced the Critical Medical Infrastructure Right to Repair Bill in the U.S. Senate in 2020, this movement was still going strong. The main objective of this bill was to safeguard consumers from copyright violations while also allowing for the repair of essential medical devices used in COVID-19 healthcare. In this context,

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

<sup>5</sup> Motor Vehicle Owners' *Right to Repair Act*, Wikipedia (last edited Apr. 15, 2023, 9:16 AM), (March 12, 2025) [https://en.wikipedia.org/wiki/Motor\\_Vehicle\\_Owners%27\\_Right\\_to\\_Repair\\_Act](https://en.wikipedia.org/wiki/Motor_Vehicle_Owners%27_Right_to_Repair_Act).

President Joseph Biden of the United States released an Executive Order on July 9, 2021, to encourage promoting competition in the economy. The Federal Trade Commission has been ordered to establish and implement regulations that would provide the Right to Repair to Consumers under section 5(h)(ii) of the Executive Order.<sup>6</sup> More than 50 US States introduced bills on the Right to Repair, but New York was particularly supportive and passed legislation on RTR. Consequently, the first law, named the 'Fair Repair Act' for Digital Electronics passed in July of 2022 by the State of New York, the US, to provide safeguards and promote refurbished products.<sup>7</sup>

## VII. PROVISIONS OF THE RIGHT TO REPAIR IN THE EUROPEAN UNION

The European Union introduced the Right to Repair rules in 2019 to promote a circular economy of digital items. These rules enable customers to access repair tools for household gadgets. The EU is working to expand the scope of product repairs, with France imposing a required repairability score through the Anti-Waste Law, 2020.<sup>8</sup> The Eco-Design Directive in 2021 provided access to RTR provisions for electronic products, but computers and smartphones were not included. Section 23 of the Consumer Rights Act of 2015 empowers individuals to repair malfunctioning devices independently or with third-party assistance. The main goal is to ensure that electronic product producers provide the necessary information and spare components to increase their lifespan by at least 10 years.<sup>9</sup>

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<sup>6</sup> A.L.R. Comm. & B. Comm., *The Right to Repair & Planned Obsolescence: New Horizons in the Indian IP Landscape*, NMIMS L. Rev.. (Sept. 8, 2021), (March 15, 2025), <https://lawreview.nmims.edu/the-right-to-repair-planned-obsolescence-new-horizons-in-the-indian-ip-landscape/>.

<sup>7</sup> Blake Lehr & Peter Meyer, Latest "Right to Repair" Bill Could Signal Changes for Consumers and Manufacturers, *JD Supra*, (March 28, 2025), <https://www.jdsupra.com/legalnews/latest-right-to-repair-bill-could-2403800/>.

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

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

## VIII. RIGHT TO REPAIR IN CANADA

Canada has been actively advocating for automotive Right to Repair legislation, aiming to ensure independent technicians have access to the same repair tools and information as manufacturers and franchised dealers. Bills like C-425<sup>10</sup> and C-273<sup>11</sup> were attempts to amend existing Acts, such as the Environmental Protection Act<sup>12</sup> and Competition Act<sup>13</sup>, to create a more effective repairable field within the automotive repair industry. This push for equitable access to information and tools is crucial in promoting fair competition and enabling independent technicians to effectively service vehicles, ultimately benefiting consumers by providing more choices and potentially reasonable repair costs.<sup>14</sup>

Concerns arose regarding the Canadian Competition Tribunal's ability to mandate auto manufacturers to share proprietary tools and information protected by intellectual property rights. An alternative approach emerged, the Canadian Automotive Service Information Standard (CASIS)<sup>15</sup>, which granted independent technicians access to diagnostic tools and information while acknowledging the manufacturer's exclusive ownership. Bill C-231,<sup>16</sup> a recent proposal by MP Brian Masse,<sup>17</sup> aims to enhance obligations, compelling access to software, and empowering the Competition Tribunal.<sup>18</sup>

In 2019, Ontario and Quebec introduced bills for consumer protection reform focusing on the right to repair. Ontario opposition MPP Michael

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<sup>10</sup> An Act to amend the Competition Act and the Canadian Environmental Protection Act, 1999 (right to repair) 2007, HC Bill [C-425] (Can.), (April 07, 2023), <https://www.parl.ca/documentviewer/en/37-1/bill/C-425/first-reading/page-11>.

<sup>11</sup> *Ibid.*

<sup>12</sup> Environmental Protection Act, 1999, S.C. 1999, c 33 (Can.).

<sup>13</sup> Competition Act, R.S.C. 1985, c C-34 (Can.).

<sup>14</sup> Anthony D. Rosborough, *Toward A Canadian Right to Repair: Opportunities and Challenges*, 37 BERKELEY TECH. L.J. 1201 (2022)

<sup>15</sup> Osler Hoskin & Harcourt LLP, *Voluntary agreement a viable alternative to bill C-273 (Right to Repair)*, (April 07, 2025), <https://www.lexology.com/library/detail.aspx?g=0a20f656-2e82-4458-8d41-f417b2f750c9>.

<sup>16</sup> *Supra* note 17.

<sup>17</sup> Brian S. Masse, Member of Parliament (born July 9, 1968), is a Canadian politician. He has been a member of the New Democratic Party in the House of Commons of Canada since 2002, representing the Windsor West riding.

<sup>18</sup> *Supra* note 17.

Coteau introduced the first bill, Bill-72,<sup>19</sup> which mandated manufacturers to provide repair at a reasonable cost. However, it faced resistance from industry groups and was ultimately unsuccessful due to concerns about competitiveness and intellectual property rights.<sup>20</sup>

Canada's executive branch, post the 2021 federal election success of the Liberal Party, spotlighted the Right to Repair as a significant policy focus. The Prime Minister's Office issued ministerial mandate letters urging collaboration between the Minister of Environment and Climate Change and the Minister of Innovation, Science and Industry to establish a Right to Repair for home appliances, ensure disclosure of environmental impacts, mandate manufacturers to provide repair manuals and spare parts, amend the Copyright Act for digital device repairs and consider introducing a 15% tax credit for repair costs up to \$500 for home appliances.<sup>21</sup>

On October 18, the House of Commons unanimously passed Bill C-244, a private member's bill to reinforce the RTR. The bill proposes changes to the Copyright Act, allowing individuals to bypass technological protection measures (TPMs) when maintaining or fixing a product.<sup>22</sup>

## IX. RIGHT TO REPAIR IN THE UK

The Right to Repair law in the UK was enacted in July 2021 and targets extending the lifespan of various electronics and appliances by potentially up to ten years. Mandated by this law, manufacturers are legally obliged to provide spare parts to both consumers and third-party repair entities. The law currently encompasses dishwashers, washing machines, washer-dryers,

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<sup>19</sup> An Act to amend the Consumer Protection Act, 2002, respecting the repair of electronic products, 2019, Legis. Assembly. Ont. Bill [72] (Can.), (April 07, 2025), <https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-72/>.

<sup>20</sup> *Supra* note 17.

<sup>21</sup> *Ibid.*

<sup>22</sup> Caludette Van Zyl, Right-to-repair bill passes unanimously at House of Commons,(April. 07, 2025), <https://www.nortonrosefulbright.com/en-ca/knowledge/publications/11c47b23/right-to-repair-bill-passes-unanimously-at-house-of-commons#:~:text=On%20October%2018%2C%20the%20House,maintaining%20or%20repairing%20a%20product.>

refrigeration appliances, televisions and electronic displays, aiming to promote reparability and reduce electronic waste in these specific product categories.

## **X. RIGHT TO REPAIR IN INDIA**

Presently, there is no specific legislation related to the RTR in India, which makes precedents the ultimate torch-bearers of this right in our country. However, according to the Ministry of Consumer Affairs,<sup>23</sup> a committee<sup>24</sup> has recently been constituted by the Department of Consumer Affairs to establish frameworks on RTR and to highlight the LiFE<sup>25</sup> (Lifestyle for the Environment) movement through sustainable consumption. The framework, as it would be implemented, is promoted as a significant step towards Aatmnirbhar Bharat (Self-reliant India) and enhancing employment generation. The Committee held its first meeting on 13<sup>th</sup> July 2023, during which important areas for the RTR have been recognized like mobile phones, tablets, consumer durables and automobile equipment.<sup>26</sup> This committee aims to develop harmonised trade between original equipment manufacturers and third-party buyers and sellers, empowering consumers and product buyers in local markets. Above all this committee also seeks to reduce E-waste.<sup>27</sup> The Committee has drawn the following conclusion –

- Firstly, Businesses should avoid issuing guides for easy repairs to protect owners' legal rights.

<sup>23</sup> Home, Dep't of Consumer Affs., Ministry of Consumer Affs. Food & Pub. Distribution, Gov't of India, (April 06, 2025), <https://consumeraffairs.nic.in/>.

<sup>24</sup> This Committee is headed by Nidhi Khare, Additional Secretary, DoCA, MoCA, F&PD. Other committee members are Sri Anupam Mishra, Joint Secretary, Justice Pramjeet Singh Dhaliwal, Former Judge of Punjab, and Haryana High Court etc.

<sup>25</sup> Life Movement - PM (Narendra Modi) recently announced this Movement (LiFE) in India in June 2022, which emphasised reusing and recycling various consumer products.

<sup>26</sup> Team, Affairs Cloud, Dep't of Consumer Affs. Sets Up Comm. to Develop a Comprehensive Framework on the Right to Repair, AffairsCloud.com (July 16, 2022), (April 04, 2025), <https://affairscld.com/department-of-consumer-affairs-sets-up-committee-to-develop-comprehensive-framework-on-the-right-to-repair/>.

<sup>27</sup> Dep't of Consumer Affs. sets up a comm. to develop a comprehensive framework on the Right to Repair, Press Info. Bureau (April 8, 2025), <https://pib.gov.in/PressReleasePage.aspx?PRID=1841403>.

- Secondly, Manufacturers' monopoly on replacement parts violates customer's "right to choose."
- Thirdly, Digital Warranty Cards prevent warranty claims from "non-recognized" companies.
- Fourthly, India has a healthy market for third-party repairs and services, including companies recycling products for the circular economy.

In this context, *Shamsher Kataria v. Honda Sael Cars India Ltd*<sup>28</sup> upheld the Right to Repair, and the Competition Commission of India ruled that restricting access to spare parts for independent auto repair units is anti-competitive.<sup>29</sup> The former Competition Appellate Tribunal (COMAT) found that OEMs<sup>30</sup> implemented this practice to ensure only authorized suppliers could service cars. Although COMPAT did not declare the Right to Repair universally recognized, it considered any restrictions used by dominant enterprises to gain market control an abuse of dominance under the Competition Act of India, 2002. The judgment affirmed that the ban by OEMs not only affects independent repairers but also harms consumer welfare by hindering their right to cost-effective repairs.<sup>31</sup> The Delhi High Court in *Tekla Corporation v. Anil Srivastava*<sup>32</sup> pointed out that there cannot be any contractual restrictions or limitations to consumers' rights to use a product after purchase.<sup>33</sup> The *Sanjeev Nirwani v. HCL*,<sup>34</sup> case highlighted the need for OEMs to provide spare parts and consumable items for laptops even after a warranty period. However, drafting Right to Repair legislation in India is crucial due to unchecked aftermarkets and secondary markets. Traditional auto parts industries recognize the Right to Repair, but

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<sup>28</sup> 2014 SCC online CCI 95.

<sup>29</sup> G.S. Bajpai et al., *Upholding the Right to Repair*, *Indian Express* (Apr. 19, 2022), (April 14, 2025), <https://indianexpress.com/article/opinion/columns/upholding-the-right-to-repair-apple-products-7875632/>.

<sup>30</sup> Original Equipment Manufacturers.

<sup>31</sup> Guest, *The Need for a "Right to Repair" in India*, *India Corp Law* (Nov. 28, 2021), (May 01, 2025), <https://indiacorplaw.in/2021/11/the-need-for-a-right-to-repair-in-india.html>.

<sup>32</sup> CS (COMM) 440/2016 & IAS No. 18819-20/2014.

<sup>33</sup> *Tekla Corporation v. Anil Srivastava*, CS(COMM) 440/2016

<sup>34</sup> DELHI- 92 CC NO. 618/2014.

digital markets make it difficult to distinguish between them. Legislation should balance IP protection and market competition. The Draft E-Commerce Rules, 2021 aims to highlight this, but Covid-19 has hindered progress.<sup>35</sup> The Supreme Court in *C.N. Anantharaman v. Fiat India Ltd. & Ors*,<sup>36</sup> ruled that if an independent technical expert identifies manufacturing defects in a vehicle, the customer can receive a refund, lifetime tax, EMI, interest 12% per annum, and costs. This decision upholds higher standards of product liability in India due to industrial growth and diverse manufacturers.<sup>37</sup>

## XI. NEED FOR THE LAW ON THE RIGHT TO REPAIR IN INDIA

E-waste is increasing in the country due to old goods and gadgets. There are about one million tons of e-waste in India every year. As a result, it pollutes the air, water and soil directly. Moreover, there are many problems faced by the consumer in the absence of RTR: -

- **Affecting Livelihood:** It is quite challenging to exist in the current world without using the necessary technology and gadgets that have ingrained themselves into daily life. The authorised service centres of reputable businesses take their time to repair, which is the exact opposite of what you wanted them to accomplish. A component that can be fixed by your neighbour next door in a few hours to a day takes around a week to fix itself.<sup>38</sup>
- **Charging High Cost of Repair:** An appliance would have been purchased with a substantial portion of one's savings, and to further repair it outside of the warranty, one would need to pay an extensive

<sup>35</sup> *Sanjeev Nirwani v. HCL*, Delhi- 92 CC NO. 618/2014.

<sup>36</sup> AIR 2011 SC 523, JT 2011 (1) SC 20.

<sup>37</sup> *C.N. Anantharaman v. Fiat India Ltd. & Ors*, AIR 2011 SC 523, JT 2011 (1) SC 20

<sup>38</sup> Abhay Pachauri, *What You Can Repair Is What You Own*, Vikalp Sangam (July 27, 2021), (May 13, 2025), <https://vikalpsangam.org/article/what-you-can-repair-is-what-you-own/>.

<sup>39</sup> Roger Harrabin, *The EU Brings in "Right to Repair" Rules for Appliances*, BBC News (Sept. 30, 2019), (May 16, 2025), <https://www.bbc.com/news/business-49884827>.

amount from one's salary. In the general market, such repairs are much less expensive than the excessive prices charged by the company's service centre.<sup>39</sup>

- **Conveyance Cost:** Some manufacturers add a certain characteristic to their product. Only that manufacturer can handle problems relating to that feature, and doing so will cost the owner a higher price.<sup>40</sup>
- **Monopoly Formation:** Such regressive business practices lead to unhealthy market competition. This pits one manufacturer against another, creating a monopoly that they can take advantage of to better control the flow of the goods they make into the market. By stopping the creation of the required parts, they can manage the supply by letting the product expire.

That is why the Right to Repair is important for several reasons. First, it promotes sustainability by extending the lifespan of products and reducing electronic waste. Thus, it will help to reduce E-Waste. Second, it empowers consumers by giving them control over their devices and reducing their dependence on manufacturers and service providers. Third, it promotes competition by allowing independent repair shops to compete with authorized service centres, which can lead to lower prices and better service. Above all, it will save the money of the consumers.

## **XII. ANALYSIS OF THE RESPONSES TO THE SURVEY QUESTIONNAIRE**

Our questionnaire focused on the Right to Repair and Consumer Protection laws, with a specific emphasis on India, the USA, and the European Union. We collected 173 responses from diverse locations, age groups, and genders. This research aimed to gain insights into public opinions and experiences related to these laws, shedding light on the perceptions and needs of individuals in different regions and demographics.

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<sup>40</sup> Kyle Wiens & Elizabeth Chamberlain, *John Deere Just Cost Farmers Their Right to Repair*, Wired (Sept. 19, 2018), (May 17, 2025), <https://www.wired.com/story/john-deere-farmers-right-to-repair/>.

**XII. (i) Awareness of Rights to Repair:**

The data represents that and based on the responses received, 77.5 per cent of the respondents indicated that they have heard about the law, while 22.5 per cent stated that they had not. This indicates that most of the participants are familiar with the Right to Repair law, suggesting a level of awareness or knowledge regarding this legislation.

**XII. (ii) Rights to repair as a consumer Rights:**

The Right to repair as a data representation from 173 participants, 92.5 per cent of the respondents agreed that the Right to Repair is an essential consumer right, while only 7.5 per cent disagreed. This high percentage of respondents supporting the notion that the Right to Repair is an essential consumer right suggests a strong belief in the importance of consumers' ability to repair and maintain their products.

**XII. (iii) Issue related to access to rights to repair of electronics devices:**

As per the discussion on the access issue related to rights to repair whereby to 173 participants. Out of these respondents, 83.8 per cent answered affirmatively, indicating that they have encountered problems with repairing their personal electronic devices. Conversely, 16.2 per cent of the participants stated that they have not faced any such issues. This high percentage of individuals experiencing difficulties with device repairs suggests that a significant portion of the sample has encountered obstacles or challenges in getting their electronic devices fixed.

**XII. (iv) Lack of Availability of Information leads to access to Rights to Repair:**

The 173 participants, 85.5 per cent answered affirmatively when asked if they had ever experienced a situation where they were unable to repair or modify a product, they owned due to a lack of available information, parts, or tools.

Conversely, 14.5 per cent responded negatively, indicating that they had not encountered such limitations in their repair or modification attempts.

#### **XII. (iv) (a) Right to repair and charges:**

As per the data received responses from 173 participants. Among them, 26.6 per cent answered “yes,” indicating their willingness to pay a higher price for a product that includes repair resources. On the other hand, 35.3 per cent responded “no,” indicating their unwillingness to pay extra for such a product. A significant portion of participants, 38.2 per cent, chose the option “maybe,” suggesting their uncertainty or need for further consideration before deciding. This indicates a mixed sentiment regarding the willingness to pay more for products that provide repair support.

#### **XII. (iv)(b) Rights to repair law help to reduce electronic waste:**

The received responses from 173 participants. Among them, an overwhelming majority of 97.1 per cent answered “yes,” indicating that they believe the Right to Repair law can contribute to reducing electronic waste. Only 2.9 per cent responded “no,” suggesting a minority opinion that the law may not be effective in addressing electronic waste concerns. These results highlight strong support for the idea that the Right to Repair legislation has the potential to positively impact electronic waste reduction efforts.

#### **XII. (iv) (c) Complaint before redressal agency for protection of consumers rights**

The research found that a significant majority of participants have taken the step to file a complaint, suggesting a level of dissatisfaction or concern with a product or service that warranted legal intervention or support from consumer protection agencies.

## **XII. (iv) (d) Rights to repair and consumer protection laws**

According to 173 responses, an overwhelming majority of 99.4 per cent answered “yes” when asked whether they think the Right to Repair and Consumer Protection laws are necessary in today’s world. Only a small fraction of 0.6 per cent responded “no.” These results indicate a strong consensus that these laws are deemed essential in the current societal and consumer landscape. Based on the responses of 173 participants, several approaches were suggested to ensure the protection of the Right to Repair. The highest percentage, 46.8 per cent, highlighted the importance of consumer education to increase awareness and knowledge about repair options. 34.1 per cent emphasised the need for more legislation to establish and enforce the RTR regulations. 13.3 per cent mentioned industry cooperation as a crucial factor, indicating collaboration between manufacturers and repair professionals. A small percentage expressed support for various combinations of these approaches, including legislation, consumer education, industry cooperation, and quick redressal of complaints. Overall, the responses emphasised the importance of legislative measures, consumer education, industry cooperation, and addressing the environmental impact of electronic waste.

## **XII. (iv) (e) Rights to repair encompasses multiple benefits:**

Based on the responses of 173 participants, the majority, 80.9 per cent, believed that the Right to Repair encompasses multiple benefits, including reducing electronic waste, saving consumers money, encouraging innovation, and increasing the lifespan of electronic devices. This indicates a recognition of the holistic advantages associated with the Right to Repair. A smaller percentage of respondents emphasised specific benefits, such as boosting business for small repair shops or the additional impact of saving the environment from global warming. Overall, the responses highlight the broad spectrum of benefits attributed to the Right to Repair, ranging from environmental considerations to economic advantages and technological progress.

## **XII. (iv) (f) Need to improvement of the rights to repair and consumer protection laws:**

After analysing the suggestions from the 173 respondents, several recommendations emerged to improve the Right to Repair and Consumer Protection laws in India: Some recommendations include increasing consumer awareness through education programs, implementing more product repair legislation, enforcing manufacturers' responsibility to provide repair manuals, spare parts, and tools, setting time limits for affordable repair options, improving the grievance redressal system, encouraging industry cooperation, focusing on sustainability and reducing electronic waste, simplifying laws, extending warranty and guarantee periods, establishing customer-friendly service centers, involving the government in seeking public opinions, promoting reuse, recycling, and reducing E-waste, enhancing government policies against non-compliance, and providing compulsory repair services and reasonably priced parts. Future implementation of the RTR in India should be evaluated, and dedicated legislation should be introduced to protect it. Consumer education on the benefits of the Right to Repair should be promoted, and dispute resolution mechanisms should be established to reduce litigation. Legal backing for the Right to Repair framework should be ensured through legislation, and local repair shops should be supported and encouraged. Promoting the Right to Repair can eliminate additional expenses for consumers, and collaboration with other jurisdictions can help protect national interests.

## **XIII. FINDINGS OF THE RESEARCH**

The study revealed a high level of awareness among the participants regarding the Right to Repair. A substantial majority acknowledged it as a vital consumer right, with many of them having first-hand experience of the difficulties involved in repairing electronic devices like smartphones, laptops, and tablets. These difficulties often stemmed from the unavailability of essential repair tools, spare parts, or technical information issues that pointed to the manufacturers' dominant control over post-sale repair

options. Participants also expressed concerns over being unable to fix or modify their products due to these limitations. Such responses highlight a broader sentiment about the lack of autonomy consumers feel after purchasing a product, suggesting a need for stronger legal backing to empower user ownership and control. Interestingly, opinions varied when it came to paying extra for products designed with repairability in mind. While a portion of respondents showed willingness to bear higher costs for easy-to-repair products, a notable segment remained unsure or hesitant, indicating that affordability remains a significant concern even when consumers value durability and repair access. Another strong consensus emerged around the environmental benefits of RTR. Almost all respondents agreed that giving consumers the right to repair their devices could significantly help in curbing electronic waste. This view aligns with global concerns about sustainability and the mounting environmental impact of e-waste, particularly in developing countries. The data also showed that a good number of participants had taken action by lodging complaints with consumer forums or legal bodies, reflecting a rising consciousness about consumer rights and the importance of legal remedies. Furthermore, there was near-unanimous support for the idea that manufacturers should be compelled to provide spare parts and repair manuals to consumers and third-party repairers. Respondents believed such obligations would not only strengthen consumer rights but also foster a more competitive and transparent repair market.

In terms of improving RTR legislation and enforcement, participants offered thoughtful suggestions. Many emphasised the role of consumer education in spreading awareness. Others stressed the need for concrete legislative frameworks and better cooperation between manufacturers and independent repair services. Several participants pointed out that an efficient grievance redressal system would encourage more consumers to seek help and enforce their rights. A large majority of respondents recognised multiple benefits of the Right to Repair movement—from reducing e-waste and extending product life to supporting local repair businesses and minimising repair costs. This holistic understanding indicates a growing shift in consumer

priorities toward sustainability and autonomy. Thus, the findings clearly demand more inclusive and enforceable repair rights. Consumers not only want the freedom to repair but also expect supportive infrastructure, fair pricing, and government accountability in making repairability a norm rather than an exception. These insights build a strong case for urgent legal reforms in India, with lessons drawn from models in the US and the European Union.

#### **XIV. CONCLUSION AND SUGGESTIONS**

The Right to Repair is a legal and ethical concept that empowers consumers by allowing them to repair their old products themselves or seek repair services from independent technicians. This movement promotes consumer protection, fights against planned obsolescence, ensures access to repair information and spare parts, and contributes to reducing electronic waste. It encompasses principles of ownership and control, access to repair documentation and parts, a fair repair market, and environmental sustainability. The RTR has global implications, with examples from the United States, the European Union, and India. The US has legislative efforts to establish the RTR, while the EU has implemented rules and directives to promote repairability, reduce waste, and empower consumers. In India, efforts are underway to recognise and establish the RTR through committee discussions and legal precedents. The need for the RTR in India is significant due to the rise of electronic waste, challenges in repair availability, high repair costs, and monopolistic practices. This movement can address these issues by promoting consumer rights, sustainability, competition, and reduced electronic waste, aligning with the global trend towards environmental protection and responsible consumption. The RTR is not only about fixing products but also about empowering consumers, promoting sustainability, and challenging monopolistic practices. By ensuring access to repair resources and information, consumers can make informed decisions, extend product lifespans, and contribute to a more equitable, sustainable, and environmentally conscious future.

Based on the analysis, it can be concluded that there is significant support for the Right to Repair and Consumer Protection laws among the responses. The majority of participants were aware of the Right to Repair law and believed it to be an essential consumer right. Many individuals reported difficulties in repairing personal electronic devices, highlighting the need for better accessibility to repair resources. Additionally, there was a mixed sentiment regarding the willingness to pay more for repairable products. The overwhelming majority believed that manufacturers should be obligated to provide repair manuals and parts, and there was strong support for the necessity of these laws in today's world. The recommendations provided by the respondents emphasised the importance of consumer education, legislative improvements, industry cooperation, and sustainable practices to enhance the Right to Repair and Consumer Protection laws in India. Overall, the findings indicate a belief in the importance of consumers' Right to Repair and the need for measures to address electronic waste and protect consumer interests. Thus, the Right to Repair is a powerful tool for protecting the environment. By promoting repairability, we can reduce waste, conserve resources, stimulate local economies, encourage innovation, and mitigate the negative impact of electronic waste. Recognizing and supporting the Right to repair is a crucial step towards a more sustainable and environmentally conscious society.

### **SUGGESTIONS:**

In the light of the above discussion on the various provisions of the Right to Repair, the following suggestions -

1. Customer-friendly repair service centres should be established.
2. Consumers should ensure legal backing for the Right to Repair framework through legislation.
3. Manufacturers should provide compulsory repair services and parts for a defined period at a reasonable price.

4. Framing of policy on repair is required, and provisions for strict actions against manufacturers to be made who do not comply with the necessary repair.
5. Awareness programmes of the Right to Repair among consumers to be made through various programmes like conferences, seminars and similar other information on electronic and print media.
6. Support and encourage local repair to be made through schemes that provide them with licensing.
7. Manufacturing companies must provide repair manuals, spare parts and tools for their products.
8. Recycling culture and rewarding repairability must be promoted.

# COMMERCIALIZATION OF TRADITIONAL CULTURAL EXPRESSIONS: LEGAL AND ETHICAL ISSUES

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## ABSTRACT

*Commercializing traditional cultural expressions (TCEs) presents significant legal and ethical challenges. This article examines the issues associated with the economic exploitation of TCEs in the global market, including the risk of cultural appropriation, misrepresentation, and the equitable distribution of benefits. It critically analyzes the effectiveness and limitations of the prevailing intellectual property framework, international conventions, and sui generis system for preserving TCEs. By examining case studies and international practices, the paper also clarifies the ethical issues, including consent, representation, and the need to protect indigenous peoples' cultural integrity. It so advocates a sui generis system with an emphasis on ethical concerns for the balanced protection of cultural legacy and ensuring that commercialization efforts are equitable, respectful, and beneficial to the communities.*

**Keywords:** *Traditional Cultural Expressions, Commercialization, Protection, Intellectual Property, Appropriation, Misrepresentation.*

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## I. INTRODUCTION

Traditional Cultural Expressions (hereinafter TCEs) are more than simple decorative elements and an important component of a community's identity and uniqueness and are often closely associated with its ethnicity. Such cultural expressions are handed down from one generation to another and serve as a reflection of the social and cultural character of a community<sup>1</sup>, but nowadays, due to the inadequacy of the existing IP regime, it has offered an opportunity for multinational corporations and big industrial houses to commercially exploit these knowledge for their economic benefits. TCEs represent a manifestation of the traditional knowledge and cultural practices inherent to indigenous communities. It has a strong relationship with indigenous cultures, religious traditions, and the community's economy.<sup>2</sup> Since the current IP regulations classify this information as unowned or in the public domain, third parties are allowed to exploit it through the appropriation and commercialization of indigenous knowledge. Several efforts have been made at the international and national levels to protect the TCEs, but no consensus has been achieved on such protection.

Currently, there is no globally recognized definition of TCEs, although there are two international instruments that mention them expressly. However, these instruments do not define the term TCEs. The first instrument, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (hereinafter CCD), was adopted by the United Nations Educational, Scientific and Cultural Organization (hereinafter UNESCO) in 2005.

The CCD introduces the concept of TCEs and emphasizes their cultural and economic significance for indigenous populations; however, it fails to provide any substantive protection for these expressions. The second

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<sup>1</sup> Ann Rose Jojo, *Protection against Cultural Misappropriation: Analysis of Intellectual Property Law in India and the International Scenario* 4(2) Int. J. Law Manag. Humanit 2968, 2971(2021).

<sup>2</sup> Rajnish Kumar Singh, *Protection of Traditional Cultural Expressions/ Folklore: International and National Perspective* 8 DLR 19, 20 (2016).

instrument, the United Nations Declaration on the Rights of the Indigenous Peoples (hereinafter UNDRIP), adopted in 2007, recognizes numerous rights of people of indigenous backgrounds. Article 31 of the UNDRIP connects traditional knowledge and cultural heritage to TCEs.<sup>3</sup>

These documents encourage states to establish legal frameworks that safeguard TCEs, which is consistent with current intellectual property laws. Such frameworks would allow indigenous communities to pursue legal actions for injunctions and financial restitution in cases of unauthorized use of their traditional knowledge. Furthermore, they propose a broader definition of protectable subject matter compared to existing intellectual property legislation, urging states to refrain from granting patents, copyrights, or other exclusive rights over “any aspect of indigenous heritage” unless there is a provision for “shared ownership, control, use, and benefits” with the indigenous peoples.<sup>4</sup> TCEs can sometimes be misrepresented and exploited, often utilized without regard for their inherent meanings or the cultural significance associated with them. In the absence of effective legal frameworks to safeguard TCEs at both national and international levels, their cultural and religious relevance is likely to diminish. This study aims to develop a fundamental understanding of TCEs, encompassing their cultural, social, and economic significance for indigenous communities. This paper presents a comprehensive analysis of existing intellectual property law to evaluate its effectiveness and limitations in protecting TCEs. Additionally, it investigates the ethical considerations associated with the commercialization of TCEs and provides an analysis of several case studies, highlighting both the positive and negative aspects of TCE commercialization.

## II. UNDERSTANDING TRADITIONAL CULTURAL EXPRESSIONS

Since the final decade of the 20th century, the global community has begun to emphasize the existing intellectual property regulations aimed at

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<sup>3</sup> Lily Martinet, *Traditional Cultural Expressions, and International Intellectual Property Law* 47 Int. J. Leg. Inf. 6, 7 (2019).

<sup>4</sup> LAURENCE R. HELFER and GRAEME W. AUSTIN, *HUMAN RIGHTS AND INTELLECTUAL PROPERTY MAPPING THE GLOBAL INTERFACE* 50 (Cambridge University Press, 2011).

safeguarding, promoting, and securing traditional knowledge (TK) and TCEs. Over time, a range of alternative terms has been employed by scholars and commentators to refer to TCEs, including 'folklore,' 'expression of folklore,' 'indigenous culture,' 'indigenous heritage,' and 'traditional cultural expression.'<sup>5</sup>

TCEs emerge from the imaginative output of individuals who live in a specific geographic region, united by a shared language, culture, means of sustenance, and living environment. TCEs arise from the innovative thoughts of individuals, which are expressed through verbal communication, art forms, or physical artifacts. This cultural expression is then passed down across generations, either verbally, in writing, or through various other channels. It encompasses the traditions of literate and non-literate communities, including tribal and non-tribal and rural and urban populations.<sup>6</sup> These expressions often embody culture-specific meanings that reflect a community's historical background, spiritual beliefs, and artistic traditions. They also demonstrate reverence for the land and contribute to preserving and continuing cultural heritage. In indigenous and traditional folk communities, customary cultural expressions often carry significant importance and symbolism, frequently playing an integral role in people's everyday lives.<sup>7</sup> TCEs are essential in forming community identity and safeguarding cultural legacy. These expressions encompass various art forms such as music, dance, spoken traditions, handicrafts, ceremonies, and other creative manifestations transmitted across generations. TCEs contribute to community identity, cultural resilience and social cohesion.

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<sup>5</sup> DAPHNE ZOGRAFOS, INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS 2 (Edward Elgar Publishing Limited, 2010).

<sup>6</sup> Anuttama Ghose & S.M. Aamir Ali, *Protection and Preservation of Traditional Cultural Expressions & Traditional Knowledge in Handicraft Industry: Advocating a Need for Global Cultural Policy Framework* 20(2) Revista De Direito Internacional Braz. J. Int'l. L. 472, 475 (2023).

<sup>7</sup> Librarianship and Traditional Cultural Expressions: Nurturing Understanding and Respect, [https://www.ala.org/sites/default/files/membership/content/librarianship\\_and\\_traditional\\_cultural\\_expressions\\_nurturing\\_understanding\\_and\\_respect\\_jan2010.pdf](https://www.ala.org/sites/default/files/membership/content/librarianship_and_traditional_cultural_expressions_nurturing_understanding_and_respect_jan2010.pdf) (last visited Nov. 6, 2024).

## II. (i) Protection from what?

Most cultural expressions are normally transmitted within communities through oral manifestation, which is not fixed. These communities consider their knowledge an instrument for manifesting their culture, history, and religion.<sup>8</sup> By manifesting them, indigenous communities maintain their spiritual links with their land and communities. By preserving the cultural expression of the communities, it is possible to sustain their traditional lifestyle and cultural values. Cultural expressions are viewed as components of the public domain, thus making them susceptible to commodification and appropriation without the consent or benefit of the communities. Safeguarding TCEs enables indigenous and local communities to engage in wealth generation and sustainable economic progress, which encompasses the advancement of fair benefit-sharing from the utilization of TCEs.<sup>9</sup>

## II. (ii) Commercialization of TCEs

Globalization has increased interconnectivity to every corner of the globe, consequently threatening the cultural inheritance of indigenous populations. TCEs have been subjected to widespread commercial exploitation and have become a valuable source material for the fashion, art, and craft industries, as well as for new songs, films, and other products. This exploitation often occurs without acknowledgement of the source of inspiration or any economic benefit accruing to the preservers of these cultural expressions. Furthermore, these derivative products frequently offend the social, cultural, and religious sensibilities of the communities from which they originate.<sup>10</sup> Apart from the commercial exploitation, there are several instances when the

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<sup>8</sup> LUO LI, INTELLECTUAL PROPERTY PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS: FOLKLORE IN CHINA 27 (Springer 2014).

<sup>9</sup> Alberto Vargas, *WIPO's Proposed Treatment of Sacred Traditional Cultural Expressions as a Distinct Form of Intellectual Property*, CHICAGO JOURNAL OF INTERNATIONAL LAW (Nov. 6, 2024, 12:18 PM), <https://cjl.uchicago.edu/print-archive/wipos-proposed-treatment-sacred-traditional-cultural-expressions-distinct-form>.

<sup>10</sup> P.V. Valsala G. Kutty, 'National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia, and the Philippines' 33 WIPO (2002).

art of indigenous people is misappropriated by public figures such as rock musician Robbie Williams and boxer Mike Tyson have both showcased tattoos inspired by Māori designs, Kim Kardashian braids hairstyle, and there are several sports teams across the world which uses the name, mascots, & logos of the indigenous peoples.

The expansion of the tourism industry has led to an increased interest in indigenous arts and crafts, thereby creating opportunities for third parties to replicate these products. Consequently, local artisans have been deprived of a reliable source of income, and in numerous instances, these imitated products have been deemed offensive. Commercializing TCEs will remove the deeper understanding or meaning associated with the indigenous products, they will be presented as exotic or aesthetic products, stripping them of their spiritual and religious significance.

The commercialization of innovations and traditions derived from TCEs, when authorized by the relevant communities, has the potential to generate economic opportunities for said communities by facilitating trade and contributing to their sustainable economic development.<sup>11</sup> Commercializing TCEs can increase cultural awareness and appreciation for different cultures across the globe by increasing curiosity among the public and can boost the preservation of TCEs, which are at risk of fading away. It will encourage the younger generations of the communities to learn & preserve their traditional skills and knowledge.

## **II. (iii) Legal Issues**

The inadequacy of the existing intellectual property system justifies indigenous communities' claims to safeguard TCEs.<sup>12</sup> The IP system treats TCEs as unowned, enabling their exploitation by third parties. The discourse

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<sup>11</sup> KAMIL IDRIS, INTELLECTUAL PROPERTY A POWER TOOL FOR ECONOMIC GROWTH 241 (WIPO Publication, 2003).

<sup>12</sup> Molly Torsen, *Anonymous, Untitled, Mixed Media: Mixing Intellectual Property Law with Other Legal Philosophies to Protect Traditional Cultural Expressions* 54(1) Am. J. Comp. L. 173, 179 (2008).

surrounding TCEs and the IP framework has underscored the limitations of current IP regulations in meeting the various needs and expectations of TK holders. Nevertheless, existing IP laws can serve to protect against certain forms of exploitation and misappropriation of TCEs. Nonetheless, it may be necessary to adapt or modify IP legislation to enhance its efficacy.<sup>13</sup> Since TCEs are owned collectively by communities instead of individuals, this is frequently cited as a significant challenge in the preservation of TCEs within IP systems.

## II. (iv) Copyright

Many TCEs that seek protection under the copyright law fall under the literary and artistic domain. Examples of TCEs that may qualify for copyright protection encompass a range of artistic forms, including music, songs, dances, theatrical performances, narratives, ceremonies, rituals, as well as various crafts like drawings, paintings, carvings, pottery, mosaics, woodworking, metalwork, needlecraft, and textiles.<sup>14</sup>

Copyright law protection for a work hinges on meeting various criteria, many of which are relate to the aspects of originality, identifiable authorship, fixation, and a specified duration of protection. TCEs often struggle to fulfill the originality requirement, as they consist of long-standing, multigenerational knowledge and it is impossible to trace their original author.<sup>15</sup> Indigenous people desire indefinite protection for their TCEs, and copyright does not meet their needs.<sup>16</sup> TCEs transmitted and perpetuated through oral traditions encounter another obstacle, as copyright law requires

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<sup>13</sup> Khaing San Thwe, *Protection of Traditional Cultural Expressions (TCEs) by means of IP Rights* 7(1) DURJ 69, 72 (2016).

<sup>14</sup> Richard Awopetu, *In Defense of Culture: Protecting Traditional Cultural Expressions in Intellectual Property* 69 ELJ 745, 777 (2020).

<sup>15</sup> WIPO, *INTELLECTUAL PROPERTY, TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE: A GUIDE FOR COUNTRIES IN TRANSITION* 11 (WIPO Publication, 2013).

<sup>16</sup> Nenny Dwi Ariani, Rohaini, & Sunaryo, *Legal Protection of Traditional Cultural Expression as a Copyright in Indonesia* 628 ASSEHR 579, 581(2021).

the fixation of expressions to be in tangible form.<sup>17</sup> Furthermore, the conventional copyright system is inadequate for protecting TCEs because it focuses on individual ownership, whereas TCEs are collectively owned by entire communities.<sup>18</sup>

## II. (v) Trademark

In recent decades, indigenous names, signs, and symbols have been used more frequently in trade and business by non-indigenous people and companies. Primarily, there exist two forms of marks: certification marks and collective marks, which serve to safeguard against the unauthorized use and commercialization of TCEs.<sup>19</sup> A certification mark is used as a guarantee for the authenticity of the products, material, quality, place of origin, or other characteristics. On the other hand, members of a corporation or association utilize a collective mark to set their products or services apart from those offered by other organizations. Several nations across the globe use collective and certification marks to promote products based on TCEs. There are several cases where certification and collective marks have prevented the unauthorized use of TCEs and helped to preserve the cultural integrity of the community. Some notable examples are New Zealand's Toi Iho Maori trademark,<sup>20</sup> the Craftmark for handmade crafts in India,<sup>21</sup> and the Alaska Silver Hand Program in Canada.<sup>22</sup> Trademarking indigenous names, symbols, and signs can have dual benefits firstly, it will boost consumer

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<sup>17</sup> PETRE DRAHOS and SUSY FRANKEL, *INDIGENOUS PEOPLES' INNOVATION INTELLECTUAL PROPERTY PATHWAYS TO DEVELOPMENT* 575 (Australian National University E Press, 2012).

<sup>18</sup> LILY MARTINET, *supra* note 3, at 11.

<sup>19</sup> Murphy Yanbing Chen, *Safeguarding Traditional Knowledge and Traditional Cultural Expression Through Intellectual Property Systems*, Center for Art Law (Nov. 8, 2024, 2:05 PM), <https://itsartlaw.org/2023/02/01/safeguarding-traditional-knowledge-and-traditional-cultural-expression-through-intellectual-property-systems/>.

<sup>20</sup> Daphne Zografos, *New Perspectives for the Protection of Traditional Cultural Expressions in New Zealand* 36(8) ICC 1, 23 (2005).

<sup>21</sup> Craftmark Hand Made in India, Home - Craftmark (last visited Nov. 9, 2024).

<sup>22</sup> Alaska State Council on the Arts, Alaska State Council on the Arts - Alaska State Council on the Arts (last visited Nov. 9, 2024).

awareness of genuine indigenous products secondly, it will confer economic benefits to the community.<sup>23</sup>

## II. (vi) Geographical Indication

TCEs can be effectively safeguarded using Geographical Indications (GIs), especially when they are closely associated with a particular location, possessing distinctive qualities, and notable reputation linked to their place of origin. For a sign to be classified as a GI, it must convey that a product comes from a specific geographical area.<sup>24</sup> GIs can be applied to a diverse array of products, encompassing those that are manufactured, natural, and agricultural. Like GI, TCEs are closely associated with specific regions or localities.<sup>25</sup> GI tags are often granted to products that require traditional skills and knowledge for their creation and these skills and knowledge are passed down through generations within a community in a particular area.

The nature of GIs aligns well with TCEs, as they provide indefinite protection if a distinctive connection between the products and their place of origin persists. This protection can extend to tangible items like handicrafts, which possess unique qualities or characteristics stemming from their geographical roots.<sup>26</sup> Some examples of registration of TCEs as GIs are:

- MADEIRA embroidery from Portugal,
- Blue Mountain Coffee from Jamaica,
- Banarasi Brocades and Sarees from India, etc.

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<sup>23</sup> WIPO, *supra* note 15, at 14.

<sup>24</sup> Geographical Indications, Geographical Indications: What do they specify? (wipo.int) (last visited Nov. 11, 2024).

<sup>25</sup> WIPO Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions, Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions. (wipo.int) (last visited Nov. 11, 2024).

<sup>26</sup> WIPO, INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS 15 (WIPO Publication, 2020).

## **II. (vi) Industrial Design**

Industrial design can play a vital role in safeguarding the visual and decorative elements of a product based on TCEs. Several TCEs, such as costumes, garments, carpets, carvings, sculptures, pottery, and woodwork, may be potentially protected by industrial design. However, the design must be unique or inventive to qualify for registration as an industrial design. Once the TCEs are registered as industrial designs, the protection is for a fixed time; the design will be disclosed to the public.<sup>27</sup> Such protection for sacred or secret traditional designs is inappropriate.

## **III. INTERNATIONAL FRAMEWORKS**

International organizations play a significant role in protecting TCEs. These organizations help to protect, preserve, and promote TCEs by implementing various strategies, legal frameworks, and advocacy efforts. Here are some international organizations, treaties, and conventions that play a key role in protecting TCEs:

### **III. (i) TCEs Under the World Intellectual Property Organization (WIPO)**

The creation of a robust legal framework for the protection of TCEs is a central aim of WIPO. Numerous indigenous communities and member countries of WIPO have called for a comprehensive legal mechanism to secure these expressions, as the existing IP system fails to offer sufficient protection.<sup>28</sup> To tackle these issues, WIPO formed the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (IGC).<sup>29</sup> This committee has undertaken various research initiatives and assessed the challenges that indigenous populations

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<sup>27</sup> Sameer Kumar Swarup and Sachin Rastogi, *Industrial Designs and Folklore: A Comparative Study in Indian Perspective*, 28 JIPR 273, 276 (2023).

<sup>28</sup> WIPO, *supra* note 15, at 44.

<sup>29</sup> WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (IGC), <https://www.wipo.int/tk/en/igc/> (last visited Nov. 14, 2024).

encounter in safeguarding their cultural heritage within the context of intellectual property. The inaugural session of the IGC occurred in 2001, and additional sessions have taken place from 2001 through 2024.<sup>30</sup> Ongoing discussions are focused on finalizing the definition of TCEs, the parameters of protection, along with exceptions, limitations, sanctions, and remedies designed to prevent the misappropriation and misuse of TCEs,<sup>31</sup> all based on the committee's draft articles titled "The Protection of Traditional Cultural Expressions."<sup>32</sup>

However, during the process of reaching a consensus on the negotiating texts, certain challenges emerged. These included a lack of understanding about the document's character particularly whether it would be a flexible international agreement without binding obligations for member states or be a legally obligatory instrument. There was also debate about whether protection should be offered through a human rights approach or inside the current intellectual property framework.<sup>33</sup>

### **III. (ii) Cultural Heritage Protection Regime Under UNESCO**

To encourage global cooperation in the fields of education, research, and culture, UNESCO was established.<sup>34</sup> It was felt that some aspects of intangible cultural heritage would vanish in the face of increasing globalization, and it plays a crucial role in its preservation. So, it started working with communities to protect living heritage. UNESCO launched capacity-building programs to encourage youth to document and learn about their living heritage and to help transmit these practices to a new generation.<sup>35</sup> The "Convention for the Safeguarding of the Intangible Cultural

<sup>30</sup> Intergovernmental Committee (IGC), <https://www.wipo.int/tk/en/igc/> (last visited Nov. 14, 2024).

<sup>31</sup> Asiia Sharifullova Gazizova, *Protection of Traditional Knowledge: The Work and the Role of International Organisations and Conferences* 9(8) Int. J. High. Educ. 95, 96 (2020).

<sup>32</sup> Protection of Traditional Cultural Expressions: Draft Article, [https://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_47/wipo\\_grtkf\\_ic\\_47\\_5.pdf](https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_47/wipo_grtkf_ic_47_5.pdf) (last visited Nov. 14, 2024).

<sup>33</sup> Id.

<sup>34</sup> UNESCO, <https://www.unesco.org/en/brief> (last visited Nov. 14, 2024).

<sup>35</sup> UNESCO Helps Future Generations Safeguard Intangible Heritage, <https://www.unesco.org/en/articles/unesco-helps-future-generations-safeguard-intangible-heritage> (last visited Nov. 15, 2024).

Heritage,”<sup>36</sup> which recognized the value of preserving cultural diversity, was signed by United Nations member states in 2003 with assistance from UNESCO. The convention requires the member countries to acknowledge, document, and take the appropriate actions to safeguard their cultural heritage. The adoption of “The Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions”<sup>37</sup> by UNESCO and WIPO in 1982 marked a major advancement in the protection of folklore expressions. The goal of the Model Provisions has been to strike a balance between safeguarding folklore against “illicit exploitation” and “other prejudicial actions” while simultaneously encouraging its growth and evolution.

### **III. (iii) United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)**

In 2007, the UNDRIP was adopted by the UN General Assembly. The declaration specifies numerous rights and obligations of indigenous groups concerning the preservation and enhancement of their cultural heritage. Additionally, it imposes an obligation on signatory nations to uphold these rights. The purpose of these provisions is to discourage the unlawful use or commercialization of indigenous knowledge by third parties.

### **III. (iv) Tunis Model Law, 1976**

To prevent inappropriate exploitation of national folklore and traditional expressions, UNESCO and WIPO collaborated to create the model law. For works to be protected, they must be fixed in a tangible form, and the requirement is not time-limited.<sup>38</sup> It also included the mechanism of benefit-sharing to benefit the writers and performers of folklore and to safeguard the author’s moral and monetary rights. The legislation mandates the member

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<sup>36</sup> Convention for Safeguarding Intangible Cultural Heritage, 2003.

<sup>37</sup> Model Provision for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action, 1982.

<sup>38</sup> Tunis Model Law on Copyright for Developing Countries, 1976, art. 6(2).

nations to establish a competent authority for the administration of authors right in relation to TCEs.<sup>39</sup>

#### IV. NATIONAL LEGISLATION

Several nations have developed sui generis systems. In this regard, Panama has enacted a special law titled “Special System for the Collective Intellectual Property Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge” in 2000. The law serves as an important legislative tool to safeguard Panama’s cultural heritage. The law mainly has two objectives: (i) to safeguard the collective IP rights and culture of local peoples, and (ii) to encourage the commercialization of the products based upon indigenous knowledge, emphasize social and cultural values, and ensure social justice.<sup>40</sup> It also provides mechanisms for the registration of indigenous knowledge and guidelines for third-party use.

Unlike other countries, Kenya is rich in its cultural heritage. As a result, indigenous knowledge is exploited by third parties for their economic benefit, resulting in economic and cultural loss to the people of Kenya. In response, the government of Kenya issued the “National Policy on Traditional Knowledge, Genetic Resources, and Traditional Cultural Expressions” in 2009.<sup>41</sup> The policy later became an Act in 2016, titled “The Protection of Traditional Knowledge and Cultural Expression Act” 2016.<sup>42</sup> The act limits the unlawful, unfair, inequitable, or misappropriated access to indigenous knowledge<sup>43</sup> and establishes the legal basis for the registration of TK and TCEs.<sup>44</sup> The legislation permits indigenous knowledge holders to enter into license contracts with other parties, permitting the use of their

<sup>39</sup> Protection of Traditional Cultural Expressions in India, Scooping Paper No 3 (1).pdf (ris.org.in) (last visited Nov. 20, 2024).

<sup>40</sup> Special System for the Collective Intellectual Property Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge, 2000, art. 1.

<sup>41</sup> National Policy on Traditional Knowledge, Genetic Resources, and Traditional Cultural Expression, 2009.

<sup>42</sup> Protection of Traditional Knowledge and Cultural Expression Act, 2016.

<sup>43</sup> Id. s. 4.

<sup>44</sup> Id. s. 18.

culture.<sup>45</sup> In New Zealand, the protection of TCEs is incomplete without referring to the Māori culture, as it is significant to protect cultural identity and to prevent exploitation. To protect Māori culture, the government in New Zealand has established the ‘Waitangi Tribunal’ under the “Treaty of Waitangi Act” 1975. The issues were raised before the tribunal to investigate the cases of cultural misappropriation of the Māori’s culture and make recommendations for the protection of cultural heritage and knowledge.<sup>46</sup> The Trademark Act of 2002 in New Zealand considers the Māori community’s concerns. IP Office in New Zealand (IPONZ) may revoke or refuse the registration of the mark if a trademark is deemed offensive by a significant portion of the population, particularly Māori.<sup>47</sup> In Mexico, TCEs are protected by the Federal Law on Copyright, 1996, which is the main law governing copyright and neighboring rights. Article 116 protects the performer rights of actors, narrators, singers, etc. The law protects the works based on customs and traditions that do not have an identifiable author.<sup>48</sup> The Mexican government in 2022 has enacted the Federal Law<sup>49</sup> with the objective to preserve and defend indigenous and Afro-Mexican groups’ culture, knowledge, and TCEs.<sup>50</sup>

Cultural and religious diversity are hallmarks of India. TCEs play a crucial role in modern Indian society, with tribal culture being a source of national pride and a symbol of the country’s cultural legacy. Despite this appreciation, no specific laws have been enacted to safeguard TCEs.<sup>51</sup> While the Indian Constitution does not directly address TCEs’ protection, it does include provisions addressing the rights of minorities.<sup>52</sup> The Constitution also obliges

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<sup>45</sup> Id. s. 22.

<sup>46</sup> The Waitangi Tribunal, Home | Waitangi Tribunal (last visited Nov. 21, 2024).

<sup>47</sup> Trademark Act, 2002, s. 17 cl. (1)(c).

<sup>48</sup> Federal Law on Copyright, 1996, art. 157.

<sup>49</sup> Protection of the Cultural Heritage of the Indigenous and Afro-Mexican Peoples and communities, 2022

<sup>50</sup> Jaime Rodriguez and Alejandra Badillo, *Protecting the Cultural Heritage of Indigenous and Afro-Mexican Peoples* Mondaq (Nov. 21, 2024, 5:42 PM), <https://www.mondaq.com/mexico/indigenous-peoples/1343422/protecting-the-cultural-heritage-of-indigenous-and-afro-mexican-peoples>.

<sup>51</sup> RICHARD AWOPETU, *supra* note 14, at 756.

<sup>52</sup> INDIA CONST. art. 29, cl 1.

citizens to cherish and safeguard the diverse cultural heritage of our composite culture.<sup>53</sup> Unlike the Constitution, the current IP framework does not explicitly deals with the issues of TCEs.

To protect and safeguard India's rich cultural practices, the Ministry of Culture, Government of India, initiated a National Inventory on the Intangible Cultural Heritage in 2013.<sup>54</sup> The inventory aims to record various forms of ICH, including festive events, folk songs, dances, rituals, arts, traditional crafts, etc. By documenting these cultural expressions, the Inventory helps protect them from fading due to modernization, and urbanization, and allows their smooth transmission to upcoming generations. Apart from this, there are several Non-Governmental Organizations (NGOs) such as Sahapedia,<sup>55</sup> Indian National Trust for Art and Cultural Heritage (INTACH),<sup>56</sup> and Dastkar<sup>57</sup> actively engage in documenting, promoting, and supporting the preservation of TCEs. These organizations advocate for community rights, raise public awareness, provide legal assistance, and facilitate market access for artisans and cultural practitioners.

## V. ETHICAL ISSUES

Commercialization of TCEs by people outside the community raises several ethical concerns. These concerns are intricately linked to the social, cultural, and economic effects of utilizing cultural heritage in a commercial context. Key ethical issues are:

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<sup>53</sup> Id. art. 51A, cl f.

<sup>54</sup> Pan-India ICH Inventory, <https://indiaich-sna.in/inventory> (last visited Nov. 23, 2024).

<sup>55</sup> It is an open online resource on the arts, cultures, and heritage. It is a non-profit organization registered in India under the Societies Registration Act, 1860. Sahapedia, <https://www.sahapedia.org/> (last visited Nov. 23, 2024).

<sup>56</sup> INTACH works to safeguard and preserve the country's heritage, including monuments, sites, artworks, and intangible cultural heritage. The organization aims to create awareness about the importance of conservation and to undertake restoration and preservation projects across India. INTACH, <http://www.intach.org/> (last visited Nov. 23, 2024).

<sup>57</sup> Dastkar is a private not-for-profit NGO established in 1981, working to support traditional Indian craftspeople, many of them women and village-based, with the objective of helping craftspeople regain their place in the economic mainstream. Dastkar, <https://www.dastkar.org/> (last visited Nov. 23, 2024).

### • **Cultural Appropriation**

Cultural appropriation leads to the unregulated use and commodification of TCEs, diluting their authentic meaning, disrespecting the community's cultural identity, and reducing such culture to mere aesthetic or commercial objects.

### • **Consent and Representation**

TCEs are often used by companies or individuals without obtaining prior permission from the originating community, impacting their culture and spiritual identity. The commercialization of TCEs, without the consent of local communities, often disregards the community's ability to control how their traditions are shared and perceived.

### • **Benefit Sharing**

There are two main components of access and benefit sharing: firstly, there must be prior informed consent, and secondly, there must be equitable agreements between users and communities to ensure that benefits are shared fairly and transparently.<sup>58</sup>

## **VI. CASE STUDY**

It is desirable to conduct a practical investigation into the practices associated with commercialization of TCEs. There are several cases where commercializing TCEs has generated revenue, promoted tourism, encouraged sustainable practices, and preserved the culture and traditions of local people. Some of the pragmatic case studies are as follows:

### • **Africa's Maasai Tribe IPR Initiative**

The Maasai are a well-known tribe in Africa, especially known for their strength, courage, art, craft, design, traditional skills, and knowledge.

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<sup>58</sup> WIPO, INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE, TRADITIONAL CULTURAL EXPRESSIONS 25 (WIPO Publication, 2020).

International companies used their names and images without their consent, and many times the use was offensive to the Maasai. To overcome this, an initiative was launched in 2010, the Maasai Intellectual Property Initiative.<sup>59</sup> The purpose of the initiative is to encourage international companies and organizations to apply for Maasai certificates and licensing arrangements and pay for the use of Maasai names, designs, symbols, etc.<sup>60</sup> It has been decided that the license's proceeds will go toward community initiatives like Maasai child education, strengthening Maasai women's ability to start businesses and make handicrafts, ensuring clean water and sanitation, ensuring food security, and managing natural resources to adapt to climate change.<sup>61</sup>

### • Māori Cultural Branding

The Māori are the indigenous tribes of New Zealand, who developed their own culture, language, artwork, design, rituals, dance, etc. Māori arts and culture are considered significant branding elements for products across the global market. To incorporate Māori cultural branding into their products, corporations and companies must collaborate with Māori cultural experts. These experts elucidate the cultural and religious significance of designs or symbols and provide guidance for the appropriate use on products.<sup>62</sup> Some Māori organizations offer certificates for the authenticity of the Māori-made arts and crafts.<sup>63</sup> Commercializing the branding of the Māori culture helps the community in economic growth and creates long-lasting business opportunities for the Māori people. It also provided a global platform for the

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<sup>59</sup> Maasai Intellectual Property Initiative, <https://maasaiintellectualpropertyinitiative.org/> (last visited Nov. 5, 2024).

<sup>60</sup> Maasai Intellectual Property Initiative. <https://maasaiintellectualpropertyinitiative.org/faqs> (last visited Nov. 5, 2024).

<sup>61</sup> Id.

<sup>62</sup> Rachel Laing, *Rules to Using Māori words, imagery in Branding*, OTAGO DAILY TIMES (Feb. 22, 2021, 10:45 AM), <https://www.odt.co.nz/business/rules-using-maori-words-imagery-branding>.

<sup>63</sup> Anush, *Māori design and its Importance in Branding NZ Business*, LDNZ (Oct. 8, 2021, 3:15 PM), <https://www.logodesignnewzealand.co.nz/blog/branding/maori-brand-design/>.

Māori people to raise awareness among people about their culture and contributed to its preservation and appreciation.<sup>64</sup>

### • Kuna Mola Designs (Panama)

The Kuna, an indigenous tribe of Panama, is known for their exquisite mola designs. Molas are not just a piece of art, they represent the cultural heritage, stories, and myths associated with the Kuna tribes.<sup>65</sup> It also holds spiritual significance to the Kuna people, they believed wearing molas would connect them with their ancestors. With the increase in the tourism industry, tourists started showing interest in the mola designs, leading to growing demand in global markets.<sup>66</sup> It also attracted the attention of multinational companies such as Nike<sup>67</sup> to use mola design on their products.

### • Gloomy Pictures

The commercialization of TCEs, without the consent of the indigenous communities, has significant negative impacts on the financial and cultural life. These are some gloomy instances of commercialization of TCEs that have impacted the communities:

### • Donna Karan & Pauktuutit Community Case

This case is a notable example of protecting the cultural expressions of the Pauktuutit community in Canada from cultural appropriation. Donna Karan

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<sup>64</sup> Lynell Tuffery Huria, *3 Things to Consider about Māori IP*, myNZTE (Jan. 6, 2024, 12:49 PM), <https://my.nzte.govt.nz/article/3-things-to-consider-about-maori-ip>.

<sup>65</sup> Jennifer Nalewicki, *The Colorful History Behind Panama's Mola*, Smithsonian Magazine (Aug. 10, 2024, 9:24 AM ), *The Colorful History Behind Panama's Mola* | Smithsonian.

<sup>66</sup> Andrea Vazquez de Arthur, *Fashioning Identity: Mola Textiles of Panama*, THE CLEVELAND MUSEUM OF ART (Oct. 8, 2020, 8:16 PM), *Fashioning Identity: Mola Textiles of Panamá* | Cleveland Museum of Art.

<sup>67</sup> Nike has planned to launch a new version of its classic Air Force 1 shoe as a tribute to Puerto Rico, but the Guna community of Panama said it used their traditional “mola” design and accused Nike of “pirating” a protected traditional design. As a result of protect Nike has cancelled the launch of the shoe and issued a public statement stating “We apologise for the inaccurate representation of the design origin for the Nike Air Force 1 ‘Puerto Rico’ 2019. As a result, this product was withdrawn from the market.”

is a well-known fashion house based in the USA, mainly known for their wide range of fashion products.<sup>68</sup> In 1999, Donna Karan sent a buyer to the Western Arctic region to draw inspiration from the traditional amauti clothing<sup>69</sup> for her fashion line.<sup>70</sup> This sparked criticism from the Pauktuutit Inuit Women's Association. They launched the letter-writing campaign and mobilized the media houses to address the misappropriation, as a result, Donna Karan decided not to release the parka inspired by the amauti.<sup>71</sup>

### • Misuse of Native American Headdresses

Headdresses (also known as war bonnets) are feathered headgear traditionally worn by respected leaders and warriors who have earned a place of great respect in their tribe. They are often used as a symbol of honor and bravery holding a deep cultural and spiritual meaning for the Native American tribes.<sup>72</sup> There are several notable instances when these headdresses are misused by the fashion and entertainment industry,<sup>73</sup> music festivals,<sup>74</sup> sports

<sup>68</sup> Donna Karan New York, <https://en.wikipedia.org/wiki/DKNY> (last visited Dec. 8, 2024).

<sup>69</sup> Amauti is a distinctive, windproof, and waterproof parka designed to protect against the harsh Arctic environment. It is a hooded parka intended to help mothers carry their babies while keeping them warm and secure, even in extremely cold weather. The amauti is more than just practical clothing; it represents the ingenuity and resilience of Inuit women. It is a symbol of motherhood, tradition, and connection to the Arctic environment.

<sup>70</sup> Intellectual Property Rights and the Inuit Amauti: A Case Study, [https://www.wipo.int/edocs/mdocs/tk/en/wipo\\_ip\\_tk\\_yfb\\_19/wipo\\_ip\\_tk\\_yfb\\_19\\_ref\\_case\\_study\\_ip\\_rights\\_and\\_the\\_inuit\\_amauti.pdf](https://www.wipo.int/edocs/mdocs/tk/en/wipo_ip_tk_yfb_19/wipo_ip_tk_yfb_19_ref_case_study_ip_rights_and_the_inuit_amauti.pdf) (last visited Dec. 9, 2024).

<sup>71</sup> Id.

<sup>72</sup> War bonnet, War bonnet - Wikipedia (last visited Dec. 9, 2024).

<sup>73</sup> Charlotte Cowles, *Model Karlie Kloss walked the runway wearing a bikini with a feathered headdress in Victoria's Secret Fashion Show, 2012*, THE CUT (Nov. 12, 2012, 10:28 AM), <https://www.thecut.com/2012/11/karlie-kloss-really-sorry-about-that-headdress.html>.

<sup>74</sup> The presence of individuals wearing headdresses at music festivals, including Coachella Music Festivals and Canadian Music Festivals, elicited significant public disapproval. Consequently, these events implemented prohibitions on the use of headdresses within their festival grounds. Dorian Lynskey, *This means war: why the fashion headdress must be stopped*, THE GUARDIAN (July 30, 2014), <https://www.theguardian.com/fashion/2014/jul/30/why-the-fashion-headdress-must-be-stopped>.

events,<sup>75</sup> and arts and media houses<sup>76</sup> causing harm to culture and disrespecting the traditions of indigenous communities. Several indigenous leaders and activists have spoken against the misuse of headdresses affecting the cultural and spiritual meaning attached to them and advocated for cultural awareness and respect for their traditions.

### • **India's Madhubani Art Designs**

One of the most famous Indian art forms is Madhubani art, which has its roots in the Mithila area of Bihar. Its genesis dates to the era of Ramayana, with the tradition being transmitted through generations.<sup>77</sup> These paintings primarily served to depict ritual content, including festivals, religious ceremonies, and marriages. They represent the cultural identity of the Maithili women from the Madhubani region of Bihar. With the increase in popularity, the art form attracted the attention of the fashion industry. There have been several instances where fashion brands have utilized these art patterns in their clothing without proper authorization.<sup>78</sup> To combat the issue, Madhubani Painting received the GI tag in 2008, but the issue remains the same. There is a need for a better legal mechanism to control and monitor the misappropriation of this artwork by unauthorized parties.

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<sup>75</sup> Fans of teams like the Kansas City Chiefs, Washington Commanders, etc. have worn headdresses in the stand and some sports teams have used headdresses as part of their mascots, and costumes in a cartoonish manner contributing to the trivialization of indigenous cultures. David Close and Nicole Chavez, 'Kansas City Chiefs to ban fans from wearing headdresses and Native American-themed face paint', CNN SPORTS (Aug. 20, 2020), <https://edition.cnn.com/2020/08/20/sport/kansas-city-chiefs-ban-native-american-headaddresses/index.html#:~:text=Many%20Kansas%20City%20Chiefs%20fans,American%20headaddresses%20and%20face%20paint.&text=The%20Kansas%20City%20Chiefs%20announced,paint%20in%20the%20team's%20stadium>.

<sup>76</sup> Headdresses are frequently used as Halloween costumes by Native Americans, which caricature cultures and disregard their complexity. Terra Trevor, *Why Your Native-Inspired Halloween Costume Devalues Our Indigenous Cultures*, MATADOR NETWORK (Aug. 17, 2020), *Why Dressing Like a Native American for Halloween Is Offensive*.

<sup>77</sup> Dr. Rajan Taneja, *Madhubani Art: Tradition and Modernity in the Folk Paintings of Bihar* 5(6) IJAMSR 60, 61 (2022).

<sup>78</sup> Akanksha Jumde & Nishant Kumar, *Protection of Traditional Art Forms under Geographical Indications Law: A Case Study of Madhubani and Sujini Art Forms of Bihar* 16(7) JIPLR 647, 651 (2021).

## VII. CONCLUDING OBSERVATION

From the above discussion it is evident that commercializing TCEs is a complex and multifaceted issue. On one hand, it offers potential benefits by preserving indigenous culture, driving regional growth, and enhancing global recognition for the arts and crafts of these communities. On the other hand, it poses substantial legal and moral dilemmas. Concerns also exist regarding the risks of cultural appropriation, exploitation, and potential dilution of cultural heritage. Protecting these expressions requires a well-rounded approach that respects the rights and values of cultural custodians while also considering business objectives.

The last two decades have witnessed efforts made by international organizations and cultural institutions to protect the TCEs under the existing intellectual property regime or develop a new legal framework for their protection. The existing IP system can be beneficial in safeguarding TCEs, but it has certain limitations, as it places much emphasis on originality, individual ownership, and a limited period of protection, making the IP system insufficient to protect TCEs. To overcome these limitations, countries should develop a *sui generis* system, that of Panama's "Special System for the Collective Intellectual Property Rights of Indigenous Peoples." *Sui generis* laws can help guarantee shared ownership, long-term protection, and fair distribution of benefits. International bodies such as WIPO and UNESCO need to accelerate the adoption of legally binding global agreements that clarify, safeguard, and uphold the rights linked to TCEs. Building consensus should be the main goal of negotiations within the IGC.

The commercialization of TCEs not only impacts the cultural identity and economic well-being of the communities involved but also raises significant ethical concerns. These concerns primarily pertain to cultural appropriation, absence of informed consent, misrepresentation of cultural elements, and lack of equitable benefit-sharing mechanisms with the affected communities. Addressing the ethical concerns, corporations and individuals must be

involved in obtaining prior informed consent from the communities to utilize their knowledge, and such commercialization initiatives must be equitable, fair, respectful, and mutually beneficial to all parties involved. Ensuring a collaborative and culturally sensitive approach is crucial to successfully addressing this complex issue, thereby creating a more equitable and sustainable future for traditional cultural practices. To address these issues, communities should have the authority to approve or reject the usage of their cultural expressions. This process can be formalized through community-based organizations or cultural boards. Artists and companies must ensure that TCEs should be used respectfully and authentically and companies should share fair compensation with the communities involving monetary benefits, support cultural preservation, develop infrastructure, healthcare initiatives, etc.

Protecting TCEs involves more than just legal or financial considerations; it is a deeply moral obligation. These cultural treasures represent the history, identity, and endurance of communities and need to be protected from exploitation. By promoting fair legal safeguards and moral standards, we can uphold the legacy of TCEs and guarantee their ongoing importance and applicability in a globalized world. Achieving this goal necessitates a collaborative endeavor from governments, international bodies, corporations, and communities to uphold the dignity and rights of those who have cultivated and conserved these priceless cultural expressions.

**CASE  
COMMENT**

**UNDERSTANDING  
“SUBSTANTIAL COMPLIANCE”  
IN LIGHT OF  
SABITA JHA V. AAONE  
DEVELOPERS (SPECIAL LEAVE  
PETITION (CIVIL) NO. 7470/2025)  
SUPREME COURT’S LIBERAL  
DIRECTION TO SECTION 12A OF  
COMMERCIAL COURTS ACT.**

Pritthish Roy\*  
Nancy Goel\*\*

**I. INTRODUCTION**

The Government of India has always been a strong proponent of resolving commercial disputes through ADR mechanisms, especially mediation and arbitration. While mediation is deeply rooted in the ancient value system of India, it has only received its due and proper statutory recognition in 2023 with the coming of the Mediation Act.<sup>1</sup> Better late than never, the Government is now pushing and promoting mediation as the alter-ego of arbitration; a mechanism which is slowly losing its status of the preferred go to method for dispute resolution.<sup>2</sup> Recently, the Government of India organized the first ever National Mediation Conference in May, 2025 to bolster mediation as a tool in resolving disputes.<sup>3</sup> One of the conference’s key milestones was the establishment of the Mediation Association of India, canvassing it as a platform to unify stakeholders, promote best practices, and

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<sup>1</sup> Mediation Act, No. 32 of 2023 (Ind.)

<sup>2</sup> Pritthish Roy, The Government’s Eroding Faith in Arbitration: A Dire Need to Introspect, (May 10, 2025), <https://www.barandbench.com/columns/eroding-faith-of-the-government-in-arbitration-a-dire-need-to-introspect>.

<sup>3</sup> President Of India Graces The Launch Of The Mediation Association Of India And Addresses The First National Mediation Conference, <https://www.pib.gov.in/PressReleseDetail.aspx?PRID=2126534>.

raise standards to meet international benchmarks. Justice BR Gavai remarked that such an initiative would help address specific domestic commercial issues while aligning Indian mediation with global protocols.<sup>4</sup> Solicitor General Tushar Mehta emphasized on mediation's efficiency, particularly in resolving disputes involving labor, tenancy, and employment, which should ideally be diverted away from formal courts.<sup>5</sup>

But amidst this push for encouraging mediation as the new and the preferred mode of dispute resolution, the Supreme Court recently in *Sabita Jha v AAone Developers Pvt. Ltd.*<sup>6</sup> ("Sabita Jha") dealt with a peculiar situation, where it had to interpret as to whether an attempt to resolve disputes through mediation between the parties, before filing the commercial suit under the Commercial Courts Act, 2015<sup>7</sup> ("the Act") fulfills the mandate of Sec. 12-A<sup>8</sup> or not. Unfortunately, the matter did not receive much attention, however, a short and a crisp order passed by the Hon'ble Mr. Justice Pankaj Mithal and Hon'ble Mr. Justice SVN Bhatti has laid down a new facet of law regarding "substantial compliance" of Sec. 12-A in minimum words, which now has a far-reaching impact for future commercial suits which will be instituted in India under the Act.

## II. FACTUAL MATRIX IN BRIEF

To understand the Supreme Court's latest decision in *Sabita Jha*, it is important that we lay down some crucial facts that led to a short, yet path-breaking order passed by the Supreme Court.

The dispute arose between AA-One Developers Private Limited ("Plaintiff") and Ms. Sabita Jha ("Defendant"). A contract for civil works was executed

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<sup>4</sup> Gursimran Kaur Bakshi, *Law Students Should Be Trained With Soft Skills Essential For Effective Mediation : Justice BR Gavai*, (May 3, 2025), <https://www.livelaw.in/top-stories/law-students-should-be-trained-with-soft-skills-essential-for-effective-mediation-justice-br-gavai-291184>.

<sup>5</sup> SG Tushar Mehta bats for newer, context-sensitive solutions to mounting caseload, (May 4, 2025), <https://theprint.in/india/sg-tushar-mehta-bats-for-newer-context-sensitive-solutions-to-mounting-caseload/2614450/?amp>.

<sup>6</sup> Special Leave Petition (Civil) No. 7470/2025

<sup>7</sup> The Commercial Courts Act, No. 4 of 2016 (Ind.)

<sup>8</sup> The Commercial Courts Act, No. 4 of 2016, §12A (Ind.)

between the parties, wherein the Defendants agreed to pay the Plaintiff a sum of Rs. 1.30 crores for carrying out construction in the suit property. The Plaintiff commenced construction work and soon thereafter the Defendants entered into a second agreement for Project Management Consultancy (“PMC”) for a period of 10 months. Post this period, a monthly retainerhip fee of Rs. 2 lakhs were agreed. Though contractors and vendors were hired through the Plaintiff, their payments were directly made by the Defendants. Pursuant to completion of civil works and continuation of interior works, the Defendants directed the Plaintiff to raise final bills for civil works. Accordingly, the Plaintiff submitted final bills based on drawings and bills of quantity prepared by an appointed architect. As per the first agreement, the Defendants were obligated to make payment within seven days of receipt of the final bills. It was alleged by the Plaintiff that despite repeated meetings and follow-ups, the outstanding payments remained unpaid. When payments were still not made, the Plaintiff served a legal cum demand notice. The Defendants, through their counsel, replied by denying the claims and stating that excess payments had been made.

The Plaintiff finally filed an Ordinary Suit<sup>9</sup> before the Delhi High Court along with an injunction application praying for urgent direction upon the Defendant and preventing them from creating third-party interests in the suit property and ensuring that the building and construction material is not harmed or destroyed. As per the plaint of the suit, the Plaintiff’s total claim was of approximately Rs. 6.50 crores, excluding interest and late payment charges.

When the matter was taken up, notice was issued on the injunction application along with the commercial suit. However, while issuing notice<sup>10</sup>, the parties consented to making an attempt to resolve their differences through mediation. Therefore, the parties were referred to the Delhi High Court Mediation Centre. The mediation ultimately failed and the file was returned to the High Court.

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<sup>9</sup> Civil Suit (OS) No. 601/2023 before the High Court of Delhi at New Delhi.

<sup>10</sup> Order dated 27.09.2023 passed in Civil Suit (OS) No. 601/2023 before the High Court of Delhi at New Delhi.

When the matter was again heard, the High Court determined the nature of the dispute as commercial in nature and directed the Plaintiff to take steps in amending the nature of the suit from an Original Suit to that of a Commercial Suit under the Act.<sup>11</sup> When the matter was finally taken up, the Defendant filed her written synopsis by way of objections and a counter-affidavit wherein she stated that before a commercial suit is intended to be instituted, the dispute has to be referred to institutional pre-litigation mediation, specifically under Sec. 12A of the Act. Since no such efforts were made, the commercial suit should be treated as *non est*.

### III. THE IMPUGNED ORDER OF THE DELHI HIGH COURT

The High Court in its judgment and order dated 08.01.2025<sup>12</sup>, firstly took note of the fact that it had issued notice on the injunction application and it was pending for adjudication.<sup>13</sup> Thereafter, the Court went into the interpretation of Sec. 12A of the Act and held that if a strong *prima facie* case is made out for urgent interim orders, then the statutory requirement for a pre-litigation mediation can be done away with.

The High Court then went ahead and observed that when the suit was originally filed as an ordinary suit, there was no occasion for the plaintiff to resort to pre-institution mediation, as Section 12A of the Act is not applicable to ordinary suits. However, prior to the conversion of the suit into a commercial suit, the matter was referred to mediation. Therefore, the mandatory requirement of pre-institution mediation under Section 12A stood satisfied.<sup>14</sup> This is because the underlying objective of compulsory pre-institution mediation is to reduce the burden of avoidable litigation in commercial matters, and mediation, as an alternative dispute resolution mechanism, has been recognized as an effective tool for achieving this purpose.<sup>15</sup>

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<sup>11</sup> *Aaone Developers (P) Ltd. v. Sabita Jha*, 2024 SCC OnLine Del 9636.

<sup>12</sup> *Aaone Developers (P) Ltd. v. Sabita Jha*, 2025 SCC OnLine Del 42.

<sup>13</sup> ¶22, *Supra* 14.

<sup>14</sup> ¶26, *Supra* 14.

<sup>15</sup> *Supra* 16.

Therefore, the High Court held that since the injunction application was pending adjudication and that the parties had already attempted mediation once, therefore, the argument of the Defendant that the mandate of Sec. 12A was not fulfilled, was ultimately rejected and directions were issued to list the matter for final hearing.

#### **IV. ANALYSIS OF THE ORDER OF THE SUPREME COURT IN SABITA JHA**

The judgment and order of the High Court was challenged by the Defendant before the Supreme Court of India in a Special Leave Petition (“SLP”). The same argument was raised, i.e., non-compliance with pre-litigation mediation under Sec. 12A makes a commercial suit *non est*.

When the SLP was heard on 24.03.2025<sup>16</sup>, it was dismissed at the admission stage. One of the most interesting facets of the order of dismissal passed by the Supreme Court is that it is not a very short detailed order. The operative portion<sup>17</sup> of the order held that the effort for mediation entered into between the parties before the institution of the commercial suit was enough and construed as “substantial compliance” of the mandate of Sec. 12A.<sup>18</sup> Therefore, the order of the High Court under challenge was affirmed and the SLP was dismissed.

However, the dismissal of the SLP opened the sluice gate for exploring the meaning of “substantial compliance”, when Sec. 12A has been held to be a mandatory provision in the Patil Automotives case.

#### **V. UNDERSTANDING SUPREME COURT’S SATISFACTION OF “SUBSTANTIAL COMPLIANCE” OF SEC. 12A**

The Supreme Court’s declaration in *Sabita Jha* that a mediation entered into by the parties before the institution of a commercial suit is a good enough

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<sup>16</sup> *Sabita Jha & Anr. v. Aaone Developers Pvt. Ltd.*, Special Leave Petition (Civil) No. 7470 / 2025.

<sup>17</sup> ¶4, *Supra* 18 reads as: “The facts as stated above, clearly reveal that there was substantial compliance of Section 12A as the matter was referred to mediation before the registration of the commercial suit.”

<sup>18</sup> *Supra* 19.

compliance of the mandatory pre-litigation mediation. But this is not the first time that an ancillary act of a party is held to be sufficient and a substantial compliance of a statutory requirement qua ADR and mediation jurisprudence. “Substantial compliance”, in simple terms, refers to a pragmatic approach whereby courts, in exceptional circumstances, recognize a party’s partial or non-strict adherence to statutory procedural requirements, provided the basic legislative intent is fulfilled.

The Act, especially through its 2018 Amendment<sup>19</sup> introducing Section 12A, mandates pre-institution mediation for commercial disputes, except cases where urgent interim relief is sought. Within this framework, the doctrine of substantial compliance plays a pivotal role. The authors firmly believe that the courts should accept *bona fide* actions of the parties to comply with statutory mediation requirements even if there are minor procedural deviations. For instance, in cases where a party has made a genuine attempt to initiate mediation, and comply with basic necessities like submitting relevant application before the appropriate authority, issuing notices to the opposite party, or participating in mediation sessions, even if all statutory requirements under the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018<sup>20</sup> are not strictly adhered to, courts may, depending on the facts and circumstances of the case, treat such efforts of the said party as constituting substantial compliance.

However, the High Courts in India have time and again tried to interpret the legality and veracity of substantial compliance of partaking pre-litigation mediation.

The Bombay High Court in *Ganga Taro Vazirani v. Deepak Raheja*<sup>21</sup>, emphasized that Section 12A is aimed towards encouraging pre-institution mediation, but does not impose a strict and absolute bar on instituting a suit without exhausting this remedy<sup>22</sup>. The court noted that the provision must be

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<sup>19</sup> The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, No. 28 of 2018 (Ind.)

<sup>20</sup> Supra 21.

<sup>21</sup> *Ganga Taro Vazirani v. Deepak Raheja*, 2021 SCC OnLine Bom 195. (Ind.)

<sup>22</sup> ¶18, Supra 23.

interpreted with a focus on substantial compliance, meaning that if parties have demonstrably attempted to resolve their disputes amicably—whether before or after filing the suit—the objective of Section 12A is fulfilled. Such a rigid application of Section 12A would undermine the very objective of the Act, which aims to expedite the resolution of commercial disputes.<sup>23</sup>

In *Laxmi Polyfab Pvt. Ltd. v. Eden Realty Ventures Pvt. Ltd.*<sup>24</sup>, the Calcutta High Court examined whether Section 12A, mandating pre-institution mediation for commercial disputes, allows substantial compliance or not. In this case, the plaintiff filed suit without exhausting the remedy of mediation, and argued that Section 12A is procedural, not requiring strict-adherence, and that substantial compliance suffices. The Court held that Section 12A is mandatory and dismissed the argument in support of substantial compliance, emphasizing strict adherence to mediation processes to reduce court backlogs.<sup>25</sup> This observation by the Calcutta High Court contrasted with *Ganga Taro Vazirani*<sup>26</sup>, which permitted substantial compliance for procedural provisions. However, this stance was later reinforced by the Supreme Court in *Patil Automation v. Rakheja Engineers*<sup>27</sup>, which clarified Section 12A's mandatory status. The stance taken in *Laxmi Polyfab Pvt. Ltd.*<sup>28</sup> was again reiterated in the case of *Dredging and Desiltation Company Pvt. Ltd. v. Mackintosh Burn and Northern Consortium*<sup>29</sup>, wherein it was emphasized that the primary objective of the Act is to expedite the resolution of commercial disputes<sup>30</sup>. The court opined that this goal is best achieved by enforcing mandatory pre-institution mediation under Section 12A. The court highlighted that the stipulated time frame for mediation provides an effective opportunity for parties to amicably settle disputes, a process deemed more efficient than court adjudication within the same period<sup>31</sup>. The court

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<sup>23</sup> ¶19, Supra 23.

<sup>24</sup> 2021 SCC OnLine Cal 1457 (Ind.)

<sup>25</sup> ¶¶ 46, 51, Supra 26.

<sup>26</sup> Supra 23.

<sup>27</sup> (2022) 10 SCC 1 (Ind.)

<sup>28</sup> Supra 26.

<sup>29</sup> 2021 SCC OnLine Cal 1458 (Ind.)

<sup>30</sup> ¶27, Supra 31.

<sup>31</sup> Supra.

concluded that mandatory compliance with Section 12A is essential to fulfill the Act's purpose.<sup>32</sup>

However, the Madras High Court in *Shahi Exports Pvt. Ltd. v. Goldstar Line Ltd. & Ors.*<sup>33</sup> held that Section 12A of the Commercial Courts Act, 2015, which mandates pre-institution mediation, is not an absolute procedural bar. The Court noted though the provision uses the term “shall”, its application is effectively contingent on the willingness of both parties and the absence of urgency for interim relief. The Court further observed that Section 12A cannot be treated as an absolute pre-condition for instituting a suit, and denying access to courts merely because a party has not pursued mediation first, would violate the constitutional right to access to justice. The Court clarified that courts are not subordinate to alternative dispute resolution mechanisms, and there is no legal bar preventing courts from referring ongoing matters to mediation after a suit is filed. The true intent of Section 12A, the Court observed, is to facilitate amicable dispute resolution, not to impose rigid procedural hurdles, and any contrary interpretation would defeat the legislative purpose of promoting settlement.

These divergent viewpoints and interpretations were ultimately resolved by the Supreme Court in the case of *Patil Automation Pvt. Ltd. & Ors. v. Rakheja Engineers Pvt. Ltd.*<sup>34</sup>, wherein the Court analyzed the legislative intent behind Section 12A of the Act introduced via the 2018 amendment. The Court noted that Section 12A mandates pre-institution mediation for commercial disputes, except when urgent interim relief is genuinely required, to alleviate court back-log and promote mediation as an efficient dispute resolution mechanism. The term “shall” in the provision underscores its obligatory nature, supported by detailed procedural rules ensuring accessibility, like capped fees shared equally by the parties and the option for legal representation. The Apex Court clarified that the right to file a suit is

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<sup>32</sup> ¶34, Supra 31.

<sup>33</sup> ¶23 and ¶24, 2021 SCC OnLine Mad 16514 (Ind.)

<sup>34</sup> Supra 29.

subject to statutory conditions, and the possibility of mediation failure does not render Section 12A optional.

In *Yamini Manohar v. TKD Keerthi*<sup>35</sup>, the Supreme Court reaffirmed the principles laid down in *Patil Automation*, reiterating that parties cannot bypass the statutory mandate of pre-institution mediation under Section 12A merely by citing the need for urgent interim relief. The Court clarified that Commercial Courts possess the authority to scrutinize the averments in the plaint, supporting documents, and surrounding circumstances to evaluate whether the plea for interim relief is bona fide. If the Court is not satisfied that such relief is immediately necessary, then the parties are obligated to undergo pre-litigation mediation.

A conjoint reading of *Patil Automation* and *Sabita Jha* leads the authors to conclude that the legal position established in *Patil Automation* remains undisturbed. When read together, these decisions render Section 12A of the Act more holistic, effectively conserving valuable commercial time for parties who have already attempted mediation before initiating a commercial suit. Thus, through this ruling, it has been clarified that Section 12A imposes a statutory condition on the right to file a suit, prioritizing mediation to streamline commercial dispute resolution.

## VI. CONCLUSION - THE WAY FORWARD AFTER SABITA JHA

The Supreme Court's decision in *Sabita Jha* marks a transformative moment in India's mediation landscape, redefining the spectrum of Section 12A of the Act, through the lens of "substantial compliance." By deeming pre-suit mediation attempts sufficient to fulfill the statutory mandate, the Court has struck a delicate balance between procedural rigor and the pragmatic need for expeditious dispute resolution. This ruling mitigates the risk of Section 12A becoming a technical barrier to justice, aligning with the Act's core objective of streamlining commercial disputes while promoting mediation as a viable alternative to litigation.

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<sup>35</sup> (2024) 5 SCC 815 (Ind.)

However, the decision also exposes an interpretative fault line, as it diverges from the strict compliance emphasized in *Patil Automation* and contrasts with varying High Court approaches, such as the Bombay High Court's flexibility in *Ganga Taro Vazirani* and the Calcutta High Court's rigidity in *Laxmi Polyfab Pvt. Ltd.* This judicial divergence underscores the urgent need for a unified framework to guide the application of Section 12A.

The only way to iron out the bulging overlapping in the decisions rendered in *Sabita Jha* and *Patil Automation*, a larger bench of the Supreme Court should reiterate *Sabita Jha* in a more detailed fashion, which comprehensively clarifies the scope of "substantial compliance," harmonizing it with the mandatory nature of Section 12A. If at the judicial front mediation is made to stand out more effectively it will defy systemic challenges—such as limited public awareness, a litigation-centric mindset, and a shortage of trained mediators, especially in matters of commercial nature.

India must prioritize embedding mediation training in legal curricula, fostering skills like empathy and emotional intelligence as the future is nothing is nothing but bright for commercial dispute resolution. The integration of online mediation, enabled by the Mediation Act, offers a promising avenue to enhance accessibility, particularly for cross-border commercial disputes in an increasingly digital economy. Public-private partnerships, aimed to be championed by the Mediation Association of India, should drive awareness campaigns and scale mediator training to cultivate a "mediation-first" culture.

By addressing these imperatives, India can transform its dispute resolution ecosystem, preserving business relationships and positioning itself as a global mediation hub. The *Sabita Jha* ruling, if reaffirmed and expanded, could serve as a catalyst for this paradigm shift, ensuring that mediation not only complements but redefines commercial justice in India.



